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THE FORCED USE OF INADMISSIBLE HEARSAY EVIDENCE IN BANKRUPTCY COURT

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Introduction

In bankruptcy courts across the land, the hearsay rule is violated daily. Bankruptcy courts have created a huge, largely undefended, de facto hearsay exception. It is the common practice in bankruptcy court to receive evidence via affidavit. The practice may vary from one district to the next, but typically it is this: As long as the witness is available for cross−examination and redirect, the court can order that the witness's direct testimony be received in the form of an affidavit−−and can do so over objection. The affidavit and the promise of redirect replace direct examination. [1] The affidavit is, of course, an out−of−court statement. The kind of affidavit under discussion here is offered to prove the truth of the matter asserted. [2] It most certainly is hearsay. [3] And the hearsay rule applies in proceedings "before United States bankruptcy judges." [4] Nonetheless, bankruptcy judges typically allow, and even order, testimony submitted by affidavit.

In any federal court, bankruptcy or not, if the parties agree to submit testimony by affidavit, then, of course, there is no error. If evidence is submitted via affidavit and there is no timely and specific objection, then there is no reviewable error. [5] Further, there is no problem with bankruptcy courts granting summary judgment if affidavits are submitted in support of a motion for summary judgment and the affidavits do not raise any issues of material fact. [6] This Article is not about any of that. It is about the practice in bankruptcy court that the parties can be ordered to submit a witness's evidence via affidavit, even over a timely and specific hearsay objection, and the judge can base the judgment on that affidavit evidence. It is also about the implications this has for all other federal trial courts. [7]

I.The Supporting Case Law

A. The Expediency Argument

The cases discussing this method of taking evidence from witnesses are full of language like this:

The Bankruptcy Court of the Southern District of Florida continues to try its adversary proceedings at the fastest pace in the United States in spite of a caseload twenty−five percent above the national average. The luxury of unlimited court time is no longer with us. Wasting of the Court's time by presenting undisputed testimony will only result in limiting parties in the time allowed for presentation of their case or in the inability to promptly set proceedings for trial. Neither of these alternatives is acceptable to the Court nor would they serve the interests of the litigants. [8]

This, of course, only asserts that taking evidence by affidavit is expedient, and perhaps the only way bankruptcy courts, as currently staffed, can get their business done in a timely way. Therefore, it seems to be a good idea to do it this way. While these may be good policy reasons for having a different rule, none justifies overriding the applicable rule. While these may be good policy arguments in favor of changing the hearsay rule, none supports admitting the evidence in the face of the hearsay rule.

B. The Argument that the use of Affidavit Evidence is Sanctioned by the Federal Rules of Civil Procedure and the Federal Rules of Evidence

More to the point, but still not very satisfying, are statements such as this:

Requiring the parties to submit their direct testimony in writing in lieu of the usual question−and−answer form is sanctioned under the inherent powers of the Court, the Federal Rules of Civil Procedure and the Federal Rules of Evidence. [9]

Adair v. Sunwest Bank (*In re Adair*) [10] is the seminal case on this point, and the one always cited when upholding this procedure against a hearsay objection (or any other objection, for the matter). In *Adair*, the court noted that:

The Adairs have challenged the bankruptcy court's standard procedure requiring that direct testimony be presented by written declaration. Under this procedure the parties submit written narrative testimony of each witness they expect to call for purposes of direct evidence. The witness then testifies orally on cross−examination and on redirect. [11]

At this point, the court stated that this procedure conforms to local court rules and is consistent with Rule 611 [12] of the Federal Rules of Evidence. The *Adair* court is right to this extent: Rule 611 allows the court reasonable control over the way witnesses are interrogated and evidence is presented. That is well and good, but totally irrelevant to the hearsay objection.

The *Adair* court continued:

The use of written testimony "is an accepted and encouraged technique for shortening bench trials." Accordingly, we have held that a district court did not abuse its discretion in accepting only declarations and exhibits on a particular issue where the parties were afforded "ample opportunity to submit their evidence."

The bankruptcy court's procedure permits oral cross−examination and redirect examination in open court and thereby preserves an opportunity for the judge to evaluate the declarant's demeanor and credibility. The procedure is essential to the efficient functioning of the crowded bankruptcy courts.

We note that the Advisory Committee has proposed amending Rule 43(a) to "dispel any doubts as to the power of the court under Rule 611(a) of the Federal Rules of Evidence to permit...that the direct examination of a witness, or a portion thereof, be presented in the form of an affidavit..." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of the Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence (proposed August 1991). Although not yet enacted, this proposal indicates that the Committee understands the present form of Civil Rule 43(a) and Evidence Rule 611(a) to authorize the use of declarations on direct examination....

....In the present case, the bankruptcy judge reviewed the declarations of the witnesses prior to trial. Witness credibility initially was established through factual consistency in the declarations. The bankruptcy judge also had the opportunity to observe the declarants' demeanor and to gauge their credibility during oral cross−examination and redirect examination. [13]

Again, all of this is well and good, but still totally irrelevant to the hearsay objection.

The Advisory Committee states that Rule 611(a) "*permit[s]*" [14] direct examination presented in the form of an affidavit. *Adair* changes this statement and makes it say that the Advisory Committee believes that Rule 611(a) *authorizes* this practice. Later cases, in turn, change *Adair*'s conclusion until it says that Rule 611(a) authorizes the court to impose this form of direct examination even *over objection*. [15] The truth is that the Advisory Committee's statement has nothing to do with the hearsay rule and does not support what it is asked to support by these bankruptcy cases. [16]

Everything else in the quoted portion of *Adair* is, at best, an argument in favor of what the rule should be, as a matter of policy, but it is not an argument that gets this use of affidavits around the hearsay rule. The *Adair* court argues what the rule should be, but not what the rule is.

Concluding this discussion, the court noted that neither party had raised a hearsay objection. "Federal Rule of Evidence 801(c)," the court continued, "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.' The declarations at issue here fall literally within this definition." [17] The court noted that the affidavit complained of on appeal was appellant's own. She could hardly complain that the affidavit was not sufficient, because she had the power to include whatever she chose to include, in whatever words. [18] The court finally noted that there had not been any objection to the submission of evidence by affidavit. The court concluded that the appellant had failed to show any prejudice, and therefore if there was any error, it was harmless. [19]

Rather than approving of the use of affidavit evidence over a hearsay objection, *Adair* at best reserves the question and, at the same time, seems to recognize that the question is a serious one. [20]

C. The "Summary Judgment" Argument

One court has stated that affidavits in a bankruptcy proceeding "are no more hearsay than affidavits used in motions for summary judgment." [21] This simply is not true. For one thing, the Federal Rules of Evidence is a statute that applies to bankruptcy trials, [22] and there is a separate statute that provides for the use of affidavits in summary judgment proceedings. [23] For another, affidavits are allowed in summary judgment proceedings, but if the affidavits raise genuine issues of material fact, then summary judgment cannot be granted. [24] In bankruptcy proceedings, judgment is granted all the time on the basis of conflicting affidavits. [25]

Further, there is an argument that summary judgment affidavits, unlike affidavits submitted in bankruptcy trials, are not hearsay in the first place. Affidavits in summary judgment proceedings are not used to prove the truth of the matter asserted. Instead, they are used to show that neither side contests any of the material facts. They are akin to stipulations. If neither side contests any of the material facts stated in the affidavits, then the court can assume they are true, not because they are stated in the affidavits, but because they are not disputed. It is the affiant who *evidences* the truth of the matter asserted in the affidavit, but it is the lack of challenge that *proves* the truth of the matter asserted. This lack of challenge constitutes an implied (if not an expressed) agreement with the facts unchallenged.

By the time affidavits and counter affidavits are submitted in a summary judgment proceeding, [26] and there is no dispute of material facts therein, the court is presented with a series of implied adoptive admissions. The Federal Rules of Evidence classify adoptive admissions as nonhearsay: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement of which the party has manifested an adoption or belief in its truth." [27] The whole point of the adoptive admission exclusion is that a party's failure to contradict takes a non−party's statement and turns it into a party's admission. Each affidavit is offered against a party. Each party against whom it is offered has a chance to dispute the facts in the affidavit. If they do not do so, then it is fair to say that they have "manifested an adoption or belief in [their] truth." [28] In summary judgment proceedings, on the one hand, undisputed affidavits are nonhearsay implied adoptive admissions; if the affidavits do raise a dispute as to an issue of material fact, then summary judgment cannot be granted. In bankruptcy court, on the other hand, judgment is granted day in and day out on the basis of conflicting affidavits, affidavits that do raise genuine issues of material fact, [29] and affidavits that cannot be said to be implied adoptive admissions.

The statement, then, that affidavits in a bankruptcy proceeding "are no more hearsay than affidavits used in motions for summary judgment," [30] simply is not true. First, the controlling statutes are different in summary judgment proceedings and in bankruptcy trials. Second, the undisputed affidavits upon which summary judgment is granted constitute implied adoptive admissions, while the disputed affidavits upon which a bankruptcy trial is adjudicated are not adoptive admissions. In addition, even if affidavits in summary judgment proceedings were hearsay, no one objects. If no one objects to evidence, then use of that evidence is not reversible error. [31]

D. Other Justifications Offered Without Much of a Supporting Argument

Many other cases addressing this hearsay problem either miss the point or give unsatisfying explanations. In one case, [32] the defendant−corporation, filed the affidavit of its credit manager, Thornborough. In the affidavit, Thornborough recounted certain things he had been told by the president of the plaintiff−corporation, Baeza, Sr. The court dealt with

the hearsay objection in a footnote. The court pointed out that what Baeza, Sr. told Thornborough was not hearsay. First, it was a nonhearsay admission. Second, it was not offered to prove the truth of the matter asserted, but rather because it gave Thornborough cause for alarm and constituted a justification for Thornborough's company filing an involuntary petition in bankruptcy. The footnote states: "Thornborough's affidavit containing Baeza, Sr.'s statements *did not contain* hearsay." [33] This is true. What the court fails to deal with, however, is this: While Thornborough's affidavit does not *contain* hearsay, the affidavit itself *is* hearsay.

II."I'll Take It For What It's Worth"

Another unsatisfactory explanation for bankruptcy judges requiring direct testimony by affidavit is that the judge is just taking the evidence "for what it's worth." This use of the affidavit evidence is different from the procedure where a judge in a trial to the court takes evidence "for what it's worth." The difference is in the fact that bankruptcy judges can, and do, base judgments on these affidavits. When a judge at a bench trial reacts to a specific piece of evidence by saying, "I'll take it for what it's worth," that means that if the evidence in fact is inadmissible (and therefore not worth anything), the judge will see that and will ignore it. [34] The judge will not consider it when forming his or her judgment. It does not mean that the judge has the power to consider inadmissible evidence or, certainly, to base a judgment on inadmissible evidence.

As affidavits are being used in bankruptcy court, if the party with the burden of proof introduces affidavit evidence only, and does so over a hearsay objection, and if the party without the burden does not cross−examine the affiant (resulting in there not being any redirect examination either), then there will be no admissible evidence in support of the burden of proof. [35] To put it another way, the only evidence offered in support of the burden of proof will be the inadmissible affidavits. Thus, the party who has the burden of proof loses. If the party with the burden does win at trial, then that judgment should be overturned on appeal because the burden of proof has not been met. [36]

Here is what this means to counsel who *does not have* the burden of proof. If at trial the other side's evidence is all initially submitted by affidavit, counsel without the burden of proof could simply object to the receipt of the evidence and decline to examine any of the witnesses. At the close of the opposing party's case counsel should then move for dismissal on the grounds that the opposing party−−the party with the burden−−has failed to introduce admissible evidence of one or more of the essential elements of his or her case. Here is what this means applies to counsel who *does have* the burden of proof. There is a risk that this procedure of direct testimony by affidavit will not be upheld on appeal. Consequently, counsel with the burden should be very careful, at the trial stage, to get in some nonhearsay evidence on each essential element of the case−−at least just enough nonhearsay evidence to support a judgment. [37]

III.Hearsay Within Hearsay

Even bankruptcy courts seem to take care not to admit hearsay accompanying or within the hearsay affidavit. When there are multiple levels of hearsay−−hearsay within the affidavit or in attachments thereto−−federal bankruptcy courts generally [38] recognize the second−level statement as hearsay. [39]

IV.Sometimes Affidavits Are Admissible in Bankruptcy Trials

There are, of course, many situations where an affidavit is admissible even under traditional hearsay analysis. There are cases where the affidavit is not hearsay in the first place. [40] In *Giove v. Stanko*, [41] the issue in federal court was whether Stanko had attempted to shield his assets, intending to defraud his creditors. The evidentiary question concerned an affidavit Stanko had filed in a state court, affirming that he was a pauper. The affidavit was not being offered to prove Stanko was a pauper (or, for that matter, that he was not a pauper). Rather, it was being offered to show Stanko's state of mind, his intent. It was being offered as an act from which the trial court could infer fraudulent intent. The filing of the affidavit was an act that a trier of fact could find to be a part of a larger fraudulent scheme. "The truth or falsity of the affidavit is immaterial. The mere existence of the affidavit, true or false, allowed the court to determine whether or not Rudy Stanko intended to defraud current or future creditors when he transferred assets to Jeanne Stanko." [42]

There are cases where an affidavit fits under one of the definitional exclusions to the hearsay rule. *In re Applin* [43] involved, among other things, a party's affidavit offered against the party−affiant. A statement by a party, offered against that same party, is not hearsay: It is excluded from the definition by the statement of a party opponent exclusion in Rule 801(d)(2)(A). [44]

There are also cases where an affidavit fits under an exception to the hearsay rule. This would be the case with a self−authenticating copy of an official report. In *Fields v. City of South Houston*, [45] for example, an autopsy report was admitted into evidence, along with the coroner's affidavit verifying the correctness of the autopsy. Though the court does not say so, by combining Federal Rules of Evidence 902 and 803(6) the affidavit itself would no doubt be considered a self−authenticating record of a regularly conducted business activity. As such, the affidavit would be admissible to authenticate the autopsy report.

In *FSLIC v. Griffin*, [46] the court affirmed the admission into evidence of bank documents under the exception for records of regularly conducted activity. The foundation for this exception had been laid by affidavit−−the hearsay affidavit of a bank Vice President who was a custodian of the records. The court seemed to treat the affidavit itself as a record of regularly conducted activity and referred to it as "a business records affidavit." [47] The affidavit is the "sponsoring witness" for the hearsay bank−records, but who or what "sponsored" the hearsay affidavit? Allowing the foundational elements for this exception to be established by an affidavit "itself hearsay" would be appropriate if: (1) there were a stipulation to the affidavit; (2) there were no objection to the affidavit (*i.e.*, the only objection was to the records referred to in the affidavit, not to the sponsoring affidavit itself); (3) the affidavit were self−authenticating; (4) a sort of business−records presumption could be attached to the affidavit; or (5) the business−records nature of the affidavit were subject to judicial notice.

Some affidavits will no doubt be admissible under the residual exception in Rule 807 [48] of the Federal Rules of Evidence. A statement not covered by the exceptions in Rule 803 or 804 [49] will fit under the residual exception of Rule 807 if the court finds that: (1) the appropriate notice was given to opposing counsel; (2) the statement has guarantees of trustworthiness equivalent to those of the statements covered by the categorical exceptions in Rule 803 and 804; (3) the statement is offered as evidence of a material fact; (4) the statement is more probative on the point for which it is offered than any other evidence that the proponent reasonably can procure; and (5) admitting the statement serves the interests of justice and the purposes of the federal rules.

Direct evidence by affidavit, as used in bankruptcy court, certainly satisfies the notice requirement: In advance of trial, the judge orders that it be done. The evidence in the affidavit is evidence of a material fact: Either that, or the affidavit is irrelevant. Additionally, it is arguable−−and all of the cases and authorities on this point do argue−−that this procedure serves the interests of justice. [50] The problem is this: Is this affidavit evidence "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts?" [51] As a general rule, the answer has to be no. Under the procedure used in bankruptcy court, the witness is present in court for cross−examination and redirect. [52] The only effort required is calling the witness to the stand and making the effort to ask the witness questions. This is hardly the kind of "rare and exceptional circumstance[] required" [53] −−in the Eighth Circuit, at least [54] −−for the application of the residual exception.

As mentioned above, hearsay affidavits are also, of course, admissible if the parties affirmatively consent to the procedure or if there is no objection or motion to strike. [55] The general procedure for the introduction of direct evidence by affidavit, as used in bankruptcy court, goes way beyond any of the above.

V.Even Some Of The Cases That Get It Right, Seem To Get It Wrong

One of the cases that seems to get it right is *In re Roberts*. [56] The sole question there was the value of a Cadillac. The court recognized that "[b]ankruptcy litigation is no different than any other federal litigation practice" in the need to make out a prima facie case with admissible evidence. [57] The court stated that: "Debtor's proposed evidence consists of four appraisals, two of which were attached to affidavits and two of which were unverified." [58] The court recognized that these appraisals are hearsay, that they "are inadmissible unless they fall within some recognized exception to the hearsay rule," [59] and that they did not fall under any such exception. The court refused to receive them into evidence. Without these affidavits, "Debtor presented no admissible evidence at the hearing." [60] The only

admissible evidence was that offered by the bank, and therefore the bank's evidence controlled.

All of the above is correct, and the above is all the court needed to say to support the judgment. The problem is that the court went beyond what was necessary and stated these two things: First, the court stated that excluding this evidence was not an abuse of discretion. Second, the court noted that the affiant, here the debtor, was not present in court and that had he been present in court for cross−examination, that would have "eliminat[ed] the hearsay objection." [61]

By stating that exclusion of this evidence is not an abuse of discretion, the judge is implying that he had the discretion to admit the appraisals. I submit that he did not: On the facts of this case, this evidence is hearsay. [62] As hearsay, this evidence is inadmissible unless it fits under an exception. [63] On the facts of this case, this evidence does not fit under an exception to the hearsay rule. [64] Once a judge decides, as this judge did, that the evidence is hearsay and does not fit under any of the exceptions, then the judge has no discretion; [65] the evidence is inadmissible and abuse of discretion is not the standard.

The second error in *In re Roberts* is this: In support of the judgment, the court correctly concluded that the affidavits were out−of−court statements offered to prove the truth of the matter asserted, did not fit under an exception to the hearsay rule, and were inadmissible. That much is correct. In dicta, the court incorrectly concluded that had the out−of−court declarant been in−court and available for cross−examination, that would have "eliminat[ed] the hearsay objection." [66] That much is incorrect.

If the presence of the declarant eliminates the hearsay objection, then that must mean that the declarant's presence either transforms these statements into nonhearsay or qualifies them under one of the exceptions to the hearsay rule. The fact is that declarant's presence does not do either of those things. Nonhearsay: The books are full of out−of−court statements by declarants who are available in court, which are nonetheless hearsay. The presence of the out−of−court declarant does not change hearsay into nonhearsay. This is hearsay law at its most basic. Hearsay exceptions: Scour the exceptions. [67] There is not an exception for statements by a declarant who is in court and available for cross−examination, nor is there an exception for affidavits by an affiant who is in court and available for cross−examination. There is no exception that "eliminat[es] the hearsay objection" when the affiant is "present for cross−examination." [68] While the judge's rulings on these appraisals were correct, and the judgment was correct, these two gratuitous statements perpetuate the problem addressed in this Article.

VI.Is This Procedure Really Such a Good Idea After All?

Generally, allowing evidence over a hearsay objection is error. Basing a judgment in bankruptcy on that evidence is error that affects the substantial right of a party, and, therefore, is reversible error. [69] Having argued that, I now address whether direct examination by affidavit really is such a good idea. Even if it were allowed, would it be a good idea to do things this way? This particular "exception" to the hearsay rule seems largely to boil down to this: Doing it by affidavit is a good idea. But is it *really* such a good idea?

The first thing to consider is the ramifications of the rule requiring testimony by affidavit. If an affidavit is all it takes to get around the hearsay rule, then in bench trials we can altogether do away with the hearsay rule as it applies to direct examination. [70] Any judge in a nonjury trial could order that all direct testimony be received by affidavit. The only rule left would be that the affiant has to be available for cross−examination. [71] If the judge in a bench trial can require that all direct testimony be in the form of affidavits, so long as the affiant is available for cross and redirect examination, then why not allow the same rule in a jury trial? The hearsay rule does not distinguish between bench trials and jury trials. This procedure would be increase efficiency equally in other federal litigation practice and would help Article III and Magistrate Judges manage their dockets as well. One day, trial advocacy schools across the country will be presenting direct examination demonstrations where young lawyers gather around a table and watch the masters as they draft affidavits.

This is just the kind of thing Justice Holmes warned of in his 1904 dissenting opinion in *Northern Securities Co. v. United States*. [72] Justice Holmes stated:

Great cases, like hard cases, make bad law. Great cases are called great cases, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. [73]

Many of the decisions ordering the use of affidavit evidence over objection, and affirming the same, are quite frank about the immediate interests at stake here: efficiency, speed, docket management, swift resolution of issues that deserve swift resolution, and those kinds of practical policy concerns. [74] The hydraulic pressure from these interests "makes what previously seemed clear"−−*i.e.*, that the hearsay rule generally forbids the use of affidavit evidence in place of direct examination −−"seem doubtful". It is these pressures "before which even [this] well settled principle[] of law [has bent]."

The second thing to consider is why it is that we have a hearsay rule in the first place. Why it is that we prefer live testimony based on firsthand knowledge over written statements, even if based on firsthand knowledge? The affidavit is under oath. It is, however, an entirely different oath. The words may be the same, but an oath administered sitting around a conference table in your lawyer's office is a different oath from the one administered in a federal courtroom. The former is administered by a notary public who is also your lawyer's secretary. The latter is administered by an employee of the federal judicial system, with a judge and a courtroom of people looking on, and with all of the trappings of the federal courtroom. Missing from the affidavit are the trappings of testimony in a federal courtroom, all of which are designed, in part, to impress on the witness the need for careful and truthful testimony. There is a substantial difference between the one oath and the other. It is a difference that may well affect how one feels about the obligation undertaken, and that may well affect the substance of what is said under that oath.

One difference between these two oaths is that the putative declarant did not write the affidavit. The lawyer wrote the affidavit. [75] The affiant is the out−of−court declarant in that he signed the document and adopted it as his own, but the lawyer is the out−of−court declarant in that she wrote the document. As Judge Posner has pointed out, this kind of procedure allows the lawyer and the affiant "to give . . . greater salience to the part of the [witness'] examination" that favors the party offering the affidavit than to the part that favors the opposing party. [76] It allows the lawyer to write a consistency into the declarations that gives them enhanced credibility. [77] It allows the lawyer, for direct examination at least, to turn Lennie into Steinbeck, or vice versa. [78]

Admittedly, the affiant can be called to the stand and subjected to cross−examination. [79] However, the cross−examiner loses the ability to observe the affiant's demeanor on direct examination, loses the opportunity to pick up the sometimes subtle (sometimes not so subtle) clues indicating which parts of the direct examination are vulnerable, and loses the small inconsistencies that can be the basis for a successful cross−examination. The cross−examiner also misses the benefits of hearing the witness's story in the witness's own words and all that tells a lawyer about the intelligence, experience, vulnerability, and credibility of the witness. All the cross−examiner has is opposing counsel's written account of the witness's story. Much is lost when a good lawyer is forced to cross examine from a piece of paper written by opposing counsel.

Another difference between the oaths is the general fear of public speaking, which dampens intelligent lying. That fear is not at work when the witness is in the lawyer's office being asked by the lawyer to sign an affidavit. In fact, in the affidavit−signing situation, the external pressures exerted are not in the direction of, "Be careful, and tell the truth." Rather, they are in the direction of, "Hurry up and sign and lets get on with business." The internal message is not "I had better take care in what I say." Rather, it is more this: "I don't want to look foolish. I'd better sign this thing."

All of these considerations are particularly important here because if you read reported bankruptcy cases and look for themes, one of them will be deceit. The cases are full of fraudulent transfers of corporate and personal property, extrinsic fraud in the procurement of a state court judgment, and fraudulent failure to report and turn over estate property. Litigants in bankruptcy court kite checks, file false financial statements, and embezzle money. The cast includes people who pour money into slot machines and people who shoot it into their arms, people who lie about their addictions, their inventories, and their intentions. [80] Bankruptcy courts see more than their share of unsavory characters, all of whom might make it more important to have their testimony in their own words, not those of their lawyers, and to have it presented with live testimony and all of the pressures for truth telling that accompany live

testimony.

VII.The Lawyers and Judges of our Federal Bankruptcy Courts

If a lawyer litigating in bankruptcy court chooses to waive the application of the hearsay rule and present direct evidence through affidavits, that is fine−−so long as it is an intelligent waiver. Sometimes, this procedure may be better for the client. The client's presentation may be vulnerable in many respects. A live direct examination may reveal cross−examination clues to opposing counsel. The client may not be eloquent, whereas an affidavit written by counsel may be. The client may appear untrustworthy, and the less time the client spends on the stand, the better. There are many valid reasons that a lawyer would want to avoid putting the client on the stand for direct examination, and instead write out the testimony for the client to sign. This procedure allows the lawyer to write the direct examination at his or her convenience and in the comfort of his or her office, edit it to death, and make sure that the direct examination is in his or her (the lawyer's) own words. This might be better for the client than an examination in the client's own words. Thus, this procedure might be in the client's best interest. These are precisely the times, however, when the opposing lawyer should be making the hearsay objection.

All too often, however, it seems that lawyers for both sides−−the lawyer presenting the witness and the one opposing the witness−−allow the trial to proceed via affidavit just because it is easier. It is easier to write the affidavit than the questions that would produce the testimony; easier to hand in the paper then to stand up and conduct the direct examination; easier because allowing opposing counsel to get away with it, means opposing counsel will allow you to get away with it; easier to be a motions lawyer than a trial lawyer. Easier is not a good enough reason. Bankruptcy lawyers who are engaging in this practice just because it is easier, rather than because it is a better way to present the client's evidence, ought to switch to the motions or appellate practice part of their firms. They ought not continue to pretend to be trial lawyers.

Some lawyers are objecting to this procedure. Some are trying to enforce viva voce direct examination. Of those who oppose the procedure, too many are making the wrong objection. Some are objecting that this procedure somehow violates Rule 611. [81] Rule 611 gives the trial judge discretion to control the mode and order of the testimony of the witnesses. There are two things wrong with this objection. First, this is a rule granting discretion. Those objecting on the basis of this rule seem to be thinking that it is a rule that limits discretion.

Second, Rule 611 does codify the trial judge's discretion to require affidavit evidence if no one makes a *valid* objection. If the trial judge offers a procedure and the appropriate objection is hearsay, and there is no timely and specific hearsay objection, then there is nothing wrong with the trial judge plowing ahead. Almost anything is allowed, if there is no objection. [82] The Rule 611 power to control the mode of testimony does not include the power to ignore the rules of evidence or the power to override the statute and to admit inadmissible evidence over timely and specific objection. [83] Lawyers who are making a Rule 611 objection are badly missing the point of Rule 611, of the hearsay rules, and even of the very statutory nature of the entire evidence code. A statutorily required inadmissibility, a clear statutory command that hearsay that does not fit under an exception is inadmissible, cannot simply be ignored or rewritten as an exercise of judicial discretion. [84]

Other lawyers have objected to this procedure, arguing that it is a violation of their clients' constitutional right to due process of law. This too is the wrong objection. In the regular course of affairs, at least, this procedure does not amount to a constitutional violation. [85] It is an evidentiary problem.

Of the lawyers who are objecting to the procedure and making the right objection, many of them are making the objection too late. Their objection may be untimely, and it may not be untimely, but judges are ruling that it is untimely. [86] This procedure−−direct evidence by affidavit−−is no secret. There is no reason for counsel to be surprised by the procedure. There is no reason the objection cannot be made soon enough so that no one can possibly claim it is untimely. Lawyers should make the objection when the procedure is first mentioned: when counsel requests it or the trial judge suggests it. Lawyers should not wait until the time for producing evidence has closed and then object that all of the work put into following the judge's order was for naught because the judge's procedure is invalid. Counsel should not give the judge the opportunity to pull out the untimely objection card. [87] Instead, make the objection at the first opportunity, and then make it again every time an affidavit is offered. [88]

If the judge announces this procedure prior to the trial, I am suggesting counsel object then. I do not mean to say that objection that early is required: It may be and it may not be. I do mean to say that if the objection is not made early, then, rightly or wrongly, the judge may feel that the objection should have been made sooner, and is not timely. The judge may be right to play the timely objection card, or the judge may be wrong but if objection is made at the earliest possible opportunity, the judge cannot play the timely objection card.

This Article is not about lawyers who have valid reasons of trial strategy for wanting the direct evidence to come in via affidavit rather than live testimony. This Article is about those lawyers who should object, but do not because the wrong way is the easier way. It is about the lawyers who do object, but make the wrong objection. (Let's face it, as difficult as the subject of hearsay can be, [89] recognizing that an out of court statement offered to prove the truth of the matter asserted therein is hearsay, that much of it is not rocket science). This Article is about the lawyers who do object, but make their objection too late. (As a general rule, no lawyer with experience in bankruptcy court will be surprised when a bankruptcy judge orders that direct evidence be given by affidavit. If the lawyer wants to object, there is no reason not to be ready to do it right then, and again every time the subject comes up. Often, only a lack of early preparation would cause a lawyer to decide later, rather than sooner, that it is in the best interest of his or her client to object to affidavit trial testimony.)

The fault lies not just with the attorneys opposing the evidence, but also with the attorneys offering the evidence. To the extent that attorneys offering the evidence argue that Rule 611 gives the judge authority to order the use of affidavit evidence, even over a hearsay objection, then those lawyers are perpetrating a very basic misunderstanding of what it means for a judge to have discretion. [90]

The fault lies not with the attorneys alone. Many judges have behaved no better. Some courts have been quite open about the fact that doing things this way is expedient, and perhaps the only way the court can keep its docket current. They find that doing things any other way would be a waste of time and would not serve the interests of litigants. [91] The point is not that the hearsay objection gets in the way, slows things down, or really serves the interests of litigants. The point is that it is a statutory rule of evidence and, as such, it cannot so easily be ignored. The judges of the courts of the United States are not free to ignore the Federal Rules of Civil Procedure, the Federal Sentencing Guidelines, or the constitutional right to be free from self−incrimination just because these rules slow the court's march through its docket and sometimes do not serve the interests of justice. Neither are they free to ignore the Federal Rules of Evidence. This is a statute, and unless its application is unconstitutional the courts of the United States are bound to follow it.

There are judges who recognize that the Federal Rules of Evidence control the admission of affidavits and yet still let them in evidence without explaining how, under the Federal Rules of Evidence, that can be done. Once the hearsay problem is recognized−−once it is recognized that an affidavit is hearsay when offered to prove the truth of the matter asserted−−then to admit it into evidence, without pointing to an exception to the hearsay rule, is the judicial equivalent of burying one's head in the sand. There are judges who recognize that an affidavit is hearsay and then admit it under Rule 611, as though Rule 611 were some kind of exception to the hearsay rule, or as though Rule 611− which gives codifies the trial judge's power to control the mode and order of the witnesses testimony − somehow gives the trial judge to ignore the exclusionary rules of evidence. [92] In other federal litigation practice, this kind of evidence would not be admissible over timely and specific objection. In other federal litigation practice, judges would not get away with this kind of reasoning. Bankruptcy litigation practice is no different in this regard than any other, except that in bankruptcy practice the lawyers and judges are getting away with it. The hearsay rule is being ignored for the sake of convenience and efficiency.

This may partly be a result of having specialized courts. When you have judges who see only one kind of case, and when it is a kind of case that does not get much public attention, this kind of erroneous thinking can be allowed to grow and become institutionalized before anyone really notices that anything is wrong. (It is not that this work is being done in secret, but rather that no one is really paying much attention.) A line of cases can get started off in the wrong direction and when the only lawyers and judges looking at it are the lawyers and judges of the more or less specialized bankruptcy bar, it can be easy for no one to notice the drift until the ship is way off course.

Conclusion

Bankruptcy courts are running roughshod over the hearsay rule. The rule is being ignored or inadequately addressed throughout the federal bankruptcy system. It is a violation of the federal statute governing the admissibility of evidence in bankruptcy trials. While it is convenient and perhaps would be the procedure recommended by efficiency experts, it may not really be such a good idea.

At first blush, it seems that the way business is conducted in bankruptcy court would be changed dramatically if bankruptcy judges began enforcing the statutory hearsay rule. Perhaps, however, this would not be the case. This procedure has been part of the way of doing business in bankruptcy court for a long time, and practitioners are used to it. If the procedure really is as efficient as the bankruptcy courts seem to think, then attorneys should continue to stipulate to affidavit evidence or let it pass without objection, in which case there is no hearsay problem. In addition, some affidavits will be admissible under one hearsay exception or another.

Should this part of the law continue to develop along current lines, should it be better defended or perhaps even affirmed by the Supreme Court, then there does not seem to be any logical reason this procedure cannot be extended to any bench trial, or even any jury trial. [93] There are plenty of reasons to prefer live, in−court testimony over statements made outside the courtroom. In this regard, however, there is no reason for treating a trial to a bankruptcy judge any differently than a trial to any other federal judge−−not so long as the same evidentiary rules apply in the courtroom of each. All trial lawyers should be aware of what is going on in trials in federal bankruptcy court and what it does mean or may one day mean to their practice.

FOOTNOTES:

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[1] If the witness is not available, then the affidavit is not admissible unless it fits into one of the definitional exclusions or exceptions to the hearsay rule. See, e.g., Brown v. IRS (In re Brown), 82 F.3d 801, 805−06 (8th Cir. 1996) (finding affidavit inadmissible hearsay because affiants were not present at hearing); In re Burrell, 230 B.R. 309, 311 (Bankr. E.D. Tex. 1999) (discussing how counsel informed court that affiant could not appear because he was stationed in Germany with United States Air Force, and how debtor failed to present any evidence on which court could have applied The Soldier's and Sailor's Relief Act of 1940, 50 U.S.C. App. § § 501−593, to matter); In re Roberts, 210 B.R. 325, 329 (Bankr. N.D. Iowa 1997) (holding appraisals inadmissible hearsay because affiants were not present at hearing); see also infra Part IV. (regarding hearsay exclusions and exceptions in context of affidavit in bankruptcy proceeding). Back To Text

[2] It is offered to establish, through its truth, the essential elements of the party's case. Back To Text

[3] See Fed. R. Evid. 801; see also Spivey v. United States, 912 F.2d 80, 85 (4th Cir. 1990) (holding affidavit, offered to prove truth of particular assertions therein, is hearsay, unless, of course, it is excluded by definition from part of Rule 801(d)). Rule 801(d), however, will not often, if ever, apply in the situation under discussion. An affidavit is not hearsay under 801(d), for example, if the affiant is a party and the affidavit is offered against the affiant. See In re Tarkio College, 195 B.R. 424, 427 n.2 (Bankr. W.D. Mo. 1996) (holding affidavit was nonhearsay admission); see also In re Applin, 108 B.R. 253 (Bankr. E.D. Cal. 1989); infra note 41. This article, however, is not about the parties' statements offered against them. Rather, it is about the parties' affidavits (and the affidavits of others) offered by them, in lieu of their own direct testimony.

For a second example, an affidavit is not hearsay if it is consistent with the affiant's testimony and offered to rebut an express or implied charge against the affiant of recent fabrication or improper influence or motive. This too will not be the case here because the affidavit under discussion is being used in lieu of testimony, not to rehabilitate testimony. Back To Text

[4] Fed. R. Evid. 101. Back To Text

[5] Absent plain error affecting substantial rights of a party, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected, and . . . [i]n case the ruling is one admitting evidence, timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context." Fed. R. Evid. 103; see infra note 82 (quoting Fed. R. Evid. 103 at greater length). See, e.g., Ball v. Interoceanica Corp., 71 F.3d 73, 77 (2d Cir. 1995) (noting that "[b]ehind Interoceanica's motion for a new trial, there seems to lie a belated objection to the form of trial used. But, in fact, both parties consented to the form of trial, and such a procedure falls within the district court's ample authority to manage the proceedings before it."); Hoffman v. Beer Drivers & Salesmen's Local Union No. 888, 536 F.2d 1268, 1277 (9th Cir. 1976) (discussing how "not until . . . after the evidence was closed was any objection taken to the use of the affidavits."); Hardin v. Gianni (In re King Street Inv., Inc.), 219 B.R. 848, 859 (B.A.P. 9th Cir. 1998) (holding since no motion to strike, objection to affidavits waived); Emerson v. Federal Sav. Bank (In re Brown), 209 B.R. 874, 882 (Bankr. W.D. Tenn. 1997) (discussing untimely objection and presence of other proof); Union Nat'l Bank of Marseilles v. Leigh (In re Leigh), 165 B.R. 203, 229 (Bankr. N.D. Ill. 1993) (holding objection waived by failure to move to strike). Back To Text

[6] See infra notes 21−31 and accompanying text. Back To Text

[7] One more thing this Article is not about: Rule 32 of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 32), made applicable in bankruptcy court by Bankruptcy Rule 7032 (Bankr. Code, Rules, and Forms, 7032 (West 2000)), allows rather wide use of depositions in lieu of live oral testimony. This Article is not about the use of depositions; it is only about affidavits. On this point, however, see Haseotes v. Cumberland Farms, Inc., 216 B.R. 690, 694 (D. Mass. 1997) (citing Rules 32 and 7032 and then proceeding to affirm bankruptcy court's use of depositions that went way beyond either rule). Back To Text

[8] Union State Bank v. Geller (In re Geller), 170 B.R. 183, 186 (Bankr. S.D. Fla. 1994). See also id. (stating that "[t]he bankruptcy court's procedure permits oral cross−examination and redirect examination in open court and thereby preserves an opportunity for the judge to evaluate the declarant's demeanor and credibility. The procedure is essential to the efficient functioning of the crowded bankruptcy courts."); In re Heckenkamp, 110 B.R. 1, 4 (Bankr. C.D. Cal. 1989) (asserting that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . (2) avoid needless consumption of time...") (emphasis in original) (quoting Fed. R. Evid. 611(a)). Back To Text

[9] Saverson v. Levitt, 162 F.R.D. 407, 410 (D.D.C. 1995) (citing Charles R. Richey, A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to be Submitted in Written Form Prior to Trial, 72 Geo. L.J. 73, 74 (1983)); see also Richey, supra, at 74 (noting need for this technique in complex litigation, that using this technique does not violate Federal Rules of Civil Procedure, and that using this technique is consistent with judicial power under Rule 611(a) of Federal Rules of Evidence; Judge Richey does not address rule of evidence under discussion here—hearsay rule). But see id. (stating that "[i]t should be immediately cautioned that requiring the preparation of written direct testimony in advance of trial may be neither appropriate nor beneficial for use in the ordinary case"). Back To Text

[10] 965 F.2d 777 (9th Cir. 1992) (per curiam). See Saverson, 162 F.R.D. at 408 (noting that "[r]equiring direct testimony by way of declaration or sworn affidavit is improper, was explicitly rejected by the United States Court of Appeals for the Ninth Circuit in Adair v. Sunwest Bank "); Lewis v. Zermano (In re Stevinson), 194 B.R. 509, 511 (D. Colo. 1996) (citing Adair and stating that "the bankruptcy court's procedure requiring direct testimony by declaration with the right of oral cross−examination neither violated rule 43 (a) nor infringes on the due process rights of parties"). Back To Text

[11] In re Adair, 965 F.2d at 779. See Phonetele Inc. v. American Tel. & Tel. Co., 889 F.2d 224, 232 (9th Cir. 1989) (stating that "[t]he use of written testimony is an accepted and encouraged technique for shortening bench trials"); Malone v. United States Postal Serv., 833 F.2d 128, 133 (9th Cir. 1987) (upholding district court's authority, under Federal Rule of Civil Procedure 16, to compel written testimony). Back To Text

[12] See Fed. R. Evid. 611:

(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.

Id. See also In re Adair, 965 F.2d at 779 (stating that "[t]he bankruptcy court's procedure conformed with local rule 13.6 of the Central District"); C.D. Ca. R. 13.6:

In any matter tried to the Court, including matters in Bankruptcy, the judge , including the bankruptcy judge, may order that testimony on direct examination of a witness be presented by written narrative statements subject to cross − examination of the declarant at trial.

Id. Back To Text

[13] In re Adair, 965 F.2d at 779. At best, the court argues the rule should be different, but does not argue a way around the rule as it is. See Fed R. Evid. 802 (stating 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"); Fed. R. Civ. Pro. 43(a):

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Id. (emphasis added). Back To Text

[14] Fed. R. Evid. 611(a) advisory committee's note. See Lippa v. General Motors Corp., Nos. 96−7636, 96−7637, 1997, U.S. App. LEXIS 2703, at *4 (2d Cir. Feb. 12, 1997) (stating that trial courts' decisions to control their courtrooms, in regard to 611(a), should generally be given deference); Ball v. Interoceanica Corp. 71 F.3d 73, 77 (2d. Cir. 1995) (approving of written testimony in bench trials). Back To Text

[15] See, e.g., Union State Bank v. Geller (In re Geller), 170 B.R. 183, 185−86 (Bankr. S.D. Fla. 1994) (encouraging use of written statements to shorten bench trials). In re Gergely, 110 F.3d 1448 (9th Cir. 1997), does the same thing—it seems to think that Rule 611(a) authorizes the court to require affidavit evidence over objection—but, in a different way. Here, one party tried to admit rebuttal evidence through the oral testimony of witnesses. The trial court refused to admit the evidence, explaining that the rebuttal should have been in the form of rebuttal affidavits. The appellate court cited Rule 611(a), found no abuse of discretion, and affirmed. My point, in part, is that nowhere in the rules of evidence does it say that the trial court has the discretion to admit inadmissible hearsay. Back To Text

[16] Rule 611 does codify trial judges' power to control the mode of testimony but it does not grant trial judges the discretion to ignore the exclusionary rules of evidence. See, e.g., United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996) (stating that trial judge did not abuse discretion in prohibiting hearsay evidence notwithstanding 611); United States v. Woolbright, 831 F.2d 1390, 1395 (8th Cir. 1987) (deciding that Rule 611 does not authorize court to admit hearsay that does not fall within exception to hearsay rule); infra note 81 and accompanying text. Back To Text

[17] In re Adair, 965 F.2d at 780. See generally Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 173 (1988) (admitting out of court statement not to prove truth of matter asserted but merely to show such statement was made); Brown v. LaCreek Elec. Assoc., 939 F.2d 623, 625 (8th Cir. 1991) (stating that evidence not admissible as substantive evidence may still be used for impeachment). Back To Text

[18] The court stated:

Appellants argue that the declaration procedure deprived Marty Adair of the opportunity to establish her credibility with the court in the first instance because her declaration was drafted by counsel and she thus was unable to explain

things in her own words. Appellant, however, has no basis for charging the trial court with error. It was her lawyer, not the judge, who cast her declaration in legalese rather than plain English. If cross−examination revealed that Marty Adair had only a tenuous grasp of the version of events contained in a statement she signed under oath, that again is her problem and not that of the trial court.

In re Adair, 965 F.2d at 780. Back To Text

[19] See id. See generally Lewis v. Glickman, 104 F. Supp.2d 1311, 1324 (D. Kan. 2000) (stating that Tenth Circuit has held that where appellant fails to show outcome of case would have been different without asserted error no prejudice is found); Equal Employment Opportunity Comm'n v. Loral Aerospace Corp., Nos. 97−2333, 97−2350, 1998 U.S. App. LEXIS 27782, at *4 (10th Cir. Oct. 29, 1998) (stating that error in jury instructions was harmless if appellant suffered no prejudice). Back To Text

[20] There is one case where the court found that direct examination by affidavit violated both the Due Process Clause of the United States Constitution and the hearsay rule. See Danning v. Burg (In re Burg), 103 B.R. 222 (B.A.P. 9th Cir. 1989), overturned in part; Adair v. Sunwest Bank (In re Adair), 965 F.2d 777 (9th Cir. 1992) (per curiam). Burg's discussion of the hearsay aspects of this problem got it right.

Adair is widely cited as the case that overturned In re Burg. See, e.g., Saverson v. Levitt, 162 F.R.D. 407, 408 (D.D.C. 1995) (noting that Burg, which plaintiff's counsel relies on "for the proposition that requiring direct testimony by way of declaration or sworn affidavit is improper, was explicitly rejected [in Adair]."); In re Geller, 170 B.R. at 185−86 (providing that "[t]his decision, however, was specifically overruled by the Ninth Circuit in [Adair;]" and that "[t]he Court specifically overruled [Burg].")

In fact, Adair did not reject, overturn, overrule, or in any way criticize what the Burg opinion said about the hearsay rule. In Adair, the court did state this: "[The Burg court] noted that the procedure raised due process concerns and ultimately excluded the declaration testimony on hearsay grounds . . . . We disagree with the Burg panel that the bankruptcy court's procedure raises significant due process concerns." In re Adair, 965 F.2d at 780. Again, however, Adair does not in any way diminish what Burg had to say about the hearsay rule. Rather, it left the question open. Back To Text

[21] In re Heckenkamp, 110 B.R. 1, 4 (Bankr. C.D. Cal. 1989) (stating that statements within declaration are subject to same objections as if declarant were testifying in court). See also S.E.C. v. Carnicle, 216 F.3d 1088 (10th Cir. 2000) (asserting that any sworn statement is always admissible for summary judgment, provided that testimony is of type that would be admissible if witness testified at trial); Silverman v. Miller (In re Silverman), 155 B.R. 362, 365−366 (Bankr. E.D.N.C. 1993) (unwilling to strike affidavit even though it contained some inadmissible statements). Back To Text

[22] See Fed. R. Evid. 1101(a) (stating "[t]hese rules apply to . . . United States bankruptcy judges . . . [t]he terms 'judge' and 'court' in these rules include United States bankruptcy judges"); see also Harada v. DBL Liquidating Trust (In re Drexel Burnham Lambert Group, Inc.), 160 B.R. 729, 734 (S.D.N.Y. 1993) (describing appellant's contention that Bankruptcy Court refused to apply Fed. R Evid. in violation of Fed. R. Evid. 1101 (a) making Fed. R. Evid. applicable to bankruptcy proceedings); Jeffrey Thomas Ferriell, The Preclusive Effect of State Court Decisions in Bankruptcy, 59 Am. Bankr. L.J. 55, 75 & n.219 (1985) (stating "[t]he Federal Rules of Evidence apply in adversary proceedings by virtue of § 252 of the Bankruptcy Reform Act, which amended Rule 1101(a) of the Federal Rules of Evidence to provide for application in United States bankruptcy courts."). Back To Text

[23] See Fed. R. Civ. P. 56(c) (stating "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact") (emphasis added); see also First Card Servs. v. Herndon (In re Herndon), 193 B.R. 595, 597 (M.D. Fla. 1996) (discussing incident where debtor in bank proceeding moved for summary judgment and appellant submitted two affidavits in response to motion for summary judgment under Rule 56 of Fed. R. Civ. P.) (emphasis added); David A. Sonenstein, Federal Rules of Civil Procedure VII: Judgment, US NITA (2000) ("Under Rule 56, the movant ordinarily relies on either affidavits or the fruits of discovery to support its motion") (emphasis

added). Back To Text

[24] See Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322−23 (1986) (interpreting Rule 56(c) to mean entry of summary judgment is mandated "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"); Schwinn Plan Comm. v. AFS Cycle & Co. (In re Schwinn Bicycle Co.), 182 B.R. 514, 521 (Bankr. N.D. Ill. 1995) (stating in summary judgment motion "[t]he movant must inform the court of the basis of its motion and identify those portions of the record which it believes demonstrate the absence of a genuine issue of material fact"); D'Alessio v. IRS (In re D'Alessio), 181 B.R. 756, 762 (Bankr. S.D.N.Y. 1995) (quoting Fed. R. Civ. Pro. 56(c)). Back To Text

[25] See Younie v. Gonya (In re Younie), 211 B.R. 367, 376 (B.A.P. 9th Cir. 1997) (describing evidence taken by written declaration and court consideration of whether statements within declaration were hearsay but failure by court to consider whether declaration itself is hearsay); see also United States v. McClellan, 868 F.2d 210, 215 (7th Cir. 1989) (assessing defendant's argument that written admission should not be admitted where said evidence was admitted under Fed.R. Evid. 801(2)(d)); In re Drexel Burnham Lambert Group, Inc., 160 B.R. at 735 (holding lower court properly admitted written evidence and determined evidence was not hearsay). Back To Text

[26] See Fed. R. Civ. Pro. 56 (c); see also Turoczy Bonding Co. v. Strbac (In re Strbac), 235 B.R. 880, 884 (B.A.P. 6th Cir. 1999) (describing situation where summary judgment granted to creditor when "[d]ebtor does not make any statements in his affidavits in opposition to summary judgment"); In re Herndon, 193 B.R. at 597 (addressing situation where debtor in bank proceeding moved for summary judgment and appellant submitted two affidavits in response to motion for summary judgment under Rule 56 of Fed. R. Civ. P.). Back To Text

[27] Fed. R. Evid. 801(d)(2)(B). See also Vazquez v. Lopez−Rosario, 134 F.3d 28, 35 (1st Cir. 1998) (finding party's statement insufficient to establish "adoptive admission" under Fed. R. Evid. 801 (d)(2)(B)); United States v. McKinney, 707 F.2d 381, 387 (9th Cir. 1983) (stating that particular statement is not hearsay because "appellant's admission was a special kind of admission: an adoptive admission under Fed. R. Evid. 801(d)(2)(B)"); United States v. Sears, 663 F.2d 896, 904 (9th Cir. 1981) (reviewing foundation required prior to admitting evidence as an adoptive admission). Back To Text

[28] See Hoffman v. Beer Drivers & Salesmen's Local Union No. 888, 536 F.2d 1268, 1277 (9th Cir. 1976), a non−bankruptcy case, where the court, without discussing why, states that "[a] trial court may in a contempt proceeding narrow the issues by requiring that affidavits on file be controverted by counter−affidavits and may thereafter treat as true the facts set forth in uncontroverted affidavits." Id. The discussion in the text above offers a justification in the law of evidence for such a statement. See also Rogers v. Webster, 776 F.2d 607, 611 (6th Cir. 1985) (asserting that in [civil] contempt proceeding court may call for affidavits on file be controverted by counter−affidavits in order to constrict the issues). See generally Peterson v. Highland Music, Inc., 140 F.3d 1313, 1324 (9th Cir. 1998) (same). Back To Text

[29] "In as routinized area, such as bankruptcy motion practice, one easily loses sight of some of such basics as the need to make out a prima facie case by competent evidence. Bankruptcy litigation is no different than any other federal litigation practice in this respect" In re Roberts, 210 B.R. 325, 329 (Bankr. N.D. Iowa 1997). See Gardner v. New Jersey, 329 U.S. 565, 573 (1947) (asserting that proof of claim makes prima facie case); Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.), 993 F.2d 915, 926 (1st Cir. 1993) (asserting that proof of claim which agrees with requirements of Bankruptcy Rule 3001(f) encompasses prima facie evidence of validity). Back To Text

[30] In re Heckenkamp, 110 B.R. 1, 4 (Bankr. C.D. Cal. 1989). See Adair v. Sunwest Bank (In re Adair), 965 F.2d 777, 780 (9th Cir. 1992) (asserting Court's objection to bankruptcy court's "trial by affidavit" procedure); Danning v. Burg (In re Burg), 103 B.R. 222, 225 (B.A.P. 9th Cir. 1989) (asserting that such procedure infringes on party's due process rights); cf. Walton v. United Consumers Club, Inc., 786 F2d 303, 313 (7th Cir. 1986) (holding that admission of answers to interrogatories in lieu of oral testimony violated hearsay rule but that error was harmless). Back To Text

[31] See supra note 5 and accompanying text. Back To Text

[32] See General Trading Inc. v. Yale Materials Handling Corp., 119 F.3d 1485 (11th Cir. 1997); see also 11 U.S.C. § 303(h)(1) (2000) (stating pleadings do not show how debtor treated claims, and, if introduced to demonstrate truth of allegations contained therein, pleadings would be hearsay); Boston Beverage Corp. v. Turner, 81 B.R. 738, 745 (D. Mass. 1987) (observing that if certain pleadings were introduced to demonstrate truth of allegations contained therein, pleadings would clearly have been hearsay). Back To Text

[33] General Trading Inc., 119 F.3d at 1502 n.36 (emphasis added). Back To Text

[34] Silverman v. Miller (In re Silverman), 155 B.R. 362 (Bankr. E.D.N.C. 1993), is a bankruptcy case. An affidavit was submitted in opposition to defendants' motion for summary judgment. Defendants asked the court to strike the affidavit because it included hearsay and there was no showing that it was made on affiant's personal knowledge. The court admitted the affidavit into evidence, stating that "the improprieties contained in [the affidavit] are muted by the fact that, at this stage of the proceedings, they are to be considered by the court, not by a jury, and the court is competent to rely only on the portions that are admissible." Id. at 366. This is "I'll take it for what it's worth" analysis applied to an affidavit, parts of which are admissible in this summary judgment proceeding, and parts of which, as hearsay within the affidavit, are not admissible. The judge let in the whole affidavit, promising that, when making his judgment, he would separate out and not consider the inadmissible parts. See id. at 366; see also Adair v. Sunwest Bank (In re Adair), 965 F.2d 777, 780 (9th Cir. 1992) (per curiam) (stating that proposition requiring direct testimony by way of affidavit being improper was rejected by U.S. Court of Appeals for Ninth Circuit). Back To Text

[35] See, e.g., In re Roberts, 210 B.R. 325, 329 (Bankr. N.D. Iowa 1997) (providing that "[T]he documents presented as evidence by Debtor are inadmissible hearsay as properly objected to by Creditor. Debtor presented no admissible evidence at the hearing which can be considered part of this record"). See also id. at 329 (stating that excluding affidavits as hearsay is not abuse of discretion where related parties are not present to authenticate documents and for cross examination); In re 183 Lorraine St. Assocs., 198 B.R. 16, 27 (E.D.N.Y. 1996) (applying Rule 3001 (f) presumption to allocate burden of proof and persuasion in valuation hearing); Stinnett v. Wilson (In re Wilson), 96 B.R. 301, 303 (Bankr. E.D. Cal. 1989) (noting that court refused to accept as evidence affidavit by attorney regarding mailing of complaint). Back To Text

[36] The result is the same if this happens: The party who has the burden of proof introduces affidavit evidence, over a hearsay objection. The party without the burden of proof conducts a careful cross−examination, staying clear of the essential elements of the opposing party's burden of proof. There is no direct examination on the essential elements, either because none is attempted or it is blocked as outside the scope of the cross−examination. In this situation too, there is no admissible evidence on essential elements of the burden of proof, so the party with the burden loses.

"In as routinized area, such as bankruptcy motion practice, one easily loses sight of some of such basics as the need to make out a prima facie case by competent evidence. Bankruptcy litigation is no different than any other federal litigation practice in this respect." In re Roberts, 210 B.R. at 329. See In re 183 Lorraine St. Assoc., 198 B.R. at 27 (stating that if objection is made to characterization of claim as fully secured, defending creditor has ultimate burden of persuasion); In re Southmark Storage Assocs. Ltd. Partnership, 130 B.R. 9, 10 (Bankr. D. Conn. 1991) (holding that debtor has initial burden to overcome presumption of validity of proof of claim but ultimate burden of persuasion is on creditor to prove by preponderance of evidence value of collateral which secures its claim). Back To Text

[37] Direct examination by affidavit is also quite different from an order requiring that the attorneys submit a list of the questions they intend to ask on direct examination and the answers they expect to receive. See Malone v. United States Postal Serv., 833 F.2d 128, 133 (9th Cir. 1987) (serving as example of case where procedure used). Here the list of questions and anticipated answers is not offered in evidence; the evidence is a good old−fashioned direct examination. There is no hearsay involved in this pretrial procedure because there is no out−of−court statement offered into evidence. See United States v. Buschman, 527 F.2d 1082, 1085 (7th Cir. 1976) (stating that proper cautionary instruction must be given by trial court each time that hearsay testimony is admitted into evidence). Back To Text

[38] Generally, but not always. See supra, Part I(D); see also Ronald J. Allen, The Evolution of the Hearsay Rule to a Rule of Admission, 76 Minn. L. Rev. 797, 800 (1992) (stating that hearsay rule is no longer rule of exclusion; it is

instead rule of admission that is doing its subversive work under cover of darkness); Paul Bergman, Ambiguity: The Hidden Hearsay Danger Almost Nobody Talks About, 75 Ky. L. J. 841, 841 (1986−87) (stating that hearsay rule exists primarily to protect party's right to cross−examine adverse testimony). Back To Text

[39] See, e.g., In re Richards, No. 97−14798DWS, 1998 Bankr. LEXIS 474 (Bankr. E.D. Pa. April 3, 1998) (excluding affidavit is not abuse of discretion where affiant does not have personal knowledge of thing affirmed); In re Taylor & Assocs, L.P.., 191 B.R. 374, 382 (Bankr. E.D. Tenn. 1996) (finding affidavit appropriate; attachments inadmissible); In re Houbigant, Inc., 182 B.R. 958, 973 (Bankr. S.D.N.Y. 1995) (determining that letter attached to someone else's affidavit to be hearsay); In re Silverman, 155 B.R. at 366 (stating that "the affidavit contains some statements of opinion and hearsay that are inadmissible"); Associated Bicycle Serv., Inc. v. United States Comm'r of IRS (In re Associated Bicycle Serv., Inc.), 128 B.R. 436, 442 (Bankr. N.D. Ind. 1990) (holding that court can disregard affidavit that contains only hearsay); Silver, Feigen & Drucker v. Carnegie Indus., Inc. (In re Carnegie Indus., Inc.), 8 B.R. 983, 987 (Bankr. S.D.N.Y. 1981) (observing that "[a]ll that the plaintiff law firm has presented is an affidavit grounded on suspicion and innuendo, bound together with rumor and hearsay").

In addition, of course, Fed. R. Civ. Pro. 56(e) requires that affidavits supporting or opposing summary judgment "shall be made on personal knowledge." See Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir. 1995). Back To Text

[40] See In re GP Express Airlines, Inc., 200 B.R. 222, 226 (Bankr. D. Neb. 1996) (overruling hearsay objection; affidavits not considered to establish facts asserted therein, but for other purposes); In re Tarkio College, 195 B.R. 424, 427 n.2 (Bankr. W.D. Mo. 1996) (holding affidavit was nonhearsay admission); see also In re Applin, 108 B.R. 253, 257 (E.D. Cal. 1989) (asserting that evidence on routine motions for relief from stay are generally taken on affidavits). Back To Text

[41] 977 F.2d 413 (8th Cir. 1992). See In re GP Express Airlines, Inc., 200 B.R. at 226 (holding that affidavits were used for purposes other than to establish facts, so hearsay objection should be overruled); see also In re Applin, 108 B.R at 257 (asserting that evidence on routine motions for relief from stay are often taken on affidavits). Back To Text

[42] Giove, 977 F.2d at 417. See In re GP Express Airlines, Inc., 200 B.R at 226 (stating that uncontroverted facts in pre−trial statement are considered as established for purposes of trial); see also In re Tarkio College, 195 B.R. at 427 n.2 (stating that since affidavit was part of court record and relevant it was not hearsay). Back To Text

[43] 108 B.R. 253, 257−58 (Bankr. E.D. Cal. 1989). See Waddell v. Commissioner, 841 F.2d 264, 267 (9th Cir. 1988) (holding that determinations concerning admissibility of business record evidence are at discretion of trial court); see also In re GP Express Airlines, Inc., 200 B.R. at 226 (asserting that if affidavits are not used to establish facts, they should survive hearsay objection). Back To Text

[44] See Fed. R. Evid. 801(d)(2)(A); see also Waddell, 841 F.2d at 267 (asserting that trial court shall make determinations as to admissibility of business record evidence); In re Tarkio College, 195 B.R. at 427 n.2 (stating that affidavit was nonhearsay admission). Back To Text

[45] 922 F.2d 1183, 1191 (5th Cir. 1991). See Fed. R. Evid. 902; Fed. R. Evid. 803(6). Back To Text

[46] 935 F.2d 691, 702 (5th Cir. 1991). See Waddell, 841 F.2d at 267 (holding that decisions pertaining to admissibility of business record evidence are to be made by trial court); see also Fed. R. Evid. 803. Back To Text

[47] See Griffin, 935 F.2d at 702 (claiming that custodian of business record affidavits demonstrates personal knowledge); see also Wisdom v. Director of Revenue, 988 S.W.2d 127, 129 (Mo. Ct. App. 1999) (noting that business records can be admitted by affidavit rather than testimony); Coleman v. Director of Revenue, 970 S.W.2d 394, 396 (Mo. Ct. App. 1998) (noting that all essential records must be included in business record affidavit). Back To Text

[48] See Fed. R. Evid. 807 (noting that statement not specifically covered by Rule 803 or Rule 804 but having equivalent circumstantial guarantees of trustworthiness is not excluded by hearsay rule, if court determines that statement is offered as evidence of material fact, statement is more probative of general purpose of Federal Rules of Evidence, or

interest of justice will best be served). Back To Text

[49] See Fed. R. Evid. 803 (stating that hearsay exceptions when availability of declarant is immaterial); Fed. R. Evid. 804 (stating that hearsay exceptions when declarant is unavailable). Back To Text

[50] See Carrier Express, Inc. v. Home Indem. Co., 860 F. Supp. 1465, 1485 (N.D. Ala. 1994) (allowing submission of direct evidence by affidavit); see also Collins v. Ammerman, 459 S.W.2d 891, 893 (Tex. App. 1970) (noting that affidavits by reputable people, in name of justice, gives court authority which they do not normally have); Wayne T. Westling & Vicki Waye, Videotaping Police Interrogations: Lessons From Australia, 25 Am. J. Crim. L. 493, 501 (1998) (noting that trial judges usually take evidence by affidavit or from live witnesses). Back To Text

[51] Fed. R. Evid. 807 . Back To Text

[52] See Tank v. United States, 8 F.2d 697, 699 (7th Cir. 1925) (observing that witness was examined, cross examined, examined on redirect, cross examined again and examined once more on redirect); see also Novus Serv., Inc. v. Cron (In re Cron), 241 B.R. 1, 5 (Bankr. S.D. Iowa 1999) (noting that defendant testified, was examined on redirect and then again on cross−examination); In re Federated Dep't Stores, Inc., 135 B.R. 950, 952 (Bankr. S.D. Ohio 1992) (noting that affidavit of witness was admitted under residual exception, then found in Rule 804(B)(5) and now found in Rule 807 of Federal Rules of Evidence, and that witness was unavailable (deceased) and foundational elements of residual exception could be satisfied). Back To Text

[53] See Jeffries v. Wood, 114 F.3d 1484, 1492 (9th Cir. 1997) (noting that in some cases unavailability of witness might result in manifest injustices); see also Stokes v. City of Omaha, 23 F.3d 1362, 1366 (8th Cir. 1994) (noting that rare and exceptional circumstances were not present in light of court's statement about affiant in Stokes case that affiant's "death, although untimely, was not unexpected. If Stokes had believed that [affiant's] testimony was important to his case, then he should have deposed Swanson"); United States v. Dillman, 15 F.3d 384, 388 (5th Cir. 1994) (expanding on exceptional circumstances in ordering deposition; witness leaving subpoena area and threatened with prosecution if he entered United States). Back To Text

[54] Stokes, 23 F.3d at 1366 (holding that death of affiant did not produce rare and exceptional circumstances necessary to admit his affidavit under residual exception to hearsay rule). See United States v. Gaines, 969 F.2d 692, 697 (8th Cir. 1992) (maintaining that district court did not abuse its discretion in not allowing private investigator to testify regarding statements of potential witness who refused to testify, because residual exception to hearsay rule should only be applied in rare and exceptional circumstances); United States v. Love, 592 F.2d 1022, 1026 (8th Cir. 1979) (finding that Congress intended residual exception to be applied "rarely, and only in exceptional circumstances"). Back To Text

[55] See Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse−Wisconsin, Inc., 991 F.2d 1249, 1259 (7th Cir. 1993) (asserting failure to object to affidavits makes them admissible). Here is a second problem: It is arguable, I suppose, that the use of these affidavits serves the purposes of the rules of evidence: See Fed. R. Evid. 102 (stating "[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."). Rule 102, however, gives courts guidance regarding the construction of the rules of evidence, including the hearsay rule. It does not give courts discretion to ignore any or all of the rules, hearsay or otherwise. See Glen Weissenberger, The Former Testimony Hearsay Exception: A Study in Rulemaking, Judicial Revisionism, and the Separation of Powers, 67 N.C. L. Rev. 295, 333 (1989) (maintaining Rule 102 should not be construed to permit ignoring literal language of other federal rules). Back To Text

[56] 210 B.R. 325 (Bankr. N.D. Iowa 1997) (holding appraisal affidavits offered to prove value of automobile were hearsay, and thus inadmissible under Federal Rule of Evidence 801(c)). See also Fed. R. Evid. 801(c) (defining hearsay as any out of court statement offered to prove truth of matter at trial or hearing); Brown v. IRS (In re Brown), 82 F.3d 801, 806 (8th Cir. 1996) (maintaining affidavits are inadmissible as hearsay when they reflect out of court statements and affidavit cannot be cross examined). Back To Text

[57] In re Roberts, 210 B.R. at 329 (quoting In re Applin, 108 B.R. 253, 262 (Bankr. E.D. Cal. 1989)). See In re Applin, 108 B.R. at 262 (asserting questions regarding use of appraisal affidavits must be governed by Federal Rules of Evidence in bankruptcy cases, just as they would be in any other federal case); Leif Clark, Bankruptcy, 26 Tex Tech L. Rev. 357, 393 (1995) (discussing need for creditor to make out prima facie case in bankruptcy dispute). Back To Text

[58] In re Roberts, 210 B.R. at 328. Back To Text

[59] Id. at 329. See also Fed R. Evid. 801 (stating that hearsay is inadmissible unless otherwise provided by Federal Rules of Evidence, another rule promulgated by Supreme Court, or act of Congress); Fed. R. Evid. 803, 804 and 807 (enumerating exceptions to hearsay rule). Back To Text

[60] In re Roberts, 210 B.R. at 329. See Brown v. IRS (In re Brown), 82 F.3d 801, 806−07 (8th Cir. 1996) (holding that debtor's affidavit inadmissible because debtor was unavailable for authentication or cross examination); Stokes v. City of Omaha, 23 F.3d 1362, 1366 (8th Cir. 1994) (asserting that affidavit not admissible because no hearsay exception was available). Back To Text

[61] In re Roberts, 210 B.R. at 329 n.1. Back To Text

[62] In Roberts, instead of an appraiser testifying in court, an affidavit was submitted to prove the value of the automobile in question. When the affidavit was read into open court, the statement became hearsay because it was made by someone other than declarant. See Fed. R. Evid. 801(c) (defining hearsay as "some statement, other than one made by declarant while testifying at trial or hearing, offered in evidence to prove truth of matter asserted"). See, e.g., Tokio Marine & Fire Ins. Co. v. Norfolk & W. Ry. Co., No.98−1077, 1999 U.S. App. LEXIS 476, at *8 (4th Cir. Jan. 14, 1999) (stating that report "presents the opinion of someone who did not testify at trial, and it was offered as evidence of the appraisal value of the damaged cars, it was hearsay"); Norcott v. United States, 65 F.2d 913, 920 (7th Cir. 1933) (holding appraisal of assets hearsay when no testimony from author was offered to prove its accuracy). Back To Text

[63] "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory or by Act of Congress." Fed. R. Evid. 802. See, e.g., Sprynczynatyk v. General Motors Corp., 771 F.2d 1112, 1114 (8th Cir. 1985) (stating videotape is hearsay and inadmissible evidence unless it falls within exception to hearsay rule); Humphrey v. McCotter, 675 F. Supp. 1043, 1046 (S.D. Tex. 1987), rev'd on other grounds, Humhrey v. Lynaugh, 861 F.2d 875 (5th Cir. 1988), cert. denied, 490 U.S. 1024 (holding ex parte affidavits hearsay and inadmissible evidence unless hearsay exception applies). Back To Text

[64] See Fed. R. Evid. 803 (enumerating exceptions to hearsay rule); Fed. R. Evid. 804 (describing six exceptions to hearsay rule where declarant is unavailable); Fed. R. Evid. 807 (describing residual exception to hearsay rule). Back To Text

[65] General Electric Co. v. Joiner, 522 U.S. 136 (1997) notwithstanding. In that case the Supreme Court stated, "We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings." Id. at 141. General Electric involved a decision on a matter of evidence where the Federal Rules of Evidence give the trial judge discretion. General Electric cited Old Chief v. United States, 519 U.S. 172, 174 n.1 (1997); United States v. Abel, 469 U.S. 45, 54 (1984); Spring Co. v. Edgar, 99 U.S. 645, 658 (1879). The first two cases cited in General Electric were decided under the Federal Rules of Evidence and each involved the interpretation of a rule that grants discretion to the trial judge. The third case predates the federal evidence statute by 100 years. It seems to me that the broad statement from General Electric must be implicitly limited to its facts, and its facts include the review of a discretionary ruling by the trial court. It does not seem that General Electric means to say, without any discussion, that the trial court has the discretion to ignore Rule 802 and to admit evidence that is hearsay and does not fit under any exception. If Old Chief does mean that, and the rule against hearsay is discretionary, then I suppose bankruptcy judges do have the discretion to require written examination rather than oral. But see, e.g., Trepel v. Roadway Express, Inc., 194 F.3d 708, 716−17 (6th Cir. 1999):

The Supreme Court has recently stated that all evidentiary rulings are reviewed for "abuse of discretion." See General Elec. Co. v. Joiner, 522 U.S. 136 (1997). There, the Court was not dealing with an alleged hearsay rule violation, but its sweeping "all evidentiary ruling" statement rather clearly means what it says. It is not clear to us how a trial court would have "discretion" to ignore the definition of inadmissible hearsay in Federal Rule of Evidence 801 or the foundation requirements for establishing exceptions to the hearsay rule under Federal Rules of Evidence 803 or 804, but it is not this court's privilege to "question why." Therefore, in disregard of our heretofore well−settled precedent that hearsay evidentiary rulings are reviewed de novo, see United States v. Fountain, 2 F.3d 656, 668 (6th Cir. 1993), we shall review the district court's ruling for an abuse of discretion.

Id. I do not suggest that it is my privilege to "question why" either. I do suggest that there is a different way to interpret the General Electric case: Limit its statement regarding abuse of discretion to the facts of that case and the others cited. Abuse of discretion is the standard for the review of decisions where the statute grants the court discretion. For example, regarding a set of statutory rules almost identical to the federal rules, the Nebraska Supreme Court has stated the following: "[I]n all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in admissibility of evidence." State v. Messersmith, 473 N.W.2d 83, 92 (Neb. 1991). It seems that General Electric, Old Chief, and Abel must be limited to their facts and thereby limited to those cases where judicial discretion is a factor under the controlling statute. Alternatively, there must be a rule that violation of the statute is always an abuse of discretion, but then that is not an abuse of discretion standard either. Back To Text

[66] In re Roberts, 210 B.R. at 329 n.1. Back To Text

[67] The exceptions are, for the most part, found in Fed. R. Evid. 803, 804, and 807. Back To Text

[68] In re Roberts, 210 B.R. at 329 n.1. Back To Text

[69] See id. at 329 (noting when parties are not present to authenticate documents, exclusion of hearsay affidavit is not abuse of discretion); id. (holding hearsay exhibits inadmissible unless they fall within exception); Garner v. Shier (In re Garner), 246 B.R. 617, 625 (B.A.P. 9th Cir. 2000) (asserting that under Rule 820 and Civil Rule 43(e) affidavit testimony on personal knowledge is admissible). Back To Text

[70] Except, of course, for hearsay within the affidavit: for example, an affidavit (written hearsay) affirming that "I was in the coffee shop the next morning, and I heard someone say..." (oral hearsay within the written hearsay). See In re Roberts, 210 B.R. at 329 (noting affidavit offered for substantive evidence inadmissible for hearsay if affiant is not present); In re Applin, 108 B.R. 253, 257 (Bankr. E.D. Cal. 1989) (stating admission of affidavit for hearsay still must comply with rules of admissibility); supra Part II. Back To Text

[71] Whether this is a good idea or a bad one, if Congress does have the power to promulgate binding rules of evidence, then it is contrary to the governing statute, Rule 802 of the Federal Rules of Evidence. As such, it is an idea outside the scope of the power of the judicial branch. Federal Rules of Evidence 802 states, "Hearsay is not admissible except as provided by those rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Fed R. Evid. 802. See In re Roberts, 210 B.R. at 329 (noting that for affidavit used for substantive evidence to be admissible, affiant must be present for cross−examination). Back To Text

[72] 193 U.S. 197 (1904) (Holmes, J., dissenting). Back To Text

[73] Id. at 400−01. See also United States v. Clark, 96 U.S. 37, 49 (1877) (Harlan, J., dissenting) (recognizing same problem and stating, "it is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law"); Roe v. Alabama, 43 F.3d 574, 587 (11th Cir. 1995) (asserting, "I do know that bad facts can result in bad law. . . ."). Back To Text

[74] See, e.g., Adair v. Sunwest Bank (In re Adair), 965 F.2d 777, 779 (9th Cir. 1992) (noting that "use of written testimony 'is an accepted and encouraged technique for shortening bench trials'"); Union State Bank v. Geller (In re

Geller), 170 B.R. 183, 186 (Bankr. S.D. Fla. 1994) (explaining that courts do not have time to waste with undisputed testimony); id. (stating that where parties are given "ample opportunity to submit their evidence" it has been held no abuse of discretion by the court). Back To Text

[75] The cases often refer to various affidavits filed therein with language such as this: "In their identical affidavits . . . ." In re Houbigant, Inc., 182 B.R. 958, 973 (Bankr. S.D.N.Y. 1995). Can this really be the kind of direct examination upon which our system is built? Back To Text

[76] Traylor v. Husqvarna Motor, 988 F.2d 729, 734 (7th Cir. 1993) (discussing unfair advantage having direct examination live in courtroom and cross−examination videotaped because live presentation gives stronger impression than transcript or tape of testimony); Danning v. Burg (In re Burg), 103 B.R. 222, 225 (B.A.P. 9th Cir. 1989) (explaining direct examination by declaration may prejudice parties because "[e]ssential rights of the parties may be jeopardized by a procedure where oral presentation is not allowed"); Gordon Van Kessel, Hearsay Hazards in the American Criminal Trial: An Adversary Oriented Approach, 49 Hastings L.J. 477, 485−6 (1998) (asserting court testimony is more reliable than declarant−oriented affidavits in learning all relevant facts). Back To Text

[77] See In re Adair, 965 F.2d at 780 (stating "[w]itness credibility initially was established through factual consistency in the declarations"); Van Kessel, supra note 76, at 484 (asserting hearsay rules must be enforced because attorneys are given "almost unfettered power to create and shape both out of court statements of declarants and trial testimony of witnesses" allowing them to paint favorable impressions of their story); Saverson v. Levitt, 162 F.R.D. 407 (D.D.C. 1995) (quoting Adair and further stating "the bankruptcy judge also had the opportunity to observe the declarants' demeanor and to gauge their credibility during oral cross−examination"). Back To Text

[78] John Steinbeck, of Mice and Men (any edition). Back To Text

[79] See Ankeny v. Meyer (In re Ankeny), 184 B.R. 64, 69 (B.A.P. 9th Cir. 1995) (explaining that "[d]eclaration testimony may be used in lieu of direct testimony", however declarant is subject to cross examination regarding their statements); In re Adair, 965 F.2d at 780 (explaining that "[t]he primary purposes of [FED. R. CIV. P.] Rule 43(a) are to ensure that the accuracy of the witness statements may be tested by cross examination and to allow the trier of fact to observe the appearance and demeanor of the witness."); In re Heckenkamp, 110 B.R. 1, 3 (Bankr. C.D. Cal. 1989) (discussing procedure of trial whereby direct testimony of witness is presented by declaration, however in order for declaration to be admissible affiant must be present in court and subject to cross examination). Back To Text

[80] See United States v. Sorrentino, 190 B.R. 19, 21 (N.D.N.Y. 1995) (finding defendant guilty of making false statement in bankruptcy petition); United States v. Weinstein, 834 F.2d 1454, 1462 (9th Cir. 1987) (holding failure of debtors to disclose assets required to be reported by law to be criminal). See generally 1 Collier on Bankruptcy ¶ 7.01, et seq., at 7−1, et seq. (Lawrence P. King, editor−in−chief, Matthew Bender 15th ed. Revised (1996) (discussing bankruptcy crimes); 5 Collier on Bankruptcy ¶ 548.01, et seq., at 548−1, et seq. (Lawrence P. King, editor−in−chief, Matthew Bender 15th ed. Revised (1996) (discussing fraudulent transfers and obligations). Back To Text

[81] Fed. R. Evid. 611 (giving trial courts reasonable control as to mode and order of interrogating witnesses and presenting evidence). See also In re Burg, 103 B.R. at 225 (concluding that there is no support in Rule 611 for procedure of taking direct testimony by affidavit). Some judges are arguing that Rule 611 authorizes the taking of direct testimony by affidavit. See supra text accompanying note 10. Back To Text

[82] Rule 103 of the Federal Rules of Evidence reads as follows:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . . [I]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . . Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Fed. R. Evid. 103. See Building Serv. Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway, 46 F.3d 1392, 1396 (6th Cir. 1995) (discussing application of Rule 103 and discretion of judge regarding hearsay objection and necessity of timely and specific objection); see also Robert F. Magill, Jr., Issues Under Federal Rule of Evidence 803(18): The "Learned Treatise" Exception to the Hearsay Rule, 9 St. John's J.L. Comm. 49, 55 (1993) (discussing interaction of Rule 803 with Rule 103). Back To Text

[83] See supra note 13. Back To Text

[84] See supra note 65. Back To Text

[85] See, e.g., Lewis v. Zermano (In re Stevinson), 194 B.R. 509, 512 (D. Colo. 1996) ("All that is necessary for a trial procedure to satisfy due process is to provide the parties with fair notice and an opportunity to submit their evidence to an impartial arbiter . . . . As an efficient means of managing ever increasing dockets, the bankruptcy court is well within the ambit of due process in requiring direct examination by declaration followed by the opportunity for cross−examination and redirect questioning.") Back To Text

[86] See, e.g., In re Stevinson, 194 B.R. at 511; In re Heckenkamp, 110 B.R. 1, 3 (Bankr. C.D. Cal. 1989). But see Ball v. Interoceanica Corp., 71 F.3d 73, 77 (2d Cir. 1995) (deciding that direct testimony is an accepted technique for shortening bench trials). Back To Text

[87] The need for a timely objection is codified in Rule 103, quoted above, in note 82.

An objection must be timely. "[I]t must be made as soon as the applicability of it is known (or could reasonably have been known) to the opponent, unless some special reason makes a postponement desirable for him and not unfair to the proponent of the evidence." ...[O]bjections that would be curable before trial should...be raised then, such as best evidence or authentication deficiencies.

1 Jack B. Weinstein et al., Weinstein's Evidence ¶ 103[02], at 103−23−25 (1996) (footnote omitted) (quoting 1 Wigmore Evidence § 18 at 796 (Little Brown & Co., Tilers. Rev. (1983)). This analysis of the timely objection problem suggests that counsel opposed to direct examination by affidavit should object at the time the trial judge calls for the procedure. The objection "'must be made as soon as the applicability of it is known.'" Id. The applicability of the hearsay objection to direct examination via out−of−court statements is known as soon as the procedure is announced. Back To Text

[88] When a trial court issues a pretrial order that direct evidence will be received by affidavit, a pretrial objection may or may not be required in order to make the objection timely and preserve the issue for appeal. See supra note 87.

If a pretrial objection is made and overruled, then in order to preserve the issue for appeal, counsel should renew the objection during trial when the affidavit is offered into evidence. The closest analogy would seem to be the motion in limine. The Supreme Court has recognized that the ruling on the motion in limine is not the final word on the subject. "The ruling is subject to change when the case unfolds . . . ." Luce v. United States, 469 U.S. 38, 41 (1984). For that reason, some cases on the point state that when a pretrial motion to exclude evidence is overruled, the objection must be renewed when the evidence is offered during the trial. See Peerless Corp. v. United States, 185 F.3d 922, 925 (8th Cir. 1999) (providing "[w]hen a motion to exclude evidence is made in limine and overruled, if the evidence is thereafter admitted at trial without objection, the error if any, has not been preserved for review") (citations and multiple and internal quotation marks omitted); Drohan v. Vaughn, 176 F.3d 17, 23 n.5 (1st Cir. 1999); Tanner v. Westbrook, 174 F.3d 542, 545 (5th Cir. 1999) (asserting that overruling motion in limine does not preserve error on appeal, and objection at trial required); Wilson v. Vermont Castings Inc., 170 F.3d 391, 395 (3d Cir. 1999) (holding that counsel must object at trial when ruling on motion in limine is violated). Some cases state that a ruling on a motion in limine does preserve an issue for appeal. See United States v. Williams, 81 F.3d 1321, 1325 (4th Cir. 1996) (stating ruling must be clear to preserve issue for appeal). Others state that some kinds of rulings preserve the issue for appeal, and other kinds do not. See Richardson v. Missouri Pac. R.R. Co., 186 F.3d 1273, 1276 (10th Cir. 1999) (deciding that, preserving issue for appeal when issue was adequately presented to trial court, issue can be finally decided in pretrial, and issue was definitively ruled upon by trial court); Wilson v. Williams, 182 F.3d 562, 575 (7th

Cir. 1999) (stating "definitive" rulings preserve issue for appeal and "conditional" rulings do not); United States v. Brawner, 173 F.3d 966, 970 (6th Cir. 1999) (finding issue was thoroughly explored and ruling was explicit and definitive).

To protect one's position, the only sensible approach seems to be to make the objection pretrial, if the issue comes up pretrial, and to renew the objection at trial, when the affidavit is offered into evidence. See also Wilson, 182 F.3d at 576 (Manion J., concurring in part, dissenting in part) (stating prudent practice would renew all objections at trial, avoiding equivocation over whether pretrial ruling will suffice). Back To Text

[89] See State v. Hyatt, 519 A.2d 612, 614 (Conn. App. Ct. 1987) (illustrating that, strictly speaking, even testimony as to one's own age and date of birth may be deemed hearsay, requiring considerable discussion by court as to its reliability before being admitted into evidence); G. Michael Fenner, Law Professor Reveals Shocking Truth About Hearsay, 62 UMKC L. Rev. 1, 21 (1993) (arguing that by characterizing out−of−court statements as relevant to "state of mind" or other background issues, courts frequently allow into evidence otherwise inadmissible hearsay); Irving Younger, Reflections on the Rule Against Hearsay, 32 S.C. L. Rev. 281, 293 (1980) (hypothesizing that in practice there is no rule against hearsay, but rather only against unreliable evidence). Back To Text

[90] See In re Applin, 108 B.R. 253, 257 (Bankr. E.D. Cal. 1989) ("The fact of accepting affidavits does not … excuse compliance with the requirement that evidence be admissible pursuant to the Federal Rules of Evidence. Thus, the hearsay rule, and its exceptions, remain applicable."); supra text accompanying notes 11 & 80 (arguing that Adair does not stand for proposition that Rule 611(a) of Federal Rules of Evidence authorizes courts to impose affidavit form of testimony over hearsay objection, and discussing advantages of live, oral testimony over carefully prepared, written statements). Back To Text

[91] See, e.g., In re Gergely, 110 F.3d 1448, 1452 (9th Cir. 1997) (finding evidence by written declaration and pretrial order permitting oral cross−examination of declarant consistent with efficient and accurate fact−finding); Adair v. Sunwest Bank (In re Adair), 965 F.2d 777, 779 (9th Cir. 1992) (per curiam) ("The procedure is essential to the efficient functioning of the crowded bankruptcy courts.") (quoted more fully at supra text accompanying note 13); Union State Bank v. Geller (In re Geller), 170 B.R. 183, 186 (Bankr. S.D. Fla. 1994) (positing that direct testimony by affidavit allowed court "to try its adversary proceedings at the fastest pace in the United States…", and that "[w]asting… time" with direct testimony would not "serve the interests of the litigants") (quoted more fully at supra text accompanying note 8). Back To Text

[92] See Fed. R. Bankr. P. 9017 (stating that Federal Rules of Evidence apply in cases under Bankruptcy Code); In re Digby, 47 B.R. 614, 618 (Bankr. N.D. Ala. 1985) (holding that, because Federal Rules of Evidence apply in bankruptcy cases, hearsay will not be admitted except as those rules allow); supra text accompanying notes 11 & 80 (observing that some courts mistakenly interpret Rule 611 of Federal Rules of Evidence as granting authority to admit hearsay in furtherance of judicial economy). Back To Text

[93] See supra text accompanying and following note 70 (arguing that rule against admitting hearsay is not discretionary, and suggesting that cases holding broadly that all evidentiary rulings are reviewable for "abuse of discretion" should be limited to their facts). Back To Text