AMERICAN BANKRUPTCY INSTITUTE

Alexander L. Paskay Memorial Bankruptcy Seminar

Consumer: Countdown to Trial

CONCURRENT SESSION

David S. Jennis, Moderator
Jennis Morse | Tampa, Fla.

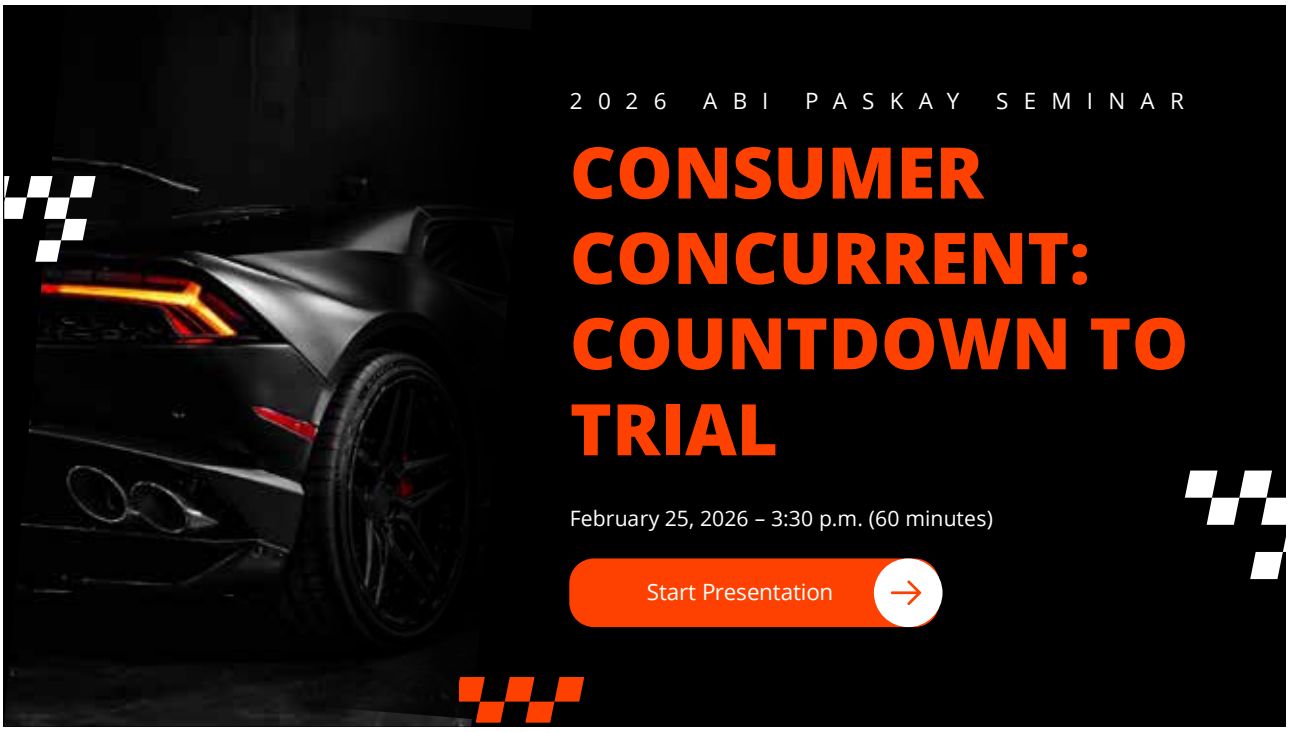
Lara Roeske Fernandez
Trenam | Tampa, Fla.

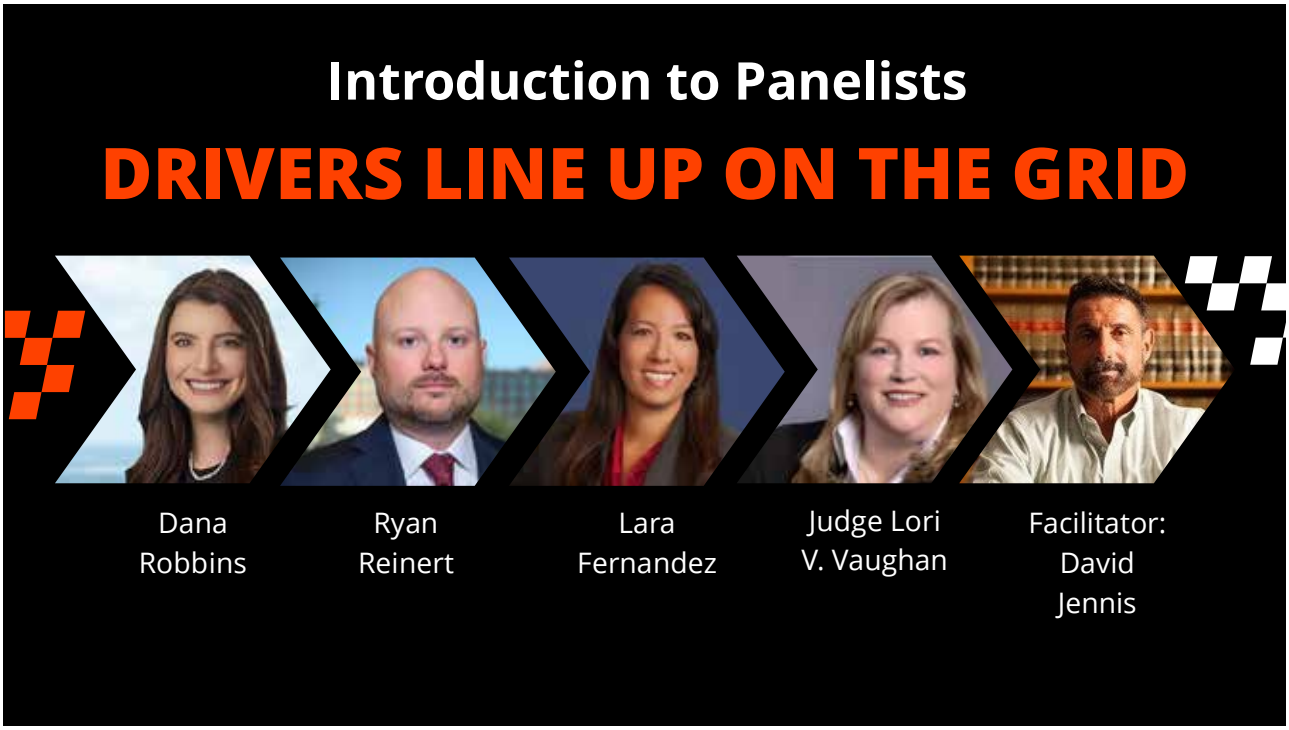
Ryan C. Reinert
Shutts & Bowen LLP | Tampa, Fla.

Dana L. Robbins-Boehner
Burr & Forman LLP | Tampa, Fla.

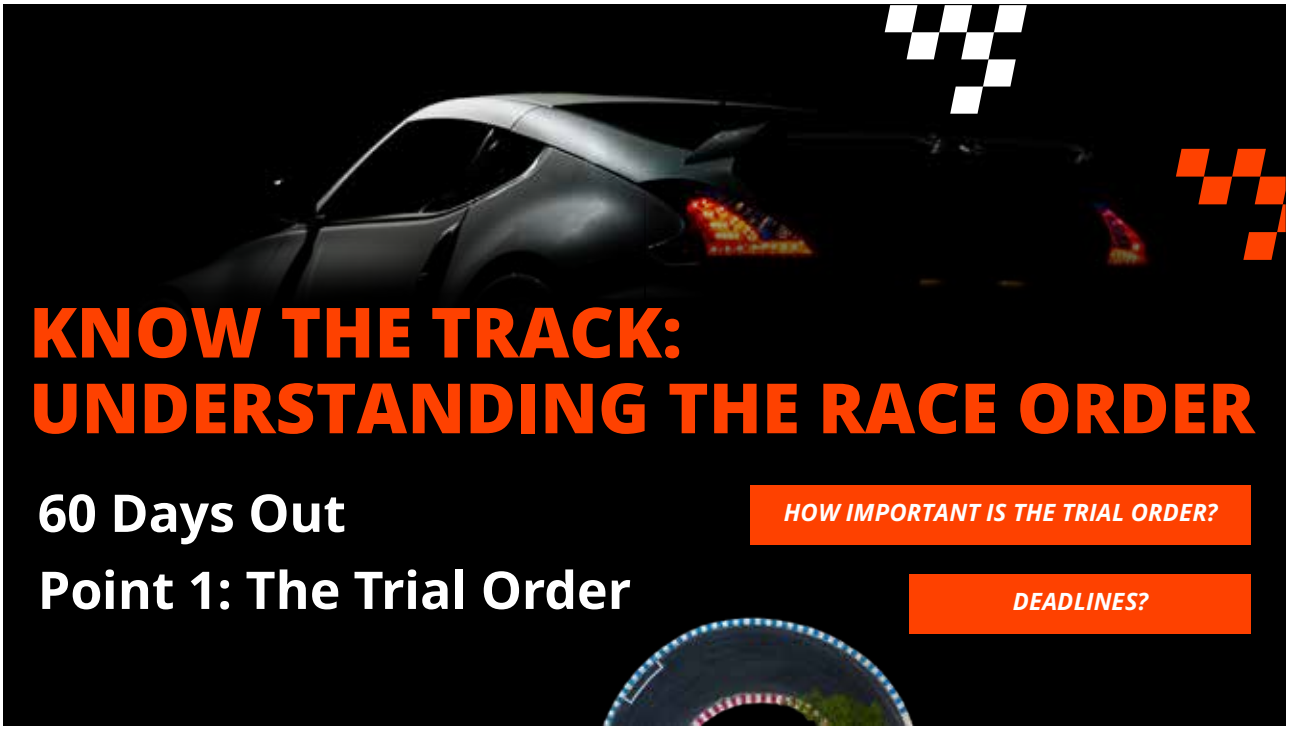
Hon. Lori V. Vaughan
U.S. Bankruptcy Court (M.D. Fla.) | Orlando

2026


2026 ABI PASKAY SEMINAR
CONSUMER CONCURRENT: COUNTDOWN TO TRIAL
February 25, 2026 – 3:30 p.m. (60 minutes)
Start Presentation


Introduction to Panelists
DRIVERS LINE UP ON THE GRID
Dana Robbins
Ryan Reinert
Lara Fernandez
Judge Lori V. Vaughan
Facilitator: David Jennis


IN THE GARAGE
Introduction/Explanation


KNOW THE TRACK:
UNDERSTANDING THE RACE ORDER
60 Days Out
Point 1: The Trial Order
HOW IMPORTANT IS THE TRIAL ORDER?
DEADLINES?

60 Days Out

Point 2: Attorneys Fees

- *PUSH FOR LIMITED DISCOVERY/QUICK TRIAL*
- *CONSIDER STIPULATING FACTS TO SHORTEN HEARING*
- *CONSIDER WHETHER FEE SHIFTING IS AVAILABLE – IS THIS A CONTRACTUAL DISPUTE?*
- *CHECK YOUR ENGAGEMENT – EXCLUDED? NEW ENGAGEMENT ON HOURLY BASIS?*

WHAT ARE THINGS COUNSEL CAN DO AT THE BEGINNING OF A DISPUTE TO ADDRESS THIS OR TO INCREASE THE LIKELIHOOD THEY WILL GET PAID?

PRACTICE, PIT WORK, AND SIMULATIONS

30 Days Out: Preparation

PRACTICE LAPS & PIT STRATEGY

Finalizing Discovery

Depo Designations

Putting Together Trial Exhibits

Witnesses

TIPS FOR MAPPING OUT YOUR CASE
THINKING ABOUT THE BURDEN OF PROOF
WITNESS TESTIMONY

Experts

THE PIT CREW

ASSUME YOU ARE USING AN EXPERT. WHAT SHOULD YOU BE DOING?

TIPS FOR PREPARING YOUR EXPERT FOR TRIAL?

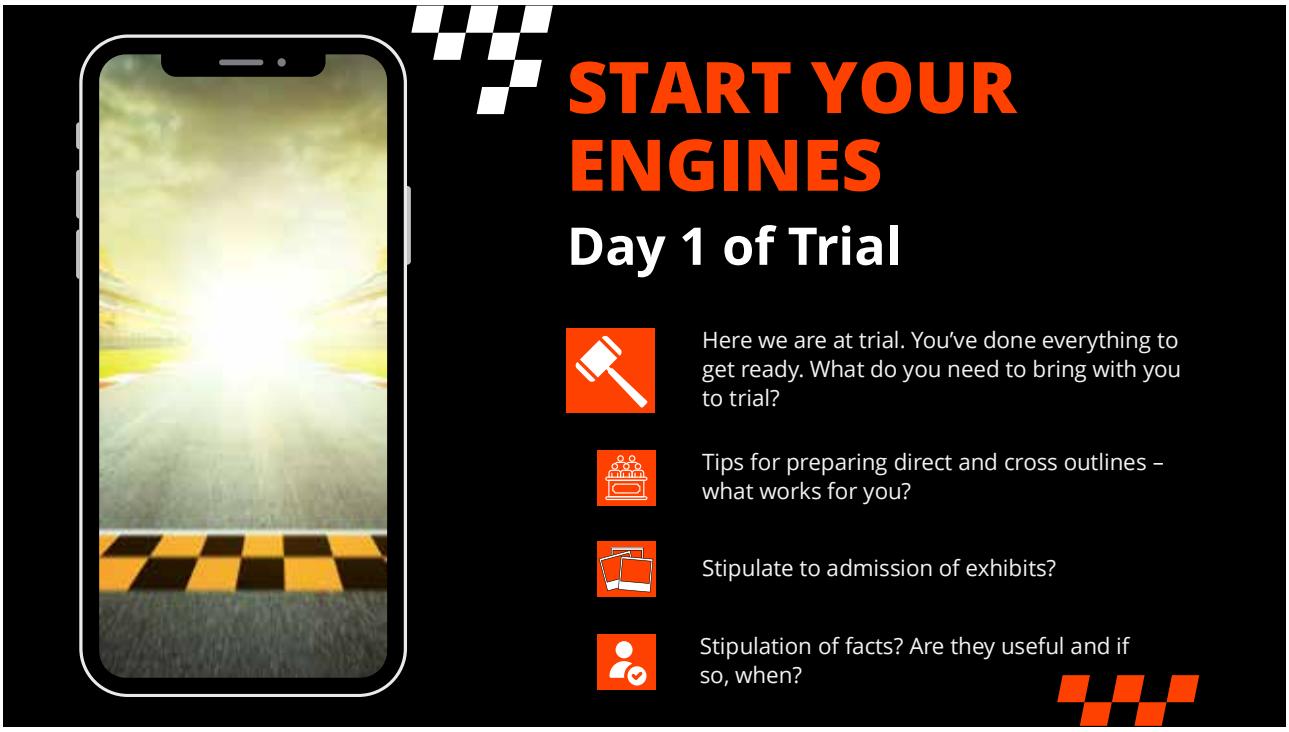
7 Days Before Trial

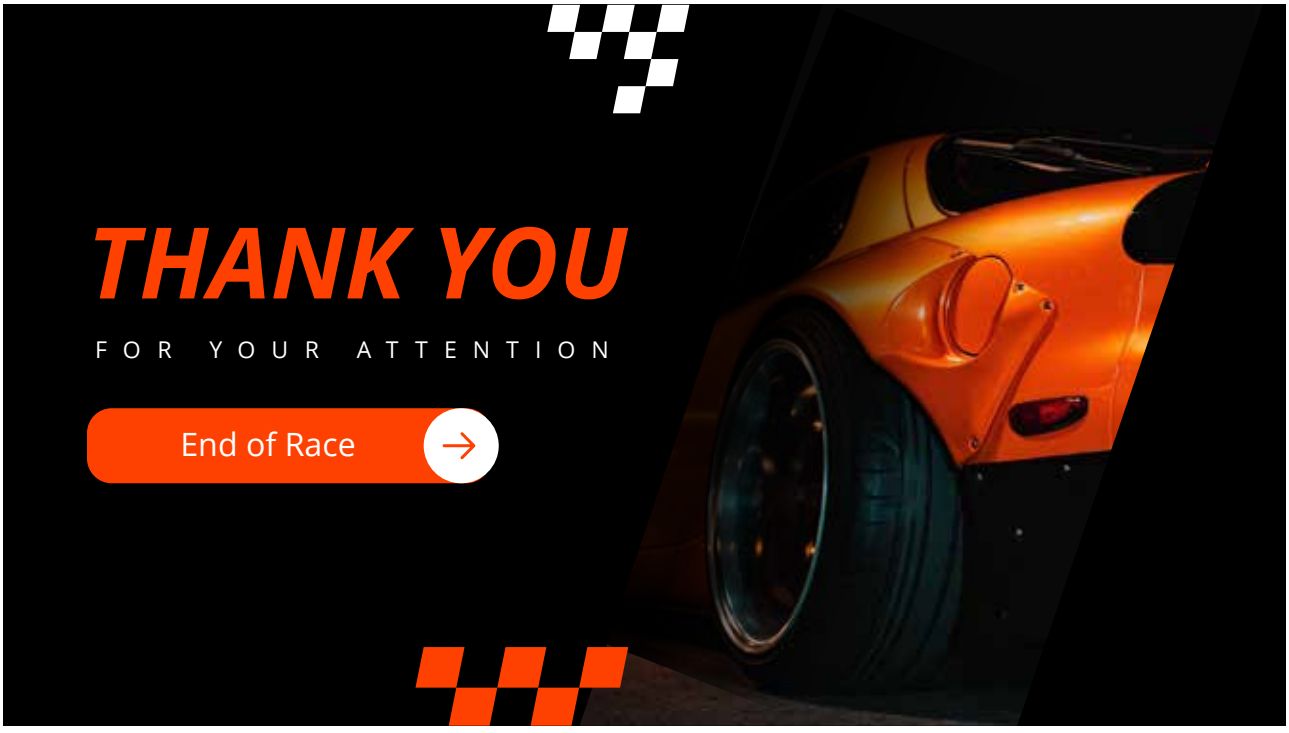
FUEL UP AND FOCUS: THE FINAL COUNTDOWN

What Should you be Doing to Prepare for Trial?

Meet and Confer - Exhibits? Settlement?

Tips for Handling Unrepresented Parties?


START YOUR ENGINES
Day 1 of Trial
Here we are at trial. You've done everything to get ready. What do you need to bring with you to trial?
Tips for preparing direct and cross outlines – what works for you?
Stipulate to admission of exhibits?
Stipulation of facts? Are they useful and if so, when?


THANK YOU
FOR YOUR ATTENTION
End of Race

50th Annual Alexander L. Paskay Memorial Bankruptcy Seminar

Consumer Concurrent: Countdown to Trial

February 26, 2026 – 3:30 p.m.

Table of Contents

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re	)	
	)	Case No.
,	)	Chapter
	)	
Debtor.	)	
	)	

ORDER SCHEDULING TRIAL AND ESTABLISHING PROCEDURES

THIS CASE came before the Court on **[date]** for a status conference. Having reviewed the pleadings, considered the position of all interested parties and for the reasons stated in open court, it is,

ORDERED:

1. **Trial**. A trial will be held **on [date], at [time]** ("Trial") before the Honorable Lori V. Vaughan, United States Bankruptcy Judge at Courtroom C, Sixth Floor, of the United States Bankruptcy Court, 400 West Washington Street, Orlando, Florida 32801 on the following matters ("Contested Matters"):

- **[list contested matters with Doc. Nos.]**

The Court has reserved **[one day]** for trial.

2. **The Trial will be in person. No ZOOM links will be provided.**

3. Parties are directed to comply with all requirements of Local Rules 9070-1 and 9070-2, unless modified by this order.

4. **Pretrial Disclosures**. Unless modified by this order, Fed. R. Civ. P. 26(a)(3) governs pretrial disclosures. Parties shall file any designations of depositions at least 28 days before Trial. Objections to the use of depositions shall be filed within 14 days of the disclosure.

5. **Witnesses.** Parties shall exchange names and addresses of witnesses within 14 days after entry of this Order.

6. **Exhibits.** Parties shall file and exchange exhibits no later than seven (7) days before the Trial. Unless written objection to the admissibility of any exhibit is filed two (2) days before the Trial, any objection to admissibility (other than under Fed. R. Evid. 402 and 403) shall be deemed waived.

7. **Expert Testimony**. As a condition of using expert testimony at trial, parties must comply with Fed. R. Civ. P. 26(a)(2) no later than 28 days before Trial.

8. **Discovery Cutoff.** Parties shall complete discovery no later than **[date or 7 days before trial]** except that parties may complete previously scheduled depositions up to the Trial date.

9. **Discovery Disputes**. The parties shall first confer in good faith to resolve any discovery disputes. If unsuccessful, any party may request a telephone conference with the Court so that the Court may render an informal, preliminary ruling on the discovery dispute, without prejudice to the right of any party to file a formal motion.

10. **Summary Judgment**. Motions for summary judgment shall be filed no later than **[date or 90 days before Trial]**. Once briefing is completed, the Court will take the matter under advisement and may set oral argument in its discretion. The Court reserves the right to cancel or

postpone trial as is necessary to dispose of motions for summary judgment. Absent order of the Court, Trial will proceed as scheduled even if a motion for summary judgment is pending. **If the Trial is scheduled for a date within 90 days of the entry of this Order, the Court presumes material facts are in dispute and summary judgment is not appropriate.**

11. **Meet and Confer Requirement.** Counsel for all parties shall confer within seven (7) days prior to the Trial and seek in good faith to settle the case.

12. **Exhibit Binders.** Parties must bring binders of their exhibits to the Trial. Parties should bring a binder for the judge, opposing counsel and if applicable, the witness. Binders should not exceed two (2) inches. Each document in the binder should be separated by a tab and numbered. Numbers should correspond to the related exhibit number. Documents may be printed double-sided.

13. **Appropriate Attire.** You are reminded that Local Bankruptcy Rule 5072-1(b)(18) requires that all persons appearing in court should dress in business attire consistent with their financial abilities. Shorts, sandals, shirts without collars, including tee shirts and tank tops are not acceptable.

14. **Avoid Delays at Security Checkpoints**. Please note that a photo ID is required for entry into the Courthouse.

###

The Clerk is directed to serve a copy of this order on interested parties.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re	)	
	)	
,	)	Case No.
	)	Chapter
Debtor.	)	
	)	

ORDER SCHEDULING TRIAL AND ESTABLISHING PROCEDURES

THIS CASE came before the Court on **[date]**. Having reviewed the pleadings, considered the position of all interested parties and for the reasons stated in open court, it is

ORDERED:

1. **Trial**. An evidentiary hearing is scheduled for **[date] at [time]**. ("Trial") before the Honorable Lori V. Vaughan, United States Bankruptcy Judge in Courtroom C, Sixth Floor, of the United States Bankruptcy Court, 400 West Washington Street, Orlando, Florida 32801 on the following matters ("Contested Matters"):

- **[list contested matters with Doc. No.]**

2. **The Trial will be in person. No ZOOM links will be provided.**

3. Parties are directed to comply with all requirements of Local Rules 9070-1 and 9070-2, unless modified by this order.

4. **Witnesses.** Parties shall exchange names and addresses of witnesses within 14 days after entry of this Order.

5. **Exhibits.** Parties shall exchange exhibits no later than seven (7) days before the Trial. Unless written objection to the admissibility of any exhibit is filed two (2) days before the Trial, any objection to admissibility (other than under Fed. R. Evid. 402 and 403) shall be deemed waived.

6. **Expert Testimony**. As a condition of using expert testimony at trial, parties must comply with Fed. R. Civ. P. 26(a)(2) no later than 28 days before Trial.

7. **Discovery Deadlines & Cutoff. The deadline to respond to any discovery is shortened to 14 days for all parties.** Parties shall complete discovery no later than seven (7) days before Trial, except that parties may complete previously scheduled depositions up to the Trial date.

8. **Exhibit Binders.** Parties must bring binders of their exhibits to the Trial. Parties should bring a binder for the judge, opposing counsel and if applicable, the witness. Binders should not exceed two (2) inches. Each document in the binder should be separated by a tab and numbered. Numbers should correspond to the related exhibit number. Documents may be printed double-sided.

9. **Appropriate Attire.** You are reminded that Local Bankruptcy Rule 5072-1(b)(18) requires that all persons appearing in court should dress in business attire consistent with their financial abilities. Shorts, sandals, shirts without collars, including tee shirts and tank tops are not acceptable.

10. **Avoid Delays at Security Checkpoints**. Please note that a photo ID is required for entry into the Courthouse.

###

The Clerk is directed to serve a copy of this Order on all interested parties.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re , Debtor.	)	Case No. 6:__-bk-___-LVV Chapter
Plaintiff, v. Defendant.	)	Adversary No.

ORDER SCHEDULING TRIAL,
FINAL PRETRIAL CONFERENCE AND ESTABLISHING PROCEDURES

THIS PROCEEDING came before the Court on **[date]** for a pretrial conference. Having reviewed the pleadings, considered the position of all interested parties and for the reasons stated in open court, it is,

ORDERED:

1. **Trial**. A trial on the complaint (Doc. No. 1) will be held **on [date], at [time].** ("Trial") before the Honorable Lori V. Vaughan, United States Bankruptcy Judge at Courtroom

C, Sixth Floor, of the United States Bankruptcy Court, 400 West Washington Street, Orlando, Florida 32801. The Court has reserved **[one day]** for trial.

2. **The Trial will be in person. No ZOOM links will be provided.**

3. **Final Pretrial Conference.** A final pretrial conference is scheduled for **[date] at [time].** before the Honorable Lori V. Vaughan, United States Bankruptcy Judge at Courtroom C, Sixth Floor, of the United States Bankruptcy Court, 400 West Washington Street, Orlando, Florida 32801.

4. Parties are directed to comply with all requirements of Local Rules 7001-1, 9070-1 and 9070-2, unless modified by this order.

5. **Pretrial Disclosures**. Unless modified by this order, Fed. R. Civ. P. 26(a)(3) governs pretrial disclosures. Parties shall file any designations of depositions at least 28 days before Trial. Objections to the use of depositions shall be filed within 14 days of the disclosure.

6. **Witnesses.** Parties shall exchange names and addresses of witnesses within 14 days after entry of this Order. Parties may supplement their witness lists as dictated by discovery up until 28 days before Trial.

7. **Exhibits.** Parties shall file and exchange exhibits no later than seven (7) days before the Trial. Unless written objection to the admissibility of any exhibit is filed two (2) days before the Trial, any objection to admissibility (other than under Fed. R. Evid. 402 and 403) shall be deemed waived.

8. **Expert Testimony**. As a condition of using expert testimony at trial, parties must comply with Fed. R. Civ. P. 26(a)(2) no later than 28 days before Trial.

9. **Discovery Cutoff.** Parties shall complete discovery no later than **[date or 7 days before trial]** except that parties may complete previously scheduled depositions up to the Trial

date.

10. **Discovery Disputes**. The parties shall first confer in good faith to resolve any discovery disputes. If unsuccessful, any party may request a telephone conference with the Court so that the Court may render an informal, preliminary ruling on the discovery dispute, without prejudice to the right of any party to file a formal motion.

11. **Summary Judgment**. Motions for summary judgment shall be filed no later than **[date or 90 days before Trial]**. Once briefing is completed, the Court will take the matter under advisement and may set oral argument in its discretion. The Court reserves the right to cancel or postpone trial as is necessary to dispose of motions for summary judgment. Absent order of the Court, Trial will proceed as scheduled even if a motion for summary judgment is pending. **If the Trial is scheduled for a date within 90 days of the entry of this Order, the Court presumes material facts are in dispute and summary judgment is not appropriate.**

12. **Meet and Confer Requirement.** Counsel for all parties shall confer within seven (7) days prior to the Trial and seek in good faith to settle the case.

13. **Exhibit Binders.** Parties must bring binders of their exhibits to the Trial. Parties should bring a binder for the judge, opposing counsel and if applicable, the witness. Binders should not exceed two (2) inches. Each document in the binder should be separated by a tab and numbered. Numbers should correspond to the related exhibit number. Documents may be printed double-sided.

14. **Appropriate Attire.** You are reminded that Local Bankruptcy Rule 5072-1(b)(18) requires that all persons appearing in court should dress in business attire consistent with their financial abilities. Shorts, sandals, shirts without collars, including tee shirts and tank tops are not acceptable.

15. **Avoid Delays at Security Checkpoints**. Please note that a photo ID is required for entry into the Courthouse.

###

The Clerk is directed to serve a copy of this order on interested parties.

2022 WL 16635428
Only the Westlaw citation is currently available.
United States Bankruptcy Court, M.D. Florida,
Orlando Division.

IN RE: Jeffrey Renick HEFNER, Debtor.

Case No. 6:21-bk-00936-LVV
|
Signed June 8, 2022
|
Filed June 9, 2022

Attorneys and Law Firms

Jeffrey Ainsworth, Jacob D. Flentke, BransonLaw PLLC, Orlando, FL, Paul F. Daley, Daley Law Melbourne, Tallahassee, FL, for Debtor.

ORDER SUSTAINING OBJECTIONS TO CLAIMS 10 AND 11

Lori V. Vaughan, United States Bankruptcy Judge

***1** THIS CASE came before the Court on April 20, 2022 on the Debtor's Objection to Proof of Claim Number 10 filed by Island Coastal Charters LLC ("ICC") [1] and Debtor's Objection to Proof of Claim Number 11 filed by Robert McBride ("McBride"). [2] Because ICC and McBride have failed to meet their burden, the Court sustains the Debtor's objections.

Factual Background

Debtor, a commercial pilot for over 47 years, went into business with his neighbor, McBride. [3] The Debtor and McBride formed multiple aviation related companies which owned aircraft ("Original Companies"). [4] The Debtor and McBride each owned a 50% interest in the Original Companies. [5]

In 2016, the Debtor and McBride, along with John MacDonald ("MacDonald") formed ICC to operate an air charter business. [6] MacDonald would "act as bank" ultimately making loans totaling $949,808 to ICC plus a cash capital contribution of $150,000. [7] For capital contributions, the Debtor and McBride provided ICC their respective 50% interests in the Original Companies, with an agreed value of $150,000 each. [8] The Debtor, McBride and MacDonald each held a one-third interest in ICC. [9] No operating agreement ever existed for ICC. [10]

Within a year, the business relationship deteriorated and litigation commenced in Florida state court. [11] The Florida state court directed the parties to arbitration. [12] After considering evidence and argument at a two-day hearing, the arbitrators entered a ten-page award ("Arbitration Award") which found McBride, MacDonald and ICC as prevailing parties (collectively the "Prevailing Parties"). [13] The Arbitration Award determined and awarded the following:

- Debtor owned one-third of ICC;
- Debtor had a capital account equal to $ 150,000;
- ICC owned 100% of the Original Companies' stock;
- ICC owed MacDonald $949,808;
- Debtor was disassociated as a member of ICC;
- Debtor was directed to return all ICC property in his possession, custody or control to ICC;
- Debtor was directed to pay about $25,000 of arbitration costs; and
- All claims not expressly granted were denied. [14]

***2** On February 14, 2019, the Florida state court adopted and incorporated the Arbitration Award into a Final Judgment. [15] The Debtor appealed the Final Judgment and posted a bond for the awarded arbitration costs. [16] The Florida Fifth District Court of Appeal affirmed the Final Judgment. [17] As a result, the Debtor partially satisfied the Final Judgment as to the arbitration costs from the bond. [18] No other appeal is pending as to the Final Judgment.

During the appeal, the Prevailing Parties sought enforcement of the Final Judgment. The Florida state court directed the Debtor to return specific assets—primarily aircraft—to ICC by May 25, 2019 ("Enforcement Order"). [19] Eight months

after entry of the Enforcement Order, the Prevailing Parties filed a renewed motion seeking entry of an order compelling the Debtor to return the aircraft or entry of a monetary judgment for their value ("Renewed Enforcement Motion"). Before the Florida state court could hear and rule on the Renewed Enforcement Motion,[20] the Debtor filed for relief under chapter 13 of the Bankruptcy Code on March 3, 2021.[21]

ICC filed proof of claim 10-1 asserting an unsecured claim of $530,359 ("Claim 10"). ICC describes the basis as "Debtor financial liability arising from being member of Island Coastal Charters LLC liquidated by arbitration award." McBride filed amended proof of claim 11-2 asserting an unsecured claim of $170,546 ("Claim 11") and described the basis as "Debtor converted creditor's 50% investment and basis for capital contribution to LLC." In support of their claims, ICC and McBride attached: claim calculation worksheets, the Final Judgment with Arbitration Award, the Enforcement Order and the Renewed Enforcement Motion. Claim 11 also attached an itemization titled "cost from our personal account" along with copies of various checks and partial bank statements. The Debtor filed objections to Claim 10 and Claim 11 asserting that the attachments did not support the claims asserted.[22] ICC and McBride responded that the attachments "speak for themselves" and identify the basis and amounts of the claims.[23]

On April 20, 2022, the Court held a trial on the objections. The parties presented evidence and examined witnesses, including the Debtor, Robert McBride, and John MacDonald. Although the parties had ample opportunity to present evidence on their claims and objections, the testimony before the Court consisted primarily of whether the Debtor complied with the Arbitration Award and turned over certain aircraft. The exhibits admitted into evidence were largely the Florida state court pleadings and orders. After hearing argument of counsel, the Court took the objections under advisement.

Discussion

Section 502 of the Bankruptcy Code provides a proof of claim is deemed allowed until an interested party objects.[24] 11 U.S.C. § 502(a). A proof of claim filed in accordance with the bankruptcy rules constitutes *prima facie* evidence of the validity and amount of the creditor's claim. *In re Thornburg*, 596 B.R. 766, 769 (Bankr. M.D. Fla. 2018)(quoting *In re Winn-Dixie Stores, Inc.*, 418 B.R. 475, 476 (Bankr. M.D. Fla. 2009) (internal quotation marks omitted)). When an objection is filed, the objecting party has the burden of proof to rebut the *prima facie* validity of the proof of claim. *Id.* (citing *In re Eddy*, 572 B.R. 774, 778-79 (Bankr. M.D. Fla. 2017)). The objecting party must refute the legal sufficiency and make a good argument why the claim should not be allowed as filed. *Id.* at 770. As quoted by Judge Jennemann in *Thornburg*.

> ***3** [T]he objecting party [must] ... produce evidence at least equal in probative force to that offered by the proof of claim and which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. This can be done by the objecting party producing specific and detailed allegations that place the claim into dispute, by the presentation of legal arguments based upon the contents of the claim and its supporting documents ... in which evidence is presented to bring the validity of the claim into question. If the objecting party meets these evidentiary requirements, then the burden of going forward with the evidence shifts back to the claimant to sustain its ultimate burden of persuasion to establish the validity and amount of the claim by a preponderance of the evidence.

Thornburg, 596 B.R. at 770 (quoting *In re Armstrong*, 320 B.R. 97, 103 (Bankr. N.D. Tex. 2005) (internal quotations omitted) (citations omitted)).

Before considering the merits of each objection, the Court notes that the parties agreed collateral estoppel prohibits the parties from challenging the findings and conclusions of the Arbitration Award which the Final Judgment adopted and incorporated.[25]

ICC's Claim 10

Claim 10 seeks (i) $150,000 for the Debtor's unpaid capital contribution to ICC, (ii) $316,602 for the Debtor's one-third

portion of ICC's debt to MacDonald and (iii) $63,757 of interest.[26] The Debtor objects to Claim 10 arguing that there can be no claim against an investor for a capital contribution and in any event, the Arbitration Award found that the Debtor made the $150,000 capital contribution, owns one-third of ICC, and only ICC owes MacDonald. ICC responds that the Debtor did not present evidence which sufficiently rebuts the *prima facie* validity of Claim 10 and as a result, the burden of proof has not shifted to ICC.

The Court disagrees with ICC. After a claim is filed, the Debtor may rebut the claim's *prima facie* validity with evidence or legal argument based on the contents of the proof of claim. *See Thornburg*, 596 B.R. at 770. Here, the Debtor makes sufficient arguments based on legal authority and the substance of the supporting documents—the Arbitration Award—which brings the validity of Claim 10 into question. As a result, the burden shifts to ICC to sustain its ultimate burden of persuasion to establish the validity and amount of Claim 10 by a preponderance of the evidence.

ICC has failed to meet this burden. First, ICC has no basis for a claim of capital contribution against the Debtor. ICC's assertion is against the very nature of a capital contribution, i.e. a voluntary "contribution" that entitles one to ownership of an entity. Chapter 605 of the Florida Statutes governs Florida limited liability companies such as ICC. It defines a contribution as "property or a benefit ... which is provided by a person to a limited liability company to become a member or which is provided in the person's capacity as a member." Fla. Stat. § 605.0102 (10). Under Florida law, "[a] promise by a person to contribute to the limited liability company is not enforceable unless it is set out in a writing signed by the person." Fla. Stat. § 605.0403 (1).

***4** Here, the parties agree no fully executed operating agreement exists. Indeed, the Arbitration Award found there was no meeting of the minds among the ICC members and therefore "there is no operating agreement governing ICC."[27] ICC produced no evidence of a written agreement by the Debtor to contribute $150,000 and as a result under Florida law, there is no enforceable claim for a capital contribution.

In any event, the Arbitration Award found and determined that the Debtor owned one-third of ICC with a $150,000 capital account based on a contribution of his 50% interest in the Original Companies.[28] This finding, along with the finding that McBride contributed his 50% interest in the Original Companies, provided the basis for the Arbitration Award finding that ICC has a 100% ownership interest in the Original Companies. Although the Debtor disputes whether he contributed his 50% interest in the Original Companies, like ICC, the Debtor is bound by the Arbitration Award. Based on the Arbitration Award and Florida law, ICC cannot maintain a claim against the Debtor for a $150,000 capital contribution.

The remaining basis for ICC's Claim 10 also fails under Florida law. The Arbitration Award found and determined that ICC owes MacDonald $949,808 for monies he loaned to ICC.[29] The Arbitration Award does not attribute liability for this obligation to any of ICC's members. Under Florida Statute § 605.0304, a member is not personally liable for a debt of the limited liability company solely by reason of their membership. *See* Fla. Stat. § 605.0304 (1). ICC has submitted no evidence that the Debtor guaranteed this debt,[30] or is responsible for any reason other than his membership interest in the LLC. Accordingly, ICC's claim of $316,602 for the Debtor's one-third potion of ICC's debt to MacDonald must fail as well.

ICC argues that liabilities of the company may be allocated to members upon dissolution of the company. ICC presumably relies on Florida Statute § 605.0711 for this assertion which addresses known claims against dissolved limited liability companies. However, even upon a company's dissolution, a member of a limited liability company (even a disassociated member) only becomes liable for the company's debts *to the extent* the member received a distribution. *See* Fla. Stat. § 605.0711 (13). ICC offered no evidence that the Debtor received a distribution from ICC.

ICC's reliance on Florida Statute § 605.0603 is similarly misplaced. Florida Statute § 605.0603 provides a disassociated member's liability to the company or other members does not extinguish by disassociation alone. *See* Fla. Stat. § 605.0603 (2). While true, there must first be some basis for the disassociated member's liability—the statute does not provide a basis for liability. ICC has provided no legal or factual basis to hold the Debtor responsible for repayment of ICC's obligation to MacDonald.

McBride's Claim 11

***5** Claim 11 seeks (i) $150,000 for the Debtor's conversion of McBride's capital contribution, and (ii) $20,546 of interest.[31] The Debtor objects to Claim 11 for similar reasons

as Claim 10—there can be no claim against an investor for a capital contribution and the Arbitration Award found that the Debtor, McBride and MacDonald each made a $150,000 capital contribution and thereby each owns one-third of ICC. McBride responds that the Debtor did not present evidence which sufficiently rebuts the *prima facie* validity of Claim 11 and as a result, the burden of proof has not shifted to McBride. Again, the parties agree that the Arbitration Award controls. The Arbitration Award, however, makes no findings or conclusions that the Debtor is indebted to McBride for his capital contribution to ICC. As a result, the burden shifts to McBride to sustain the ultimate burden of persuasion to establish the validity and amount of Claim 11 by a preponderance of the evidence.

McBride has likewise failed to meet this burden. Claim 11 attaches an itemization titled "cost from our personal account" along with copies of various checks and partial bank statements totaling $166,812. Yet, none of the attached papers demonstrate why the Debtor is responsible or that the Debtor converted McBride's $150,000 capital contribution. McBride's testimony at trial was equally devoid of such an explanation. The evidence submitted to the Court fails to demonstrate that McBride has a claim against the Debtor for conversion of his $150,000 capital contribution to ICC.

The Court recognizes that the Arbitration Award includes findings that the Debtor engaged improperly by:

> changing locks on hangers and having airport access privileges denied to McBride and MacDonald from accessing ICC's business premises; removing and hiding property of ICC, including logbooks and other books and records of ICC; denying McBride and MacDonald access to important tax and financial information; hiding aircraft owned by subsidiaries of ICC; pointing a gun at MacDonald and threatening the life of both McBride and MacDonald on separate occasions; acting in a threatening and belligerent manner to employees of businesses with whom ICC did business; failing to maintain aircraft to appropriate standards; and making improper and authorized filings with the Florida Secretary of State's office with respect to ICC and the Original Companies. [32]

But, the Arbitration Award did not award damages based on that conduct or find that the Debtor was responsible for damages. Although ICC and McBride's primary complaint at trial were the Debtor's actions regarding certain aircraft listed in the Arbitration Award and Enforcement Order, ICC and McBride did not articulate a claim against the Debtor for those actions. Instead, Claim 10 and Claim 11 asserted amounts allegedly owed for the Debtor's capital contribution, ICC's debt to MacDonald and conversion of McBride's capital contribution. Overall, the Arbitration Award and Florida law do not support the claims asserted by ICC and McBride in Claim 10 and Claim 11. ICC and McBride have not met their burden. Accordingly, it is

ORDERED:

1. Debtor's Objection to Proof of Claim Number 10 filed by Island Coastal Charters, LLC (Doc. No. 17) is **SUSTAINED**.

2. Claim 10-1 is disallowed in its entirety.

3. Debtor's Objection to Proof of Claim Number 11 filed by Robert McBride (Doc. No. 18) is **SUSTAINED**.

4. Claim 11-2 is disallowed in its entirety.

ORDERED.

All Citations

Not Reported in B.R. Rptr., 2022 WL 16635428

Footnotes

1 Doc. No. 17. ICC filed a response to the objection. Doc. No. 26.

2 Doc. No. 18. McBride filed a response to the objection. Doc. No. 27.

3 Debtor Ex. 2, Final Award of Arbitrators. The parties agree that they are collaterally estopped from challenging any of the findings or conclusions in the Final Award of Arbitrators.

4 Debtor Ex. 2, Final Award of Arbitrators. The Original Companies are Florida Barnstormers, Inc., Flying Tigers Aviation, Inc., Old Pelican Aero, Inc., and View from Above, Inc.

5 Debtor Ex. 2, Final Award of Arbitrators.

6 *Id.*

7 *Id.*

8 *Id.* at p.6.

9 Debtor Ex. 2, Final Award of Arbitrators.

10 *Id.*

11 Debtor Ex. 2, Creditors Ex. 3. *Heffner v. McDonald*, Case No. 2017-CA-038748 (Fla. 18th Cir. Ct. 2017).

12 Debtor Ex. 2, Final Award of Arbitrators. At arbitration, McBride, MacDonald and ICC asserted claims against the Debtor for: (i) an accounting; (ii) disassociation from ICC, or alternatively dissolution of ICC if disassociation is denied (iii) declaratory relief as to certain matters in dispute and (iv) injunctive relief, including the production of certain documents and aircraft. Because the Debtor did not pay the required filing fee, the Debtor's counterclaims were not considered at arbitration.

13 Debtor Ex. 2, Final Award of Arbitrators.

14 Debtor Ex. 2, Final Award of Arbitrators.

15 Debtor Ex. 2, Final Judgment.

16 Creditors Ex. 2, Creditors Ex. 3. These exhibits are found at Doc. No. 144 and are mislabeled Exhibit 25 and Exhibit 35. *See also* Debtor Ex. 14.

17 Creditors Ex. 2, Creditors Ex. 3. These exhibits are found at Doc. No. 144 and are mislabeled Exhibit 25 and Exhibit 35.

18 Debtor Ex. 14. The surety paid the Prevailing Parties' arbitration costs when the Florida Fifth District Court of Appeal affirmed the Final Judgment.

19 Debtor Ex. 4. The aircraft are Cherokee 180, Waco, and Cherokee VI aircrafts as well as any other aircrafts described in the Arbitration Award.

20 Debtor Ex. 1.

21 Doc. No. 1.

22 Doc No. 17, Doc. No. 18.

23 Doc. No. 26, Doc. No. 27.

24 All references to the Bankruptcy Code refer to 11 U.S.C. §§ 101 *et seq.*

25 Because the Florida state court entered the Final Judgment, collateral estoppel under Florida law is applied. *In re St. Laurent*, 991 F.2d 672, 675-76 (11th Cir. 1993)("If the prior judgment was rendered by a state court, then the collateral estoppel law of that state must be applied to determine the judgment's preclusive effect."). Under Florida law, collateral estoppel "bars relitigation of issues that were actually adjudicated in the prior suit." *In re Bhairo*, Case No. 8:19-bk-08804-MGW, 2021 WL 2981066 at * 3 (Bankr. M.D. Fla. July 15, 2021). Collateral estoppel requires a final order or judgment. *Id.* The Court finds that the Final Judgment is final, with all appeals having been exhausted. As a result, the parties are estopped from challenging the findings and conclusions of the Arbitration Award which the Final Judgment adopted.

26 Claim 10-1, Proof of Claim Interest Calculation Worksheet.

27 Debtor Ex. 2, Final Award of Arbitrators at p. 7.

28 Debtor Ex. 2, Final Award of Arbitrators at p. 6 and 10.

29 *Id.* at p. 7 and 10.

30 Even if ICC submitted evidence demonstrating the Debtor guaranteed ICC's debt to MacDonald, the claim would be barred by *res judicata.* "*Res judicata* prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127 (1979).

31 Claim 11-2, Proof of Claim Interest Calculation Worksheet.

32 Debtor Ex. 2, Final Award of Arbitrators at p. 8-9.

End of Document

2021 WL 4237546
Only the Westlaw citation is currently available.
United States Bankruptcy Court, M.D. Florida,
Orlando Division.

IN RE: Kristin Lee DAVIS, Debtor.

Case No. 6:20-bk-06209-LVV
|
Signed September 15, 2021

Attorneys and Law Firms

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MEMORANDUM OPINION SUSTAINING DEBTOR'S OBJECTION TO AMENDED CLAIM 4 OF BANK OF AMERICA, N.A.

Lori V. Vaughan, United States Bankruptcy Judge

***1** In 2007, the Debtor sought to refinance the mortgage on her home, but at closing discovered errors in the loan documents. Assured by the closing agent that revised loan documents were forthcoming and her right to cancel the loan would be extended, the Debtor proceeded with the loan closing. The Debtor never received the revised loan documents and canceled the loan. But the bank funded the loan anyway. Bank of America, N.A. ("BOA") [1] filed a secured claim in the Debtor's chapter 13 case, asserting that the Debtor did not timely cancel the loan and even if she did, the Debtor's statements in prior bankruptcy cases and the state court's ruling in the related foreclosure action bar the Debtor from now asserting she canceled the loan and that the mortgage is void.

After considering the evidence and argument of counsel at trial, [2] the Court finds that the Debtor timely rescinded the loan and is not precluded from arguing recission in this case. Because the Debtor timely rescinded the loan and BOA failed to demonstrate what amounts, if any, the Debtor may have received from the loan, the Debtor's objection to claim (Doc. No. 21) is sustained. BOA's mortgage is void and its claim disallowed in its entirety.

Factual Background

In 2005, the Debtor acquired real property located at 16719 Corner Lake Dr. Orlando, FL 32820 (the "Home"). She obtained a $90,000 loan for home improvements and to purchase a vehicle. The $90,000 loan, secured by a mortgage on the Home, would be paid over 30 years with 6% interest ("Initial Loan"). For the next two years, the Debtor, who then worked as a truck driver, believed she paid down the Initial Loan to approximately $40,000.

In 2007, the Debtor sought to refinance the Initial Loan. The Debtor believed she would receive a $150,000 loan with a fixed lower (3 to 4%) interest rate. Debtor intended to use the loan to pay the balance of the Initial Loan, some other creditors, and have funds available for her personal use. On March 7, 2007, the loan closing occurred at the Home, with the Debtor and a notary present. Upon reviewing the loan documents, the Debtor discovered that the Truth in Lending disclosure statement provided that the loan had a variable 8.5% interest rate and 40-year term. The Notice of Right to Cancel provided the Debtor had through March 10, 2007 to cancel the loan ("Cancelation Notice"). [3]

The Debtor immediately called the closing agent, who told her that she would receive corrected loan documents tomorrow, but that she should sign the loan documents provided so funding would not be delayed. The closing agent also told the Debtor she would have an additional day to cancel the loan. Based on the closing agent's statements, the Debtor signed some loan documents, including the note and mortgage ("Loan"). [4] The Debtor, however, did not sign the Truth in Lending disclosure statement. [5]

***2** The Debtor never received the revised loan documents. The Debtor signed the Cancelation Notice and on March 11, 2007, the Debtor's friend, Stephen Weaver, faxed the Cancelation Notice with a cover page to BOA. [6] The Debtor's exhibits at trial included a fax report showing that on March 11, 2007 at 7:38 p.m. a two-page document was faxed to the number provided on the Cancelation Notice. [7] Although the Debtor sent the Cancelation Notice, BOA still funded the Loan.

A few days later, the closing agent sent the Debtor documentation regarding the Loan, including checks payable

to some of her creditors.[8] The Debtor did not receive a check for funds she anticipated from the Loan for her personal use. On March 22, 2007, the Debtor contacted the closing agent, informing them that she timely faxed the Cancelation Notice to BOA for the Loan.[9] At no time did the Debtor send the checks to her creditors or otherwise endorse them. Although the Debtor never received another payment demand for the Initial Loan, the Debtor did not know who or how much was paid on her behalf. BOA provided no evidence at trial on how much it paid to the Initial Loan or other creditors, if any. BOA submitted only a payment history with a $150,000 starting balance for the Loan. Because the Debtor believed she timely canceled the Loan, she never made a payment to BOA.

In 2008, BOA filed a complaint against the Debtor in the Circuit Court for Orange County, Florida seeking to foreclose on the Home ("Foreclosure Action").[10] During the Foreclosure Action, the Debtor filed three bankruptcy cases.

Ch 13 Bankruptcy

On January 24, 2014, the Debtor filed a chapter 13 bankruptcy case.[11] The Debtor listed BOA as a secured creditor with a disputed claim of $150,000.[12] The Debtor's initial plan disputed that BOA had a valid claim secured by the House and did not provide for payment to BOA.[13] After the Chapter 13 Trustee sought dismissal of the case for failing to provide adequate protection payments to BOA,[14] the Debtor amended her plan to pay BOA $95,000 and requested mediation with BOA.[15] Before mediation could be completed or the plan confirmed, on August 15, 2014, the Court dismissed the Debtor's case for failing to make the plan payments.[16] BOA never filed a proof of claim in the case.

Ch 7 Bankruptcy

On December 27, 2015, the Debtor filed a chapter 7 bankruptcy case.[17] The Debtor listed BOA as a secured creditor with a claim of $150,000.[18] The Debtor's Statement of Intentions for BOA's claim provided she would "retain the property and redeem it" and "retain the property and enter into a Reaffirmation Agreement" and "retain the property and avoid lien using 11 U.S.C. § 522(f)."[19] Although the Debtor's Statement of Intentions is confusing, she affirmatively did not state that she would "surrender" the House to BOA. On March 30, 2016, the Debtor received a discharge in her chapter 7 bankruptcy case.[20]

***3** Four years after the Debtor received her discharge, BOA requested that the state court strike the Debtor's affirmative defenses in the Foreclosure Action.[21] The motion titled, Plaintiff's Motion for Judicial Estoppel, with Memorandum of Law, argued that due to the Debtor's failure to comply with her Statement of Intentions filed in the chapter 7 bankruptcy case, the Debtor was precluded from asserting her affirmative defenses in the Foreclosure Action. In a one-page order, the state court granted BOA's request, stating "Defendant's affirmative defenses are hereby stricken and Defendant is precluded from contesting in Plaintiff's foreclosure action" ("Order Striking").[22] The Foreclosure Action remains pending, with no final judgment having been entered in the case.

Current Chapter 13 Case

On November 6, 2020, the Debtor filed this chapter 13 bankruptcy case.[23] The Debtor listed BOA as a secured creditor with a disputed claim of an unknown amount.[24] The Debtor's amended plan provided that the Debtor will seek mediation with BOA and BOA will receive adequate protection payments of $342.64.[25] BOA filed proof of claim 4-2, as amended, alleging it has a $307,362.26 secured claim ("POC"). In support of the POC, BOA attached the following: mortgage proof of claim attachment, fees breakdown, escrow statement, the Adjustable Rate Note and Mortgage for the House and various documents demonstrating BOA currently holds the note and mortgage.

On April 4, 2021, the Debtor objected to the POC ("Objection").[26] The Objection alleged in detail how the Debtor canceled or rescinded the note and mortgage days after the Loan closing. The Debtor requested in part that the Court determine whether the Debtor effectively rescinded the Loan, and if rescinded, whether the Debtor was obligated to BOA under 12 C.F.R. § 1026.23(d)(3). If the Loan was not rescinded, the Debtor requested the Court determine how much BOA disbursed given Debtor's failure to negotiate the checks distributed, and how much is currently due and validly claimed by BOA. BOA responded by arguing that the Order Striking and *Rooker-Feldman* bars the Debtor from arguing cancelation or rescission of the Loan.[27]

On July 29, 2021, the Court held a trial on the Objection. The parties examined witnesses, including the Debtor, Mr. Stephen Weaver and BOA's representative, Louise Plasse

and presented evidence. Although the parties had ample opportunity to present evidence on the Objection, the evidence before the Court consisted primarily of the Debtor's testimony. After hearing argument of counsel, the Court took the Objection under advisement.

Discussion

Section 502 of the Bankruptcy Code[28] provides a proof of claim is deemed allowed until an interested party objects. 11 U.S.C. § 502(a). A proof of claim filed in accordance with the bankruptcy rules constitutes *prima facie* evidence of the validity and amount of the creditor's claim. *In re Thornburg*, 596 B.R. 766, 769 (Bankr. M.D. Fla. 2018)(quoting *In re Winn-Dixie Stores, Inc.*, 418 B.R. 475, 476 (Bankr. M.D. Fla. 2009) (internal quotation marks omitted)). When an objection is filed, the objecting party has the burden of proof to rebut the *prima facie* validity of the proof of claim. *Id.* (citing *In re Eddy*, 572 B.R. 774, 778–79 (Bankr. M.D. Fla. 2017). The objecting party must refute the legal sufficiency and make a good argument why the claim should not be allowed as filed. *Id.* at 770. As quoted by Judge Jennemann in *Thornburg*:

> [T]he objecting party [must] ... produce evidence at least equal in probative force to that offered by the proof of claim and which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. This can be done by the objecting party producing specific and detailed allegations that place the claim into dispute, by the presentation of legal arguments based upon the contents of the claim and its supporting documents ... in which evidence is presented to bring the validity of the claim into question. If the objecting party meets these evidentiary requirements, then the burden of going forward with the evidence shifts back to the claimant to sustain its ultimate burden of persuasion to establish the validity and amount of the claim by a preponderance of the evidence.

***4** *Thornburg*, 596 B.R. at 770 (quoting *In re Armstrong*, 320 B.R. 97, 103 (Bankr. N.D. Tex. 2005) (internal quotations omitted) (citations omitted)).

Here, the Debtor has met her initial burden. The Debtor objected to the POC and demonstrated with credible evidence that she canceled the Loan and she could not have owed the full $150,000 because neither she nor her creditors endorsed the checks issued and the House only had a $40,000 mortgage. The burden now shifts to BOA to demonstrate by a preponderance of the evidence the validity and amount of the POC. To demonstrate the legal validity of the claim, BOA relies on the *Rooker-Feldman* doctrine, collateral estoppel, judicial estoppel and Debtor's failure to timely cancel the Loan under the Truth in Lending Act.

Rooker-Feldman Doctrine

The Court first addresses BOA's argument that the *Rooker-Feldman* doctrine bars the Debtor alleging she timely canceled the Loan because the state court struck the Debtor's affirmative defenses and held she could not contest the Foreclosure Action. But here, the state court never entered a judgment in the Foreclosure Action.

Rooker-Feldman only applies when a litigant asks the federal court to modify or overturn a state court judgment.[29] *Behr v. Campbell*, Case No. 18-12842, 2021 WL 3559339 at *4 (11th Cir. Aug. 12, 2021)("*Rooker- Feldman* means that federal district courts cannot review or reject state court judgments rendered before the district court litigation began.") Its application is narrow and only bars "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at *4 (quoting *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005)).

Under *Rooker-Feldman*, the District Court, and here the Bankruptcy Court, have no jurisdiction to consider appeals from state court judgments. *Id.* at *2-3. "Only when a losing state court litigant calls on a district court to modify or overturn an injurious state-court judgment should a claim be dismissed under *Rooker-Feldman*; district courts do not lose subject matter jurisdiction over a claim simply because a

party attempts to litigate in federal court a matter previously litigated in state court." *Id.* at *3 (quoting *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 292-93 (2005) (internal quotations omitted)). *Rooker-Feldman* does not bar all attempts to litigate a matter that was previously litigated in state court—only those matters reduced to a final judgment are barred since federal courts do not have appellate jurisdiction. Here, because there is no final judgment, *Rooker-Feldman* does not apply.

Collateral Estoppel

***5** Although not raised in its pleadings, BOA countered at trial that collateral estoppel applies to preclude litigation of the cancelation issue. Because the Florida state court entered the Order Striking, collateral estoppel under Florida law is applied. *In re St. Laurent*, 991 F.2d 672, 675-76 (11th Cir. 1993)("If the prior judgment was rendered by a state court, then the collateral estoppel law of that state must be applied to determine the judgment's preclusive effect."). Under Florida law, collateral estoppel "bars relitigation of issues that were actually adjudicated in the prior suit." *In re Bhairo*, Case No. 8:19-bk-08804-MGW, 2021 WL 2981066 at * 3 (Bankr. M.D. Fla. July 15, 2021). But, collateral estoppel likewise requires a final order or judgment. *Id.* Here, the Order Striking is not a final order or judgment. *See HZJ, Inc. v. Wysocki*, 511 So.2d 1088, 1088-89 (Fla. 3d DCA 1987) (treating order striking answer and affirmative defenses as interlocutory order). Until the state court has entered a final judgment, it may alter preliminary rulings in the case. *Abdullatif Jameel Hospital v. Integrity Life Sciences, LLC*, Case No: 8:15–cv–2160–MSS–JSS, 2016 WL 9526457 (M.D. Fla. Sept. 23, 2016). Accordingly, the Debtor is not barred from litigating the issues raised in her Objection.

Judicial Estoppel

The Court further finds that the Debtor's arguments are not barred by judicial estoppel. "The equitable doctrine of judicial estoppel is intended to prevent the perversion of the judicial process and protect its integrity by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1181 (11th Cir. 2017) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001)(internal quotations omitted)). Courts in this circuit may apply judicial estoppel when a party took an inconsistent position under oath in a separate proceeding and these inconsistent positions were "calculated to make a mockery of the judicial system." *Slater* 871 F.3d at 1181. In determining whether the party's inconsistent statements make a mockery of the judicial system, courts consider all the facts and circumstances of the case. *Id.* at 1185.

Here, the Debtor has consistently taken the position that the Loan was void and canceled. She disputed BOA's debt in this case and her prior chapter 13 bankruptcy case. She intended to "avoid the lien" in her prior chapter 7 case. And even if the Debtor made an inconsistent statement in her prior bankruptcy cases, the inconsistent statement does not make a mockery of the judicial system under these facts and circumstances. For thirteen years, the Debtor and BOA have been in dispute during which the Debtor made clear to this Court that she disputed the amounts owed to BOA or an issue existed between the parties. The Court finds, after considering the evidence and all the facts and circumstances, the Debtor has not made a mockery of the judicial system.

Cancelation of the Loan

The Debtor argues that she timely canceled the Loan. The Loan closed on March 7, 2007. The Notice of Cancelation provided to the Debtor required on its face, submission by midnight, March 10, 2007—three days after closing. [30]

The Debtor testified that she was presented with incorrect loan documents at closing and that the closing agent told her she would receive corrected documents the following day and would have an additional day to cancel as a result. The Debtor presented unrebutted evidence that she sent the cancelation to the proper fax number on March 11, 2007 at 7:38 p.m. —within the extended deadline. [31] Debtor's fax cover sheet further indicated that she was canceling the Loan due to the lender's failure to "provide proper figures, or paperwork." [32]

***6** BOA presented no evidence to rebut the submission of the cancelation on March 11, 2007 or that the closing agent told the Debtor she would have one additional day to cancel. Although BOA objected to the closing agent's statement as hearsay, the Court rules that the closing agent's statements are not hearsay as the admission of a party opponent. *See* Fed. R. Evid. 801(d) (statement by opposing party is not hearsay); *Pappas v. Middle Earth Condominium Ass'n*, 963 F.2d 534, 537-38 (2d Cir. 1992)(admissibility under Rule 801(d) should be given freely and the authority granted in an agency relationship need not include the authority to make the damaging statements, but simply authority to take action about which the statements relate); *United American Bank of Cent. Florida, Inc. v. Seligman*, 599 So.2d 1014, 1016 (Fla. 5th DCA 1992) (an escrow agent is an agent of all the

principal parties to the transaction). Further, the Court finds the closing agent's statement is not being admitted for its truth, but for the impact on the Debtor's belief. *Weaver v. Tech Data Corp.*, 66 F.Supp.2d 1258, 1264-65 (M.D. Fla. 1999)(verbal or non-verbal conduct offered for inferring something other than the matter asserted is excluded from the hearsay rule).

The Court finds that the Debtor timely submitted the Notice of Cancelation and canceled the Loan. The Court finds the Debtor's testimony on this issue credible and BOA, despite having the burden, presented no evidence to rebut Debtor's testimony. It is further likely that the Debtor's right to cancel did not even expire on March 11, 2007 because, according to Debtor's unrebutted testimony, BOA never provided a corrected Truth in Lending Disclosure. 15 U.S.C. § 1635, 12 C.F.R. § 1026.23 (2021) (consumer may exercise right to rescind up to three days after delivery of "all material disclosures.").

What then is the impact of Debtor's rescission of the Loan? According to 12 C.F.R. § 1026.23(d)(1), "[w]hen a consumer rescinds a transaction, the security interest giving rise to the right of recission becomes void and the consumer shall not be liable for any amount, including any finance charge." Accordingly, BOA's mortgage is void and of no force and effect, and the Debtor is not obligated on the Loan. Federal regulations further provide that the consumer may retain possession of any money or property received until such time the creditor has met its obligation to return any money or property given and to take action to reflect termination of the security interest. 12 C.F.R. § 1026.23(d)(2),(3). BOA has to date taken none of these actions. Not only has it not terminated the security interest, but it never sought return of any funds advanced.

This result may seem like a windfall. BOA could have advanced other legal theories to establish the Debtor's liability for funds advanced to pay the Initial Loan or other obligations. But, BOA never made the argument at trial or in its pleadings. BOA's argument would have been unsuccessful for other reasons. First, BOA produced absolutely zero evidence—neither testimony nor documents—of the amounts it funded to pay the Initial Loan mortgage or any other debt. The only evidence submitted was a payment history simply showing a $150,000 balance as of May 2007 with no indication of how this amount was determined. BOA also submitted satisfactions of mortgage listing the face amount of loans to the Debtor that were satisfied, but these documents do not demonstrate the balance owed or who satisfied them. BOA likewise solicited no testimony to address this issue. BOA has the burden to establish its claim and failed to do so. Debtor also testified that the balance of her first mortgage was less than $90,000, further questioning how BOA arrived at $150,000 opening balance. Second, under the regulations cited above, Debtor has no obligation to return such funds. Finally, to the extent that the Debtor has any type of obligation to BOA, as of 2007, the claim would have been unsecured as result of 12 C.F.R. § 1026.23(d). BOA has filed no unsecured claim, nor can it file one now as the unsecured obligation was discharged in the Debtor's prior chapter 7 bankruptcy case.

***7** As the prevailing party, the Debtor's request for attorney's fees and costs under the note and mortgage will also be granted. Fla. Stat. § 57.105(7) ("If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract.")

Conclusion

The Court finds the Loan was rescinded, BOA's security interest in the Home is void and BOA has not met its burden to establish that the Debtor is liable for payment of any amounts advanced. As a result, BOA's claim will be disallowed in its entirety. As the prevailing party, the Debtor is entitled to her reasonable attorney's fees and costs under the note and mortgage. The Court recognizes this ruling will result in a windfall to the Debtor, but BOA failed to meet its burden and provide this Court with credible evidence to rule otherwise. The Court will enter a separate order consistent with this memorandum opinion.

ORDERED.

All Citations

Not Reported in B.R. Rptr., 2021 WL 4237546

Footnotes

1 IndyMac Bank, FSB initially held the note and mortgage which it later assigned to Bank of America, N.A., who has used Ocwen Loan Servicing, LLC and PHH Mortgage Corporation to service the loan. *See* Proof of Claim 4-2. For the purposes of this Order, the timing and exact role or relationship between IndyMac Bank, Bank of America, Ocwen Loan Servicing and PHH Mortgage Corporation is irrelevant. As such, the Court refers to them collectively as "BOA."

2 The trial was held on July 29, 2021.

3 Debtor Ex. 1.

4 Proof of Claim 4-2.

5 Debtor Ex. 1. The Debtor testified that she did not sign the Truth in Lending disclosure statement for the loan. The Debtor also did not sign the acknowledgment in the Notice of Right to Cancel which stated that the loan had been consummated or that she received the Truth in Lending disclosure statement.

6 Debtor Ex. 2.

7 Debtor Ex. 3.

8 The Debtor testified that she received at least one check payable to a business that was not a creditor of hers.

9 Debtor Ex. 6.

10 *Bank of America, N.A. v. Davis et.al.*, Case No. 2008-CA-0020391-O.

11 *In re Davis*, Case No. 6:14-bk-00828-CCJ (Bankr. M.D. Fla. Jan. 24, 2014) ("2014 Case").

12 2014 Case Doc. No. 17.

13 2014 Case Doc. No. 16.

14 2014 Case Doc. No. 20.

15 2014 Case Doc. No. 40.

16 2014 Case Doc. No. 48.

17 *In re Davis*, Case No. 6:15-bk-10637-RAC (Bankr. M.D. Fla. Dec. 27, 2015) ("2015 Case").

18 2015 Case Doc. No. 7.

19 2015 Case Doc. No. 7.

20 2015 Case Doc. No. 11.

21 BOA Ex. 3. No evidence is before this Court demonstrating what affirmative defenses the Debtor raised in the Foreclosure Action.

22 BOA Ex. 4.

23 Doc. No. 1.

24 Doc. No. 10.

25 Doc. No. 25.

26 Doc. No. 21.

27 Doc. No. 24.

28 All references to the Bankruptcy Code refer to 11 U.S.C. §§ 101 *et seq.*

29 *Rooker-Feldman* likewise bars litigants' attempts to overturn a state court judgment even if a litigant characterizes the attempt as something else. *Behr v. Campbell*, Case No. 18-12842, 2021 WL 3559339 at *8 (11th Cir. Aug. 12, 2021).

30 Although March 10th was handwritten on the Notice of Cancelation, no party disputed that this was the date initially provided or that the closing occurred on March 7, 2007. In fact, the mortgage was notarized on March 7, 2007.

31 Debtor Ex. 3.

32 Debtor Ex. 2.

End of Document

2021 WL 6550869
Only the Westlaw citation is currently available.
United States Bankruptcy Court, M.D. Florida,
Orlando Division.

IN RE: Kristin Lee DAVIS, Debtor.

Case No. 6:20-bk-06209-LVV
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Signed December 27, 2021
|
Filed 12/28/2021

Attorneys and Law Firms

Michael Faro, Faro & Crowder, PA, Melbourne, FL, for Debtor.

ORDER DENYING MOTION FOR RECONSIDERATION

Lori V. Vaughan, United States Bankruptcy Judge

***1** In 2007, the Debtor sought to refinance the mortgage on her home, but at closing discovered errors in the loan documents. Assured by the closing agent that revised loan documents were forthcoming and her right to cancel the loan would be extended, the Debtor proceeded with the loan closing. The Debtor never received the revised loan documents and canceled the loan. But the bank funded the loan anyway. Bank of America, N.A. ("BOA")[1] filed a secured claim in the Debtor's chapter 13 case, asserting that the Debtor did not timely cancel the loan and even if she did, the Debtor's statements in prior bankruptcy cases and the state court's ruling in the related foreclosure action bar the Debtor from now asserting she canceled the loan and that the mortgage is void. The Debtor objected to BOA's claim.[2]

On July 29, 2021, the Debtor and BOA presented evidence and argument at trial on the objection to claim. After considering the evidence and argument, the Court entered a memorandum opinion and order which sustained the Debtor's objection and found that the Debtor timely rescinded the loan and is not precluded from arguing recission in this case (collectively the "Order").[3] The Court determined BOA's mortgage was void and disallowed BOA's claim entirely. The Court later entered an order confirming the Debtor's chapter 13 plan and consistent with the Order, provided that BOA's claim would receive $0.[4]

BOA now seeks reconsideration of the Order under Rule 59(e) ("Motion").[5] BOA argues that it has discovered new evidence which demonstrates the Debtor failed to timely rescind the loan. BOA further argues that the Court committed error by considering the closing agent's statements at trial and finding that the Debtor timely rescinded the loan. In support of the Motion, BOA relies on legal argument, the "new" documents and the affidavit of Louise Plasse, a senior loan analyst for PHH Mortgage Corporation and servicer for BOA. BOA, however, has not established sufficient grounds for reconsideration and the Motion is denied.

A motion for reconsideration of a final order is treated as a motion seeking a new trial under Rule 59, Federal Rules of Civil Procedure, incorporated by Rule 9023, Federal Rules of Bankruptcy Procedure. *See In re Kellogg,* 197 F.3d 1116, 1119 (11th Cir. 1999). Under this analysis, the Debtor must "demonstrate why the court should reexamine its prior decision, and set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *In re Stewart,* 280 B.R. 268, 287 (Bankr. M.D. Fla. 2001) (quoting *In re Envirocon Int'l Corp.,* 218 B.R. 978, 979 (M.D. Fla. 1998)(internal quotations omitted)). "Courts have recognized three grounds for justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear and manifest injustice." *In re Envirocon Int'l. Corp.,* 218 B.R. 978, 979 (M.D. Fla. 1998). A motion for reconsideration is not grounds to reargue or relitigate issues already decided. *In re Parker,* 378 B.R. 365, 371 (Bankr. M.D. Fla. 2007). Determining whether grounds exist for a new trial is left to the discretion of the trial court. *In re Regit,* No. 8:10-bk-29130-CED, 2012 WL 1983990 at *1 (Bankr. M.D. Fla. June 1, 2012); *In re Nofziger,* No. 6:04-bk-09253-KSJ, 2006 WL 1876952 at *1 (Bankr. M.D. Fla. June 29, 2006).

***2** First, BOA contends a new trial is warranted because it discovered the following documents *in its files*: (i) a Notice of Right to Cancel allegedly signed by the Debtor; (ii) an *unsigned* Truth in Lending Disclosure Statement with initials on subsequent pages; (iii) an estimated closing statement; and (iv) Uniform Residential Loan Applications allegedly signed by the Debtor (collectively the "Documents").

The Eleventh Circuit has made clear that "[m]otions for a new trial based on newly discovered evidence are highly

disfavored" and "should be granted only with great caution." *Dear v. Q Club Hotel, LLC,* 933 F.3d 1286, 1301-02 (11th Cir. 2019)(quoting *United States v. Campa,* 459 F.3d 1121, 1151 (11th Cir. 2006)(en banc)). To obtain a new trial for newly discovered evidence, BOA bears the "heavy burden" of demonstrating that:

> (1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of due diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result.

Id. at 1302 (quoting *United States v. Jernigan,* 341 F.3d 1273, 1287 (11th Cir. 2003)). New evidence may only be the basis for a new trial if it was unavailable at the time of judgment. *United States v. Weisman,* 651 Fed. App'x 858, 859-60 (11th Cir. 2016).

BOA has failed to meet its burden. BOA provides no explanation for failing to discover the Documents before trial or why failure to discover the Documents was not due to a lack of due diligence. In fact, Ms. Plasse's affidavit indicates otherwise.[6] Ms. Plasse's affidavit states that PHH acquired the servicing rights for the Loan on May 1, 2019, she had access to PHH's records, including PHH's business records relating to the Loan, and she *searched and reviewed the records* to ascertain the facts stated in the affidavit *which then referenced and attached the Documents.* Ms. Plasse obtained the Documents by searching and reviewing PHH's records. No mention is made why Ms. Plasse could not have searched and reviewed PHH's records before the trial and obtain the Documents.

Ms. Plasse was also present and testified as BOA's witness at the trial. Although Ms. Plasse was present, BOA did not inquire about the Documents or introduce them as evidence. Instead, BOA's trial strategy focused on legal doctrines and argument to support its position. Now, with this Court's opinion in hand, BOA regrets this strategy and seeks a second bite at the apple to present additional evidence and legal theories. *See In re Nofziger,* No. 6:04-bk-09253-KSJ, 2006 WL 1876952 at *1 (Bankr. M.D. Fla. June 29, 2006)("The function of a motion to alter or amend a judgment is not to serve as a vehicle to relitigate old matters or present the case under a new legal theory ... [or] to give the moving party another 'bite at the apple' by permitting the arguing of issues and procedures that could and should have been raised prior to judgment.").

Furthermore, the Court doubts whether the Documents alone would "probably produce a different result" at a new trial. The Truth in Lending Disclosure Statement remains unsigned by the Debtor. And although the Bank appears to have a Notice of Right to Cancel allegedly signed by the Debtor, this only challenges the Debtor's evidence and testimony. Without more, the Court cannot conclude they will "probably produce a different result" at a new trial.

***3** BOA also argues a new trial is appropriate because the Court committed error by considering the closing agent's statements and finding that the Debtor timely rescinded the loan. The Court does not find this to be a *manifest* error of law or fact. *See PBT Real Estate, LLC v. Town of Palm Beach,* 988 F.3d 1274, 1287 (11th Cir. 2021)(manifest errors of law or fact are grounds for a new trial); *Nofziger,* 2006 WL 1876952 at * 1 (movant must prove manifest errors of law or fact). The Order provides the facts and legal authority upon which the Court relied to reach its findings and legal conclusions. BOA simply disagrees with the legal conclusion, and fails to identify a manifest error of law or fact.[7] Accordingly, it is

ORDERED that the Motion (Doc. No. 65) is **DENIED**.

All Citations

Not Reported in B.R. Rptr., 2021 WL 6550869

Footnotes

1 IndyMac Bank, FSB initially held the note and mortgage which it later assigned to Bank of America, N.A., who has used Ocwen Loan Servicing, LLC and PHH Mortgage Corporation to service the loan. *See* Proof of Claim 4-2. For the purposes of this Order, the timing and exact role or relationship between IndyMac Bank, Bank of America, Ocwen Loan Servicing and PHH Mortgage Corporation is irrelevant. As such, the Court refers to them collectively as "BOA."

2 Doc. No. 21.

3 Doc. Nos. 58, 59. The Court later amended the order sustaining the objection to correct a typographical error. Doc. No. 63.

4 Doc. No. 64. The Court entered the order confirming plan on September 28, 2021.

5 Doc. No. 65.

6 Doc. No. 65, Ex. 1.

7 BOA argues the three-day right to rescind is absolute and may not be extended. At least one court, however, has found that the Truth-In-Lending Act and Regulation Z do not prevent lenders from giving borrowers rights greater than the statute requires, such as providing borrowers with an additional day to rescind the loan. *See Kramer v. Home Sav. of America, FSB,* 721 So.2d 1239, 1240 (Fla. 4th DCA 1998) (lender did not violate TILA and Regulation Z by giving borrowers more than three days to rescind the loan). Further, the Debtor's unrebutted testimony was that she did not receive all of the documents and as a result the time period to rescind would not have started.

End of Document

Practical Evidence Manual

by

Judge Michael G. Williamson

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Practical Evidence Manual

by
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I. The "Basics."

A. Absent a "short cut," i.e., a stipulation, unopposed proffer, judicial or evidentiary admission, judicial notice, or a presumption, there are generally four ways to establish a fact at an evidentiary hearing or trial: (1) real evidence (the thing itself, e.g., the murder weapon); (2) demonstrative evidence (a depiction of the thing, e.g., a picture or diagram); (3) testimonial evidence; and (4) documentary evidence.

B. As a predicate for the admissibility of evidence, the proponent must establish the following:

1. **Relevance**. The evidence must be relevant. That is, under Rule 401 the evidence must have any tendency to make any fact that is of consequence more or less probable.

2. **Personal Knowledge**.

a) The witness must have personal knowledge about the matters about which the witness is testifying. Under Rule 602 a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter (with the exception of experts who may rely on inadmissible evidence in forming opinions).

b) In the case of documentary evidence, as a condition precedent to receiving the exhibit into evidence, there must be evidence sufficient to support a finding that the exhibit in question is what its proponent claims.[1] Typically, this evidence is in the form of testimony of a witness with personal knowledge that the exhibit is what it is claimed to be.[2]

3. **Not Subject to Rule of Exclusion**. Finally, the evidence must not be subject to a rule of exclusion. If the evidence is subject to a rule of exclusion, e.g.,

[1] FED. R. EVID. 901(a).
[2] FED. R. EVID. 901(b)(1).

4. the hearsay rule, it must fall within an exception to the rule of exclusion, e.g., the business records exception.

C. Under Rule 104, these foundational requirements are considered "preliminary questions" concerning the admissibility of the evidence. Importantly, in making its determination of whether the evidence is admissible, the court "is not bound by the rules of evidence except those with respect to privilege."[3] As a result, when deciding whether certain evidence is admissible, e.g., whether an exception to the hearsay rule applies, the court may consider inadmissible evidence other than privileged evidence including hearsay evidence.[4]

II. Common Rules of Exclusion.

A. Hearsay Rule.[5]

1. Defined.[6]

a) For a statement to be hearsay, three elements must be established:

(1) The statement must be made "other than … while testifying at the trial or hearing."[7]

(2) The statement must be offered in evidence to prove the truth of the matter asserted.[8]

(3) The statement must be an oral or written assertion or nonverbal conduct of a person that is intended by the person as an assertion.[9] The "key to the definition" of an assertion "is that nothing is an assertion unless intended to be one."[10] For example, questions are generally held not be assertions.[11]

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[3] FED. R. EVID. 104.
[4] *Curtis v. Perkins (In re International Management Assoc., LLC)*, 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *United States v. Byrom*, 910 F.2d 725, 734-35 (11th Cir. 1990).
[5] *See also* "Writings are Hearsay," § V.D., *infra.*
[6] Hearsay is also discussed in the context of written hearsay more comprehensively in Section V.C. ("Writings are Hearsay").
[7] Fed. R. Evid. 801(c).
[8] *Id.*
[9] FED. R. EVID. 801(a).
[10] Advisory Committee Note to Rule 801(a).
[11] Arguably, questions not only seek information, but they convey information, too. However, as explained in *U.S. v. Love,* 706 F.3d 832, 839-40 (7th Cir. 2013), "A speaker who asks, 'Son, is it raining outside?' clearly intends to get information about the weather, but the speaker also implicitly communicates information—for instance, that he or she is probably indoors, is interested in the weather, and has a son." This fact has led some commentators to argue that "we should view both imperatives and questions as 'statements' for purposes of the hearsay doctrine" because "both

b) Out-of-court statements not offered to prove of the matter asserted are not hearsay. Categories of these not-hearsay statements include words that have an independent legal significance (referred to as "verbal acts" as discussed below); statements that are offered to prove their effect on the listener; statements offered as circumstantial evidence of the declarant's state of mind; and prior statements offered to impeach or rehabilitate.[12]

2. Verbal Acts Are Not Hearsay.

a) A "verbal act" is "an act performed through the medium of words, either spoken or written."[13] The verbal acts doctrine applies where legal consequences flow from the fact that words were said, e.g., the words of offer and acceptance which create a contract.[14]

b) The Federal Rules of Evidence "exclude from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights."[15]

c) Thus, a written contract has independent legal significance and is not hearsay. It defines the rights and obligations of the parties thereto regardless of the truth of the assertions in the contract.[16] This includes negotiable instruments.[17] And communications between the parties to a contract that define the terms of a

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intentionally express and communicate ideas or information." *Id. (citing* 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 8:6 (3d ed.2007). However, every Circuit to consider the issue has rejected this approach adopting the view that questions are not assertions and, therefore, not hearsay. *U.S. v. Love,* 706 F.3d 832, 839-40 (7th Cir. 2013) (citing *United States v. Thomas*, 453 F.3d 838, 845 (7th Cir. 2006), *United States v. Thomas*, 451 F.3d 543, 548 (8th Cir.2006); *Lexington Ins. Co. v. W. Pa. Hosp*., 423 F.3d 318, 330 (3d Cir. 2005); *United States v. Wright*, 343 F.3d 849, 865 (6th Cir. 2003); *United States v. Jackson*, 88 F.3d 845, 848 (10th Cir.1996); *United States v. Lewis*, 902 F.2d 1176, 1179 (5th Cir. 1990); *United States v. Oguns*, 921 F.2d 442, 449 (2d Cir. 1990).

[12] Use of such statements for impeachment is discussed below in the Cross Examination portion of these materials.

[13] BLACK'S LAW DICTIONARY 25 (7th ed. 1999).

[14] *Id* at 1554 (7th ed. 1990); *see also* 2 John W. Strong, MCCORMICK ON EVIDENCE § 249, at 100-01 (5th ed. 1999).

[15] FED. R. EVID 801(c) Advisory Committee's Note.

[16] *See, e.g., Stuart v. UNUM Life Ins. Co. of America,* 217 F.3d 1145, 1154 (9th Cir. 2000); *Kepner-Tregoe, Inc. v. Leadership Software*, 12 F.3d 527, 540 (5th Cir. 1994) (finding contract to be a signed writing of independent legal significance and therefore non-hearsay).

[17] *United States v. Tann*, 425 F. Supp. 2d 26, 29 (D.D.C. 2006) (finding negotiable instruments to be legally operative documents that do not constitute hearsay).

contract, or prove its content, are not hearsay, as they are verbal acts or legally operative facts admitted to prove the terms of the contract.[18]

3. Witness's Prior Inconsistent Statements.[19]

a) Rule 613 and 801(d)(1) Compared.

(1) There are two independent Rules that deal with the use of a witness's prior statement during trial. The first of these is Rule 613 that deals generally with the impeachment of a witness by showing that the witness made a prior statement that was inconsistent to the statement being made in court. This will be discussed in further detail in the section of this manual dealing with impeachment.

(2) The other rule dealing with prior statements of a witness is found in Rule 801 that defines hearsay. It provides that a witness's prior inconsistent statement is not hearsay provided the witness testifies and is subject to cross-examination about the prior statement, and the statement was given under oath and is inconsistent with the declarant's testimony at trial.[20]

(3) These rules operate differently and should not be confused with one another. Rule 613(b) applies when two statements, one made at trial and one made previously, are irreconcilably at odds. In such an event, the cross-examiner is permitted to show the discrepancy by extrinsic evidence if necessary—not to demonstrate which of the two is true but, rather, to show that the two do not jibe (thus calling the declarant's credibility into question).[21] "The theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements."[22]

(4) Thus, while Rule 613 provides that extrinsic evidence of a witness's prior inconsistent statement is admissible if the witness is given an opportunity to explain or deny the statement and the adverse party is given an opportunity to

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[18] *See, e.g., Preferred Props., Inc. v. Indian River Estates Inc.,* 276 F.3d 790, 799 n.5 (6th Cir. 2002) (holding that verbal acts creating a contract are not hearsay); *Mueller v. Abdnor*, 972 F.2d 931, 937 (8th Cir. 1992) (holding contracts and letters from attorney relating to the formation thereof are non-hearsay);

[19] Prior inconsistent statements are also discussed in Section comprehensively in Section IV.B.6.d) ("Areas of Impeachment").

[20] FED. R. EVID. 801(d)(1).

[21] *U.S. v. Winchenbach,* 197 F.3d 548, 558 (1st Cir. 1999) citing *United States v. Higa*, 55 F.3d 448, 451–52 (9th Cir.1995); *Kasuri v. St. Elizabeth Hosp. Med. Ctr.*, 897 F.2d 845, 853–54 (6th Cir. 1990); *United States v. Causey*, 834 F.2d 1277, 1282–83 (6th Cir.1987); *United States v. Lay,* 644 F.2d 1087, 1090 (5th Cir. 1981).

[22] *McCormick on Evidence*, § 34, at 114 (7th ed. 2013).

examine the witness about it, prior inconsistent statements are generally admissible for impeachment purposes only under Rule 613 and are inadmissible hearsay for substantive purposes unless they were made at "a trial, hearing, or other proceeding, or in a deposition."[23]

(5) On the other hand, Rule 801(d)(1)(A) provides that a witness's prior inconsistent statement is not hearsay if the declarant testifies at the trial and is subject to cross-examination about the statement and the statement was given under penalty of perjury in a deposition or at another trial. Assuming the prior inconsistent statement fulfills the usual foundational requirements for admissibility of evidence, e.g., relevance and personal knowledge, it is admissible as substantive evidence.[24]

b) Witness's Prior Statements under Rule 801(d)(1)(A).

(1) A witness's prior inconsistent statement is not hearsay provided:

(a) The witness testifies and is subject to cross-examination about the prior statement, and

(b) The statement was given under oath and is inconsistent with the declarant's testimony at trial.[25]

(2) A witness's prior consistent statement is not hearsay provided:

(a) It is offered to dispute a charge (express or implied) that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(b) It is offered to rehabilitate the declarant's credibility as a witness when attacked on another ground.[26]

4. Opposing Party's Statements under Rule 801(d)(2).[27]

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[23] *Santos v. Murdock,* 243 F.3d 681, 684 (2d. Cir. 2001). *See, also, U.S. v. Neal,* 452 F.2d 1085, 1086 (10th Cir. 1971).("The inconsistent statement is admitted, not as competent substantive evidence of the truth of the matters asserted, but only to impeach or discredit the witness.").
[24] *Weinstein's Federal Evidence,* § 801.21[1], at 801-33 (2d ed. 2014).
[25] FED. R. EVID. 801(d)(1).
[26] FED. R. EVID 801(d)(1)(B) (amended 2014) (The Advisory Committee noted that "[t]he intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness . . . prior consistent statements otherwise admissible for rehabilitation are not admissible substantively as well.").
[27] FED. R. EVID. 801(d)(formerly known as "Admission by Party Opponent").

a) An opposing party's statement is not hearsay if it is offered against the opposing party and the statement:

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

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

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

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

(5) was made by the party's coconspirator during and in furtherance of the conspiracy.

b) Even though an opposing party's statement can be used against the party who made the statement it cannot be used against any other party unless the party is a coconspirator and the statement was made in furtherance of the conspiracy.[28]

c) This exclusion from hearsay is not to be confused with the Rule 804(b)(3), which provides an exception for declarations against interest. The Committee Note indicates that a statement can be within the exclusion even if it admitted nothing and was not against the party's interest when made.[29]

5. Hearsay Exceptions (Witness Availability Immaterial)--Rule 803.

a) Present Sense Impression.

(1) Rule 803(1) sets out an exception to the hearsay rule for an out-of-court statement that is declarant's present-sense impression describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.[30]

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[28] *See Stalbosky v. Belew*, 205 F.3d 890, 894 (6th Cir. 2000) (stating that "[u]nder Rule 801(d)(2)(A), a party's statement is admissible as non-hearsay only if it is offered against that party."; *United States v. Trujillo*, 146 F.3d 838, 844 (11th Cir. 1198) (indicating agreement with the district court's curative instruction "stating that 'any statements made by [the declarant] after his arrest can only be considered against [the declarant] and cannot be considered as to any other defendant.'"; *accord United States v. Eubanks,* 591 F.2d 513, 519 (9th Cir. 1979) ("Under the provisions of Rule 801(d), inculpatory statement by appellants . . . are admissible as party admissions only against the individual declarants.").

[29] FED. R. EVID 801(c) Advisory Committee's Note.

[30] *See, e.g., U.S. v. Green,* 556 F.3d 151, 155 (3d Cir. 2009).

(2) The underlying premise of this exception is that substantial contemporaneity of event and statement negative the likelihood of defective recollection or conscious misrepresentation. And if the witness is the declarant, the witness may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement.[31]

(3) Courts have not adopted any bright-line rule as to when a lapse of time becomes too lengthy to preclude Rule 803(1)'s application. Generally a statement made within minutes of the event that was observed by the declarant will fall within this exception[32] while statements while statements made after a period of time will not.[33]

b) Excited Utterance.

(1) Rule 803(2) sets out an exception to the hearsay rule for excited utterances relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused. This exception requires that (1) there was a startling event; (2) the statement was made while the declarant was under the stress of excitement from this event; and (3) the statement related to this event.[34]

(2) This exception is premised on the belief that a person is unlikely to fabricate lies (which presumably takes some deliberate reflection) while the declarant's mind is preoccupied with the stress of an exciting event.[35]

(3) To qualify for this exception, there must be evidence that an event occurred and that it was startling. The content of the statement itself may be the only proof of the startling event occurred because the court is not bound by the rules of evidence in making determinations of admissibility of evidence and is entitled to rely on hearsay.[36]

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[31] Advisory Committee Note to 803(1).
[32] *See, e.g., United States v. Shoup,* 476 F.3d 38, 42 (1st Cir.2007) (911 phone call made "only one or two minutes ... immediately following" event admissible); *United States v. Danford,* 435 F.3d 682, 687 (7th Cir.2006) (statement made "less than 60 seconds" after witnessing robbery qualified as present-sense impression).
[33] *United States v. Blakey*, 607 F.2d 779, 785 (7th Cir.1979)("we are nevertheless unaware of any legal authority for the proposition that 50 minutes after the fact may appropriately be considered "immediately thereafter."); *United States v. Narciso*, 446 F. Supp. 252, 287-88 (E.D. Mich. 1977) (note written two hours after event and in response to questions not present-sense impression because declarant "not only had time to reflect on what had transpired [but] was intentionally encouraged to reflect on those events before answering").
[34] *Woodward v. Williams*, 263 F.3d 1135, 1140 (10th Cir. 2001).
[35] *United States v. Joy*, 192 F.3d 761, 766 (7th Cir. 1999)
[36] Fed. R. Evid. 104(a)(in deciding questions of admissibility of evidence, "the court is not bound by the rules of evidence….").

(4) This exception is different from the present sense impression because the statement need not describe or explain the event or condition observed by the declarant; it must only relate to the event in some manner.[37]

c) Recorded Recollection.[38]

(1) Rule 803(5) sets out an exception to the hearsay rule for a record concerning a matter about which a witness once had personal knowledge but as to which the witness now has insufficient knowledge provided the record can be shown to:

(a) have been made or adopted by the witness when it was fresh in the witness' memory; and

(b) to accurately reflect the witness's memory.

(2) The requirement that the record concern a matter that "accurately reflects the witness's knowledge" means that the record will not be admissible unless the witness had sufficient personal knowledge of the events in question at the time of recording the recollection to satisfy the requirement that a witness must have personal knowledge of the matter to which the witness is testifying.[39]

(3) If the record is admitted, it may be read into evidence but not received as an exhibit unless offered by the adverse party.[40]

6. Residual Exception.[41]

a) A statement that does not fall within one of the enumerated hearsay exceptions in Rule 803 or 804 may nevertheless be admissible provided it has equivalent circumstantial guarantees of trustworthiness.

b) Five conditions must be met to admit hearsay evidence under the residual exception of Rule 807:

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[37] *Woodward v. Williams*, 263 F.3d 1135, 1141 (10th Cir. 2001)("The Advisory Committee Notes to Rule 803 specifically state that an excited utterance is not limited to a "description or explanation of the event or condition" but rather includes anything that "relate[s]" to the event."). In *Woodward,* the court held that the decedent's statement "He is going to kill me" was properly admitted at the defendant's trial for murder as an excited utterance because the statement was made after she witnessed a violent confrontation between her father and her estranged husband and while she was curled in a fetal position even though it did not describe a startling event that precipitated the statement. It was sufficient that the statement "relates to" the startling event.

[38] FED. R. EVID. 803(5).

[39] FED. R. EVID. 602 ("Need for Personal Knowledge").

[40] FED. R. EVID. 803(5).

[41] FED. R. EVID. 807.

(1) There must be equivalent circumstantial guarantees of trustworthiness;

(2) It must be offered as evidence of a material fact;

(3) It must be more probative than other available evidence;

(4) Admitting the evidence must serve the interests of justice; and

(5) Reasonable notice of the intent to offer the statement and the substance of the statement must be provided to the opposing party before trial.[42]

c) As to any failure to provide notice, the objecting party must show he was harmed by the testimony or that he did not have "a fair opportunity to meet the statements."[43]

B. Compromise and Offers to Compromise.

1. Evidence of an offer to compromise or conduct or a statements made during compromise negotiations about the claim is not admissible to prove or disprove the validity or amount of a disputed claim.[44]

2. Importantly, the claim must be disputed in some way before this rule of exclusion applies.

a) The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. That is, the rule requires that the claim be disputed as to either validity or amount.[45]

b) "The [Advisory Committee's] Note requires a careful distinction between frank disclosure during the course of negotiations—such as, 'All right, I was negligent. Let's talk about damages' (inadmissible)— and the less common situation in which both the validity of the claim and the amount of damages are

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[42] FED. R. EVID. 807. *See, e.g., United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984) (citing *United States v. Mathis*, 559 F.2d 294, 298 (5th Cir. 1977)).
[43] *United States v. Leslie*, 542 F.2d 285, 291 (5th Cir.1976). *See also United States v. Iaconetti*, 540 F.2d 574, 578 (2d Cir.1976), cert. denied, 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977) (holding that where "defendant did not request a continuance or in any way claim that he was unable adequately to prepare to meet the rebuttal testimony [it] further militates against a finding that he was prejudiced by it.").
[44] FED. R. EVID. 408.
[45] *Molinos Valle Del Cibao v. Lama,* 633 F.3d 1330 (11th Cir. 2011) (citing *Advisory Committee* Note to FED. R. EVID. 901; 2 WEINSTEIN'S FEDERAL EVIDENCE § 408.06 (2d ed. 2010)).

admitted—'Of course, I owe you the money, but unless you're willing to settle for less, you'll have to sue me for it' (admissible)."[46]

III. Commonly Overlooked Rules.

A. Limited Admissibility.

When evidence that is admissible as to one party or one purpose but not for another party or purpose is admitted, the court shall, upon request, restrict the evidence to its proper scope and instruct the jury accordingly.[47]

B. Remainder of or Related Writings.

When a writing or recorded statement is introduced by a party, and adverse party may require the introduction at that time of any other part or any other writing or recorded statement that ought in fairness to be considered at the same time.[48]

C. Habit; Routine Practice.

Evidence of a person's habits or an organization's routine practices is relevant to prove that the person or organization acted in conformity with the habit or routine practice on a particular occasion. This is true regardless of whether the evidence is corroborated.[49]

D. Rule of Sequestration of Witnesses.

1. The court must, if requested by a party, order witnesses excluded so that they cannot hear other witnesses' testimony. The court may also do so on its own.[50] The rule is one of the most important trial mechanisms for reaching truth. Sequestration of witnesses has been referred to as "one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice."[51]

2. The right to exclude witnesses was not created by the Federal Rules of Evidence. Its origin dates to the Book of Susanna, in the Apocrypha.[52] Susanna of Biblical times was charged with adultery, for which the penalty was death. Daniel, suspecting complicity between the two prosecutorial witnesses, issued this order: "Separate the witnesses far from each other, and I will examine them." When the

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[46] *Id.* (citing *Preis v. Lexington Ins. Co.,* 279 F. App'x 940, 942-43 (11th Cir. 2008); *Dallis v. Aetna Life Ins. Co.,* 768 F.2d 1303, 1306-07 (11th Cir. 1985)).
[47] FED. R. EVID. 105.
[48] FED. R. EVID. 106.
[49] FED. R. EVID. 406.
[50] FED. R. EVID. 615.
[51] Opus 3 Ltd. v. Heritage Park, Inc., 91 F.3d 625, 628 (4th Cir. 1996).
[52] "The history of Susanna," Art and the Bible (http://www.artbible.info/bible/susanna/1.html).

process revealed material discrepancies in the witnesses' stories, Susanna was acquitted and the witnesses were beheaded for giving false testimony. Professor Wigmore, characterizing the pedigree and importance of the sequestration rule, states, "There is perhaps no testimonial expedient which, with as long a history, has persisted in this manner without essential change."[53]

3. The Court, however, may not exclude any of the following:

a) A party who is a natural person.

b) An officer or employer that is a representative of a corporate party.

c) A person who is shown to by a party to be essential to a party's cause.

d) A person authorized by statute to be present. [54]

4. A common exception to this rule is expert witnesses whose presence may be to advise counsel in the management of the litigation.[55] The policy reasons for the sequestration rule preventing one witness from conforming his testimony to that of another are not applicable when an expert is involved. The expert testifies to his opinion, not to controverted facts.[56]

5. The sequestration rule has been held to apply to depositions.[57]

6. This rule has also been interpreted to include prohibiting witnesses from discussing their testimony with other witnesses outside of the courtroom. The rule, however, does not by its terms prohibit lawyers from communicating with witnesses. But the United States Supreme Court[58] has held that a trial court's inherent authority to control its proceedings includes the right to prohibit lawyers from communicating with witnesses—even when the witness is the lawyer's client. A lawyer seeking to preclude opposing counsel from communicating with a witness must request an appropriate order from the trial court. The decision to prohibit lawyers from communicating with witnesses is within the trial court's discretion.[59]

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[53] *Government of Virgin Islands v. Edinborough*. 625 F.2d 472, 473 (3rd Cir. 1980)(citing 6 Wigmore on Evidence § 1837, at 457).
[54] FED. R. EVID. 615.
[55] *Advisory Committee* Note to FED. R. EVID. 615 (citing 6 Wigmore §1841, n. 4).
[56] *See, e.g., Skidmore v. Northwest Engineering Co.,* 90 F.R.D. 75, 76 (S.D. Fla. 1981).
[57] *Id.* (citing *Williams v. Electronic Control Systems, Inc.,* 68 F.R.D. 703 (E.D. Tenn. 1975)).
[58] *Perry v. Leeke,* 488 U.S. 272, 283-84 (1989).
[59] For an excellent discussion of "invoking the rule" to preclude opposing counsel from communicating with witnesses, *see* Judge Tom Barber, *Restrictions on Lawyers Communicating with Witnesses During Testimony: Law, Lore, Opinions, and the Rule*, 83 Fla. Bar. J. 58 (July/August 2009).

E. Proffers.

1. Where an objection is sustained and evidence is excluded, to preserve a claim of error, the party offering the evidence must inform the court of its substance by an offer of proof, unless the substance is apparent from the context.[60]

2. The method of making the offer of proof is within the court's discretion and can take various forms:

a) Typically, a proffer is made by having the witness answer the question on the record out of the presence of the jury.

b) As an alternative, a proffer may also be made by including in the record a written statement of the anticipated answer.

c) Counsel may also orally proffer to the court the answer which is being excluded.[61]

IV. The "Do's" and "Don'ts" of Effective Witness Examination.

A. Direct Examination.

1. Applicable Rule.

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

2. Questions asked of the witness by the person calling the witness are called direct examination. With certain exceptions, leading questions should not be used on direct examination.

3. A leading question is one that suggests the answer to the person being questioned. If a question can be answered by a mere "yes" or "no" it is generally

[60] See FED. R. EVID. 103(a)(2).
[61] *Johnson v. Moore,* 493 F. Supp. 2d 1236, 1240 (citing Charles W. Ehrhardt, Florida Evidence (2006), § 104.3, pp. 31-32).

considered leading. As a general proposition, questions containing the words, "Who, What, When, Where, Why, or How," are not leading questions.

4. Examples:

a) Leading question—"Was Mr. Jones in the room with you?"

b) Non-leading question—"Who was in the room with you?"

5. Exceptions.

a) "[E]xcept as necessary to develop the witness' testimony." Rule 611(c) provides that even on direct examination leading questions are proper to the extent necessary to develop the witness' testimony. Examples:

(1) Undisputed preliminary or inconsequential matters may be brought out through leading questions. To lead a witness through questions on topics on which there is absolutely no controversy is an efficient use of court time and is harmless to the opposing party.

(2) A witness that has trouble communicating such as a child or an adult with a communication problem may be asked leading questions.

(3) A witness whose recollection has been exhausted may under appropriate circumstances have his or her memory refreshed through the use of leading questions.

(4) In making a transition, a witness may be led to a new topic.

b) Hostile Witnesses. Of course, when an adverse party is called or a witness who is shown to be hostile to the examiner's questions, then leading questions become necessary to elicit the truth. The harm of having friendly witnesses respond to suggestive questions is not present. In such cases, examination may proceed as if on cross-examination.

B. Cross-Examination.

1. Applicable Rule.

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

2. Scope of Cross-Examination.

While the scope of cross-examination should generally be limited to the subject matter of the direct examination and matters affecting credibility, it is often expedient from the standpoint of court time and the convenience of witnesses to inquire in areas that are not covered on direct examination. This is particularly true in bankruptcy court where evidentiary hearings are often conducted on an emergency basis and time is at a premium. Rule 611(b) in fact contemplates that the court has broad discretion to permit inquiry in additional areas. A simple request to the court to inquire outside the scope of direct accompanied by an explanation of the witness's personal needs will ordinarily be granted.

Note, however, that when cross-examination is permitted to go beyond the scope of direct, for example, to establish facts supporting an element of the examining party's case, the examiner is required to ask questions of non-hostile witnesses as if on direct.[62]

3. Practice Pointers.[63]

a) Before rising to cross-examine a witness, the advocate should first consider the following questions. Has the witness given any testimony that is harmful to the advocate's case? Are the facts testified to by the witness subject to reasonable dispute? Most importantly, is it necessary for the advocate to cross examine the witness at all?

b) In the words of one of the great trial lawyers of all times:

"Most young lawyers seem to think it is necessary to cross-examine every witness called against their side of the case. Being conscious of their own capacity as trial lawyers, they are afraid of being criticized by their clients or

[62] *MDU Resources Group v. W.R. Grace and Co.,* 14 F.3d 1274, 1282, n. 14 (8th Cir. 1994).
[63] For an informative and entertaining lecture on this topic *see* Irving Younger, The Ten Commandments of Cross-Examination (National Institute for Trial Advocacy 1975) (video recording available from Stetson University College of Law, Law Library) ("Younger's Ten Commandments").

> associates if they lose the opportunity for cross examining. At the very threshold of this discussion let me denounce this idea as most erroneous. Almost daily, even now, lawyers associated with me in my cases expostulate with me for allowing witnesses to leave the stand without any cross-examination, until the excited whisper in my ear, 'Are you going to ask this witness any questions at all?' has become so familiar that I should almost miss its absence in my daily work."[64]

c) More damage is done by attorneys to their client's cases in the area of cross-examination than any other area. All too often, gaps in an opposing party's prima facie case are filled by the other party on cross-examination. "An advocate should remember that 'he is the greatest cross examiner who makes the fewest blunders,' and a single mistake may make an opening for a flood of testimony that may overwhelm him."[65]

4. Cross-Examination of a Friendly Witness.

Oftentimes a party will call as a witness the opposing party or agent of the opposing party. The adverse party may use leading questions in the direct examination because the witness is the adverse party.[66] The attorney representing the party will then often proceed to use leading question on cross-examination of his own client. The same dangers exist in permitting leading questions in such instances. While Rule 611(c) provides that "ordinarily" leading questions should be permitted on cross-examination, the general rule has no applicability when the witness is friendly. In such instances, the prohibition against leading questions applies.[67]

5. Ten Rules of Cross-Examination.

Here are Ten Rules to follow when considering whether and how to conduct cross-examination:[68]

Rule #1: Be brief, short, and succinct. Use short questions with plain words. Avoid long complicated sentences containing clauses with subordinate

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[64] FRANCIS L WELLMAN, DAY IN COURT OR THE SUBTLE ARTS OF GREAT ADVOCATES 182 (The Macmillan Company 1910).

[65] *Id.* at 183.

[66] "Ordinarily, the court should allow leadings questions…when a party calls … an adverse party…." FED. R. EVID. 611(c)(2).

[67] According to the Notes of Advisory Committee on Proposed Rules to FED. R. EVID. 611, "[t]he purpose of the qualification 'ordinarily' is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the 'cross-examination' of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff." *See also Ardoin v. J. Ray McDermott & Company, Inc.,* 684 F.2d 335, 336 (5th Cir. 1982).

[68] Rules one through seven are adapted from Younger's Ten Commandments.

clauses on subordinate clauses. On a good day, you may have three points to make. Make them and sit down. Remember—the shorter the time you're on your feet, the less damage you'll do.

Rule #2: Never ask anything but a leading question. (Go ahead, put words in the witness's mouth—make the witness say what you want.)

Rule #3: Never ask a question to which you do not already know the answer. "[I]t should be remembered that fishing questions are very apt to catch the wrong answers."[69] Cross-examination is not a deposition—the time for discovery has passed! An exception to this is where it doesn't matter what the answer is.

Rule #4: Listen to the answer!

Rule #5: Do not quarrel with the witness. Avoid the one question too many. If you get a stupid answer, STOP. (See Rule #6 below.)

Rule #6: Never permit a witness to explain anything. They will.

Rule #7: Do not give the witness an opportunity to repeat what the witness said on direct examination. All too often the advocate takes the witness over the same story that the witness has already given his adversary in the absurd hope that the witness is going to change the story in the repetition and not retell it with double effect upon the trier of fact.[70] This only reinforces the other party's case.

Rule #8: When in doubt, stick to safe areas for cross, e.g., areas of impeachment (discussed below) such as bias or lack of sincerity, faulty perception, faulty memory, and prior inconsistent statements.

Rule #9: Don't make a mountain out of a mole hill. "The mistake should be avoided, so common among the inexperienced, of making much of trifling discrepancies. It has been aptly said that juries have no respect for small triumphs over a witness's self possession or memory."[71]

Rule #10: Don't be a jerk. "The sympathies of the jury [or judge] are invariably on the side of the witness, and they are quick to resent any discourtesy toward him."[72] "It is marvelous how much may be accomplished with the most difficult witness simply by good humor, a smile, and tone of friendliness."[73]

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[69] WELLMAN, *supra* note 15, at 185.
[70] *Id.* at 187.
[71] *Id.* at 195.
[72] *Id.* at 189.
[73] *Id.*

"An advocate should exhibit plainly his belief in the integrity of the witness and a desire to be fair with him, and try to induce him into being candid."[74]

6. Areas of Impeachment.

a) Bias, Interest, Prejudice, and Corruption.[75]

(1) While the Federal Rules of Evidence do not by their terms deal with impeachment for bias, interest, prejudice, or corruption, it is clear that the Rules do contemplate such impeachment.[76] In this respect, Rule 611(b) allows cross examination on matters affecting the credibility of the witness.

(2) Bias means the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, the witness's testimony in favor of or against a party. Bias may be induced by the witness's like or dislike of a party, or by the witness's self-interest. Proof of bias is always relevant and extrinsic evidence of it is admissible.[77]

(3) Prejudice is an irrational predisposition against the witness.

(4) Interest is having a stake in the outcome.

(5) Corruption is bribing a witness.

(6) Examples:

(a) Bring out any relationship between the witness and litigation that might reflect on the witness's objectivity. For example, after heartrending testimony of mother of plaintiff about how the accident has impaired his ability to function, counsel for the defense asks the following question and then sits down. "Mrs. Smith, you love your son don't you?"

(b) Bring out terms of compensation with respect to paid witnesses.

(c) The witness's meeting with opposing counsel and possible "coaching" received by witness by opposing counsel in connection with the witness's testimony may show bias.

b) Perception and Recollection.

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[74] *Id.* at 194.
[75] ROBERT E. OLIPHANT, YOUNGER ON EVIDENCE (WITH FEDERAL RULES OF EVIDENCE) 36 (self-published 1978) ("*Younger*").
[76] *United States v. Abel,* 469 U.S. 45, 50 105 S. Ct. 465, 468 (1984).
[77] *Id.*

(1) The object of this method is to elicit testimony that reflects adversely on the witness's capacity to observe or recall facts about which the witness is testifying.

(2) Examples:

(a) Physical proximity of witness to object or transaction observed.

(b) Weather, lighting, obstructions, and other conditions that might impair the witness his ability to observe.

(c) Coaching by opposing counsel may show that the witness's perception was not based upon personal knowledge but on what the witness was told by opposing counsel.

(d) The witness's incorporation of new and potentially inaccurate information that was learned afterwards. This could include later conversations with others that reinforced opinions about identification.

(e) Influence of drugs or alcohol either at the time of the event or at trial.

(f) Mental impairment at a time related to the time period about which the witness is testifying.

(3) Practice tips:

(a) Stick to the objective facts.

(b) Bad question: "Mrs. Jones, isn't it a fact that it was dark that night and you could not see what my client was doing?" Inevitably, the witness will testify that she could see just fine.

(c) Good question: "Mrs. Jones, isn't it a fact that the time of day that you saw my client was 1 AM?" Next question: "And the nearest streetlight was approximately 100 feet away?"

c) Character or Reputation for Truthfulness.

(1) Reputation.

(a) While generally evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, character evidence is admissible when it bears upon a witness's credibility. See Fed. R. Evid. 404(a)(3) and 608(a). The inquiry is strictly

limited to character for truthfulness rather than allowing evidence as to character generally.

(b) Proof of character for truthfulness or untruthfulness may be made by testimony as to reputation or by testimony in the form of an opinion. Rule 608(a).

(i) For reputation evidence, a foundation must be laid showing that the testifying witness has sufficient contact with the community to enable the witness to be qualified as knowing the general reputation of the person in question (or the community's assessment).

(ii) Opinion evidence does not require the same foundation required for reputation testimony. Opinion testimony relates only to the witness's own impression of an individual's character for truthfulness. Therefore, a foundation of long acquaintance is not required. An opinion witness may testify based upon that witness's personal knowledge.

(c) Character evidence in support of truthfulness is only admissible after the principal witness's character has been attacked by another witness testifying that the principal witness is untruthful. Rule 608(a)(2).

(d) A witness who is called to prove the bad reputation of another may, after he has testified to that reputation, be asked if he would believe the witness under oath.[78]

(e) Examples: testimony of employers, neighbors, family members, or former friends.

(2) Commission of Bad Acts.

(a) Under Rule 608(b), specific instances of bad conduct of a witness for purposes of attacking or supporting his credibility are not admissible with two exceptions:

(i) First, specific instances are admissible as set forth in Rule 609 when they have been the subject of a criminal conviction.

(ii) Second, specific instances may be inquired into on cross-examination of the principal witness or of a witness giving an opinion of the principal witness's character for truthfulness. The purpose of such testimony is to show that the witness's conduct is indicative of his character for untruthfulness.

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[78] *United States v. Walker*, 313 F.2d 236, 239-40 (6th Cir. 1963).

The conduct in question must be probative of untruthfulness and not be too remote in time.

(b) Examples: false statements, dishonest acts, or fraudulent acts.

(c) Specific instances of the conduct of the witness for purpose of attacking or supporting the witnesses character for truthfulness may not be proved by extrinsic evidence.

(3) Conviction of a Crime.

(a) Under Rule 609, evidence that a witness has been convicted of a crime shall be admitted to impeach the witness if the following conditions are met:

(i) The crime is punishable by imprisonment in excess of one year or an element of the crime required proof of dishonesty by the witness,

(ii) The court determines that the probative value of admitting the evidence outweighs its prejudicial effect, and

(iii) The witness was convicted or release from confinement less than 10 years ago. (If more than 10 years have elapsed, then the evidence may still be admissible if the proponent gives the adverse party notice of intent to use the evidence prior to trial.)

(b) The pendency of an appeal does not render the evidence of the conviction inadmissible.

d) Prior Inconsistent Statement.

(1) Rule 613 deals with impeachment through the use of prior statements of the witness whether written or not. This is a common form of impeachment and often occurs when a witness's testimony at trial differs from the witness's testimony at a deposition.

(2) In practice, there are three steps to impeachment through the use of a prior inconsistent statement -- Commit, Credit, Confront:

(a) Commit. Get the witness to recommit to the testimony that the witness gave on direct examination. For example, on cross you inquire: "Mr. Jones, during your direct testimony you testified that you are unaware of any roof leaks as of January 3, 2008, the date of the closing of the sale. Is that correct?"

(b) Credit. Get the witness to accredit the source of the prior statement. Remember you want the prior statement to win. If the prior source was testimony, go through the oath given prior to testifying, the importance that the

witness assigned to signing the affidavit or giving the deposition testimony, and the nearness in time of the testimony to the incident. This is why the "commitment questions" asked at the beginning of a deposition are so important.

(c) Confront. Read the prior inconsistent statement. The only question you need to ask is "Did I read that correctly?" The inconsistency will be self-evident. And then move on. Don't ask the witness to explain the inconsistency. It may also be useful, however, to show some intervening event that resulted in the change of testimony. This could be a meeting with opposing counsel or party, or the passage of time and the inherent human tendency to forget.

(3) The rules governing the impeachment of a witness by use of prior inconsistent statements are as follows:

(a) Under the Federal Rules of Evidence, counsel examining the witness concerning the prior statement need not show the contents nor disclose the contents to the witness at the time. Rule 613(a). In this respect, Rule 613(a) abolishes the requirement that a written statement be shown or read to witness prior to examination there on. This rule originated in the famous 1820 English decision in *Queen Caroline's Case.*[79] The rule was abolished in England in 1854. The rationale for abolishing this requirement was that showing the prior written statement to the witness on cross-examination may tip off the untruthful witness who will then tailor his testimony in a way that will minimize the impact of the inconsistency.[80] Although repealed in England, many states still follow the *Queen's Case* and require that prior to cross-examination of a witness concerning a prior inconsistent statement, the substance of the statement or the statement must be revealed to the witness.[81]

(b) However, under Rule 613(a), on request, the statement must be shown or disclosed to opposing counsel. This is designed to protect against unwarranted insinuations that a statement has been made when in the fact it has not.

(c) Extrinsic evidence of a prior inconsistent statement by the witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon. Rule 613(b).

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[79] *The Queen's Case,* 2 Brod. & Bing. 284, 129 Eng. Rep. 976 (1820).
[80] John H. Wigmore, *Some Evidence Statutes that Illinois Ought to Have,* 1 Ill. L. Rev. 9 (1906) ("In short, if the witness had lied, and was ready to lie again, this gave him full warning and every chance to evade detection. This rule did as much to blunt a legitimate cross-examination as any one rule could do.").
[81] *See, e.g.,* § 90.614(1), Fla. Stat. (2011).

(4) If impeachment is by deposition transcript already in the adverse party's possession, it is customary to specify the deposition date, page, and line of the deposition transcript being used to impeach.

(5) The use of prior inconsistent statements to impeach a witness under Federal Rule of Evidence 613 does not apply to statement of a party opponent as defined in Rule 801(d)(2).

(6) Under Rule 801(d)(1), prior statements of witnesses that are subject to cross-examination concerning the statement are by definition not hearsay so long as:

(a) The statement is inconsistent with the declarant's testimony and was given under oath at a hearing or deposition, or

(b) The statement is consistent with the declarant testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

e) Contradiction of Testimony by Other Witnesses.

The testimony of a particular witness can also be impeached by other witnesses who give a different and possibly more credible recitation of the relevant facts.

V. The "ABC's" of Documentary Evidence.

A. Basic Requirements.

1. As with all evidence, absent a stipulation, documents can only be admitted if a witness with personal knowledge establishes the predicate that the documents are **relevant**, **authentic**, and not subject to a **rule of exclusion**.

2. Best Evidence Rule. In early jurisprudence before the development of copy machines, the use of copies was disfavored because of the fear of an error in making copies by hand. This led to the development of the Best Evidence Rule under which the original was required for production at trial. However, with the advent of modern copy machines, there is no longer a problem with the accuracy of copies. As a result, while Rule 1002 provides that an original writing is required, this rule is followed by Rule 1003 which states that a duplicate is admissible to the same extent as an original unless a question is raised as to the authenticity of the original or circumstances exist under which it would be unfair to admit the duplicate in lieu of the original.

B. Authentication of Documents.

1. The authentication burden is a "light one."[82] The proponent only needs to establish a prima facie case that the document is what the proponent claims it is.[83] The proponent can meet this burden with circumstantial evidence of the authenticity of the underlying documents through the testimony of a witness knowledgeable about them.[84] Once that prima facie showing of authenticity is made, the ultimate question of the authenticity of the documents is left to the factfinder.[85]

2. If a document is being introduced through a witness's testimony, it may be authenticated by testimony of a witness with personal knowledge that it is what it purports to be. Fed. R. Evid. 901(b)(1).

3. Sample Predicate Questions.

Q: Ms. Smith, I show you what I've marked as Movant's Exhibit 1. Can you identify this document?

A: Yes I can.

Q: What is it?

A: It is the contract between my company and Acme Corporation.

Q: How do you know that?

A: I signed it. (OK)

I negotiated it. (OK)

I found it in the files. (NOT OK)

C. Writings are Hearsay.

1. Hearsay Defined.

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[82] *Curtis v. Perkins (In re International Management Assoc., LLC*), 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *United States v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir.2012) (refusing to disturb an authentication decision unless there is "no competent evidence in the record to support it").
[83] *United States v. Caldwell*, 776 F.2d 989, 1001–02 (11th Cir.1985) (holding that Rule 901 required only enough evidence that a jury "could have reasonably concluded" that a document was authentic).
[84] *See* FED. R. EVID. 901(b)(1); *Caldwell*, 776 F.2d at 1002–03.
[85] *See Caldwell*, 776 F.2d at 1002.

a) "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[86] A "statement" includes a written assertion.[87]

b) Thus, as a general proposition, writings are hearsay and are not admissible under Rule 802 unless they fall within one of the categories set forth in "statements which are not hearsay" as defined in Rule 801(d) or within one of the exceptions to hearsay as set forth in Rules 803 or 804.

2. Self-Serving Letters.

Often a party will offer into evidence a letter or other document written by a witness appearing at the trial. There is a misconception that the fact that the witness is available to be cross examined somehow makes the writing admissible. There are several problems with receiving such documents into evidence:

a) The documents fall within the definition of hearsay as written statements offered in evidence to prove the truth of the matter asserted. There is no exception to the hearsay rule contained in either Rule 803 or 804 for documents simply because they were prepared by a witness who is available to be cross examined.

b) Rule 801(d)(1) specifically deals with prior written statements by a witness who testifies at trial. This Rule provides that a statement is not hearsay if the declarant testifies at trial and the statement is *inconsistent* with the declarant's testimony, that is, it is a prior inconsistent statement. Such statements are commonly used for impeachment. This rule provides no basis for receiving into evidence prior consistent statements except in limited instances such as to rebut a charge of recent fabrication.[88]

c) Such documents typically contain numerous written assertions that have not been subjected to the rigors of the evidentiary process. That is, if the facts contained in the written assertions are to be received into evidence it must be shown that they are: (1) relevant, (2) based on the witness' personal knowledge, and (3) not subject to a rule of exclusion (e.g., the hearsay rule).

3. Appraisals and Other Expert Reports.

a) Invariably, after qualifying an expert witness to testify in the form of an opinion, the attorney calling the expert will move for introduction into evidence of the expert's written report. There is a misconception that because the witness is qualified to give the opinion set forth in the expert report, that the expert's written

[86] FED. R. EVID. 801(c).
[87] FED. R. EVID. 801(a).
[88] FED. R. EVID. 801(d) (1) (B).

report is admissible. To the contrary, opposing counsel should object to the admission of the expert report on the following grounds:

(1) The facts or data contained in the expert's written report need not be admissible in evidence in order for the expert's opinion testimony to be admissible.[89] Consequently, the expert's written report will contain inadmissible evidence. If the written report is admitted into evidence without any reservations, then inadmissible evidence relied upon by the expert will then become part of the record.

(2) As with self-serving letters, written reports prepared by experts fall within the definition of hearsay as written statements offered in evidence to prove the truth of the matter asserted. There is no exception to the hearsay rule contained in either Rule 803 or 804 for expert reports.

b) The opposing attorney should also be vigilant in objecting to the expert's testimony to ensure that it does not go beyond the opinions set forth in the written report. In this respect, the written report must contain a complete statement of all opinions the witness will express, the basis for the reasons for the opinions, and the data or other information considered by the witness in forming them.[90] Any testimony beyond the areas covered in the expert's written report should be objected to.

c) Even though the expert written report should not be admitted into evidence, it is nevertheless useful to have the report marked as an exhibit and received as a demonstrative aid to assist in following the expert's testimony. In this fashion, the inadmissible evidence contained in the report does not come into evidence. However, the report will be part of the record for reference purposes when considering the expert's testimony.

D. Business Records Exception.

1. Applicable Rule.

Rule 803(6). Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant is Available as a Witness

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

[89] FED. R. EVID. 703.
[90] FED. R. CIV. P. 26(a)(2)(B).

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.[91]

2. Historical Basis for Exception.

a) Shop Book Rule. The modern "business record" exception was derived from the common law "shop book rule." The American shop book rule was based upon the ground of necessity.[92] There were many small merchants who kept their own books and did not employ clerks or a bookkeeper; and since at ancient common law the parties to lawsuits were disqualified as witnesses, such merchants were nearly always without any available evidence to prove sales made by them on credit. Out of this necessity arose a rule permitting the use of a party's shop books as evidence of goods sold and services rendered. These are considered trustworthy because they are routine reflections of the day-to-day operations of the business.

b) To be distinguished are such records as accident reports or appraisals that may be routinely generated by the businesses who prepare them but do not have the same character of trustworthiness as "shop books," that is, books of account kept in the regular course of most businesses. As stated by the Supreme Court in *Palmer v. Hoffman,*[93] a case in which it was argued that accident reports regularly generated by a railroad in the conduct of its business were within the exception*:*

> "We would then have a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the [Business Records] Act. The result would be that the Act would cover any system of recording events or occurrences provided it was 'regular' and though it had little or nothing to do with the management or operation of the business as such. Preparation of cases for trial by virtue of

[91] FED. R. EVID. 803(6) (amended 2014) (shifting the burden to the opponent to show a lack of trustworthiness).
[92] *State v. Miller,* 144 P.3d 1052, 1058-60 (Or. App. 2006).
[93] 318 U.S. 109, 113-14, 63 S.Ct. 477 (1943).

> being a 'business' or incidental thereto would obtain the benefits of this liberalized version of the early shop book rule. The probability of trustworthiness of records because they were routine reflections of the day to day operations of a business would be forgotten as the basis of the rule."

c) It follows that the name by which this exception to the hearsay rule is referred—the "business record exception"—is a misnomer. The trustworthiness of this type of documentary evidence does not come from the fact that it is associated with a business. It comes from the fact that the process by which it was created was part of a regularly conducted activity of the business.[94] That is why the title to the exception is "Records of a Regularly Conducted Activity."

3. Establishing Business Records Exception Applies.

a) To establish that the business records exception applies, the proponent must show two things. First, that the underlying documents are authentic. Second, that the requirements of Rule 803(6) have been met.[95]

b) The authentication burden is a "light one."[96] The proponent only needs to establish a prima facie case that the document is what the proponent claims it is.[97] The proponent can meet this burden with circumstantial evidence of the authenticity of the underlying documents through the testimony of a witness knowledgeable about them.[98] Once that prima facie showing of authenticity is made, the ultimate question of the authenticity of the documents is left to the factfinder.[99]

4. Qualified Witness.

a) Rule 803(6) requires that the elements necessary to establish the document is a record of a regularly conducted activity be established by "the testimony of the custodian or other qualified witness." A receiver or bankruptcy trustee qualify as the "records custodians" for purposes of Rule 803(6).[100]

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[94] FED. R. EVID. 801(d) (1) (B); *see also* 28 U.S.C. § 1732.
[95] *United States v. Dreer,* 740 F.2d 18, 19-20 (11th Cir. 1984).
[96] *Curtis v. Perkins (In re International Management Assoc., LLC*), 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *United States v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir.2012) (refusing to disturb an authentication decision unless there is "no competent evidence in the record to support it").
[97] *United States v. Caldwell*, 776 F.2d 989, 1001–02 (11th Cir.1985) (holding that Rule 901 required only enough evidence that a jury "could have reasonably concluded" that a document was authentic).
[98] *See* FED. R. EVID. 901(b)(1); *Caldwell*, 776 F.2d at 1002–03.
[99] *See Caldwell*, 776 F.2d at 1002.
[100] *Curtis v. Perkins (In re International Management Assoc., LLC),* 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *Warfield v. Byron*, 436 F.3d 551, 559 (5th Cir. 2006) (holding that the federally appointed receiver for a Ponzi scheme qualified as the scheme's "record custodian").

b) What constitutes a "qualified witness" other than a custodian is not defined by Rule 803(6). Generally, this requirement is met by establishing that the witness is familiar with the practices of the business in question at the time.[101] But the testifying witness does not need firsthand knowledge of the contents of the records, of their authors, or even of their preparation.[102]

c) The witness need not be the person who actually prepared the records so long as other circumstantial evidence and testimony suggests their trustworthiness.[103] In *International Management Associates,* the Eleventh Circuit held that the bankruptcy court could have reasonably concluded that the underlying documents were a true and authentic record of the debtor's business where the trustee testified that all of the underlying documents were found at the debtor's offices and that the information in those documents substantially matched the records kept by the financial institutions and clients with which the debtor had transacted. "That is all Rule 901 required."[104]

d) Examples of types of testimony by a successor custodian such as a receiver or trustee that are sufficient to establish that the proffered document are business records under Rule 803(6):[105]

(1) The investigation conducted by the trustee into the reliability of the documents.

(2) Interviews with former employees that established that the debtor's office routinely created the documents based on its interactions with financial institutions and other parties.

(3) A reconciliation of the debtor's documents with corresponding files held by third party financial institutions and third parties.

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[101] Information in a business record, supplied by a prior business, can be authenticated by the present business holder of the record if the witness testifies to the present business holder's mechanisms (i.e. as part of the regular practice of business activity) for checking the accuracy of the prior business's information. *See Holt v. Calchas, LLC*, 155 So. 3d 499 (Fla. Dist. Ct. App. 2015) (explaining that a bank can use a prior bank's numbers in a business record when the current bank has "procedures in place to check the accuracy of the information that it received from the previous note holder").

[102] *See United States v. Bueno–Sierra*, 99 F.3d 375, 378–79 (11th Cir. 1996); *United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984); *United States v. Atchley*, 699 F.2d 1055, 1058–59 (11th Cir. 1983). *See also United States v. Box*, 50 F.3d 345, 356 (5th Cir. 1995) ("A qualified witness is one who can explain the system of record keeping and vouch that the requirements of Rule 803(6) are met....[T]he witness need not have personal knowledge of the record keeping practice or the circumstances under which the objected to records were kept.").

[103] *United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984).

[104] *Curtis v. Perkins (In re International Management Assoc., LLC*), 781 F.3d 1262, 1268 (11th Cir. 2015).

[105] *Id.*

e) The proponent's testimony establishing the foundation for the business records exception may be based on hearsay. Under Rule 104(a), a court in making admissibility determinations is not bound by evidence rules, except those based on privilege. As a result, when deciding whether an exception to the rule against hearsay applies, the court may consider any unprivileged evidence—even hearsay.[106]

5. Elements.

a) The exhibit being offered is a business **record**;

b) It is a record of an **event**;

c) The record was **made by**, or from information transmitted by, a person with knowledge of the transaction recorded;

d) The record was **made at or near the time** of the acts or event recorded;

e) The record is kept in the course of a **regularly conducted business activity**; and

f) It was the **regular practice of that business activity to make the record**.[107]

6. Example.

Here's an example in the context of establishing that a check register in a preference action is within this exception:

a) **Record**: check register.

b) **Event**: payment of invoice.

c) **Made by**: accounts payable clerk.

d) **Made at or near time**: when check is written.

e) **Regularly conducted business activity**: payment of invoices.

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[106] *Id. (citing United States v. Byrom*, 910 F.2d 725, 734–35 (11th Cir. 1990).
[107] *See generally In re Vargas*, 396 B.R. 511, 518 (Bankr. C.D. Cal. 2008) (applying the basic elements to records maintained electronically and further detailing an "11-step foundation" for authenticating computer records).

f) **Regular practice of business to keep records of payments of invoices**: You betcha'!

7. Sample Qualifying Questions.

Q: Ms. Smith, what was your position with company at time of bankruptcy filing?

A: Central office manager.

Q: How long were you so employed?

A: One year.

Q: What were your responsibilities?

A: I oversaw different departments in Acme's headquarters.

Q: Did this include bookkeeping?

A: Yes, it did.

Q: As former manager, what, if any, familiarity do you have with record keeping procedures employed by Acme during year prior to bankruptcy?

A: It was one of my areas of responsibility so I was very familiar with bookkeeping procedures and would do reviews and spot checks on a routine basis.

Q: Does this include the method used by the company for preparing check registers?

A: Yes.

Witness qualified? Sure. The witness was not the custodian or person who created the record, but the witness was certainly familiar with the process.

Now that we have a qualified witness, let's go through the elements:

Q: Let me show you what I've marked as Trustee's Ex. 1. What is it?

A: These are the check registers for Acme for the year before filing of the bankruptcy.

Q: What information do they reflect?

A: They list the check number, date of the check, invoice number, invoice date, payee, and the amount.

Q: When are they prepared?

A: On the day that the checks are mailed.

Q: Who prepares the check registry?

A: The accounts payable clerk.

Q: Does he or she actually mail the check?

A: No, it's done by a bookkeeper in one of the remote offices. They are the ones who actually prepared and mailed checks.

Q: What are these checks in payment of?

A: They are everyday A/P's owing to vendors.

Q: Was payment of A/P's in this manner a regularly conducted business activity of Acme?

A: Sure, if we wanted to stay in business.

Q: Was it the regular practice of Acme to make these records in this fashion?

A: Absolutely.

8. Pre-Trial Declaration as Alternative to Witness.

a) FED. R. EVID. 803(6) provides, as an alternative to introducing the evidence at trial through a "qualified witness," the filing and serving of a certification that complies with FED. R. EVID. 902(11).

b) Applicable Rule.

Rule 902. Evidence that is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them.

E. Summaries to Prove Content.

1. Under Rule 1006 a proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court.

2. The only textual limit placed on the use of summaries by Rule 1006 is that "[t]he proponent most make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place."[108]

3. Rule 1007 does not require the proponent to introduce the underlying documents into evidence. However, establishing the admissibility of the underlying records is a condition precedent to introduction of the summary into evidence under Rule 1007.[109]

F. Social Media.

1. As with all evidence, absent a stipulation, copies of information obtained from social media sources can only be admitted if a witness with personal knowledge establishes the predicate that the documents are authentic, relevant, and not subject to a rule of exclusion, e.g., hearsay.

2. As with documentary evidence in general, the authentication burden is a "light one." The proponent only needs to establish a prima facie case that the

[108] *Curtis v. Perkins (In re International Management Assoc., LLC)*, 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *United States v. Johnson,* 594 F.2d 1253, 1257 (9th Cir. 1979).
[109] *Id.*

document is what the proponent claims it is. The proponent can meet this burden with circumstantial evidence of the authenticity of the underlying documents through the testimony of a witness knowledgeable about them. Once that prima facie showing of authenticity is made, the ultimate question of the authenticity of the documents is left to the factfinder.[110]

3. If a document is being introduced through a witness's testimony, it may be authenticated by testimony of a witness with personal knowledge that it is what it purports to be. Fed. R. Evid. 901(b)(1).

4. The authentication burden is a "light one."[111] The proponent only needs to establish a prima facie case that the document is what the proponent claims it is.[112] The proponent can meet this burden with circumstantial evidence of the authenticity of the underlying documents through the testimony of a witness knowledgeable about them.[113] Once that prima facie showing of authenticity is made, the ultimate question of the authenticity of the documents is left to the factfinder.[114]

5. If a document is being introduced through a witness's testimony, it may be authenticated by testimony of a witness with personal knowledge that it is what it purports to be. Fed. R. Evid. 901(b)(1).

6. See United States v. Browne, 834 F.3d 403, 414 (3d Cir. 2016) (finding authentication burden met when witness offered testimony linking Facebook account to defendant and account details matched those of defendant); State v. Ross, 2018-Ohio-3027, ¶ 40, 118 N.E.3d 371, 383 (affirming lower court's admission of screenshots of Facebook comments allegedly made by defendant based on witness testimony).

7. See, e.g., State v. Griffith, 449 P.3d 353, 357 (Ariz. Ct. App. 2019) (admitting authenticated Facebook messages as statements made by and offered against a party-opponent); State v. McCarrel, 2019-Ohio-2984, ¶ 38–41 (screenshots of Facebook messages admitted as admission by party-opponent); Browne, 834 F.3d 403, 442 (same for Facebook chats).

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[110] *Curtis v. Perkins (In re International Management Assoc., LLC*), 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *United States v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir.2012) (refusing to disturb an authentication decision unless there is "no competent evidence in the record to support it").

[111] *Curtis v. Perkins (In re International Management Assoc., LLC*), 781 F.3d 1262, 1268 (11th Cir. 2015)(citing *United States v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir.2012) (refusing to disturb an authentication decision unless there is "no competent evidence in the record to support it").

[112] *United States v. Caldwell*, 776 F.2d 989, 1001–02 (11th Cir.1985) (holding that Rule 901 required only enough evidence that a jury "could have reasonably concluded" that a document was authentic).

[113] *See* FED. R. EVID. 901(b)(1); *Caldwell*, 776 F.2d at 1002–03.

[114] *See Caldwell*, 776 F.2d at 1002.

8. By "liking" Ms. Hyland's comment, Mr. Aleksandr affirmed that the apartment belonged to him. See Bryant v. Wilkes-Barre Hosp. Co., LLC, 2016 WL 3615264, at *3 (M.D. Pa. July 6, 2016) (admitting Facebook comments made and liked by plaintiff on a Facebook page based on probative value).

9. Authenticated social media evidence can be admitted as statements of a party opponent. See, e.g., Griffith, 449 P.3d at 357 (Ariz. Ct. App. 2019) (admitting authenticated Facebook messages).

10. See Tripkovich v. Ramirez, No. CV 13-6389, 2015 WL 13544196, at *2 (E.D. La. June 30, 2015) (holding that plaintiff's Facebook and Instagram photographs undermining her previous testimony are relevant and admissible because they go to the question of her credibility); see also Burdyn v. Old Forge Borough, 2019 WL 1118555, at 7–11 (M.D. Pa. Mar. 11, 2019) (lower court did not abuse discretion by admitting Instagram photograph and caption that raised a question as to plaintiff's motive and bias).

11. Finally, Ms. Mawford and "petroboi4eva"'s wordless "like"s of Ms. Hyland's comment are so vague and ambiguous as to provide the finder of fact with no meaningful probative information. See People v. Johnson, 51 Misc. 3d 450, 455 (N.Y. Co. Ct. 2015) (holding that an image of witness's Facebook page showing that she "liked" a website is inadmissible).

VI. Use of Depositions at Trial.

A. General Rule.

At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise.[115] The Advisory Committee drafted Rule 43(a) to combat the practice in equity of presenting juries with edited depositions of witnesses' testimony.[116] The federal rules strongly favor the testimony of live witnesses wherever possible, so that the jury may observe the demeanor of the witness to determine the witness's veracity.[117] For testimony to be presented "orally in open court," the witness must be present in the courtroom.[118] However, there are circumstances when the use of a deposition taken prior to the trial may be used as allowed by FED. R. CIV. P. 32.

[115] Fed. R. Civ. P. 43
[116] See 9 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2408, at 331 (1991).
[117] See 5 Moore's Federal Practice ¶ 43.03 (1990).
[118] Murphy v. Tivoli Enterprises, 953 F.2d 354, 359 (8th Cir. 1992)

B. FED. R. CIV. P. 32 in application.

1. Under FED. R. CIV. P. 32, a deposition may be used at an evidentiary hearing if three requirements are met:

a) The testimony must be admissible under the Federal Rules of Evidence as if the deponent were present and testifying at the hearing;

b) The party against who the deposition testimony is being offered must have been present or had the opportunity to be present at the deposition; and

c) One of the following circumstances must be present:

(1) The deposition is being **used to impeach** a witness;

(2) The **deposition is of a party** and it is being **offered by an adverse party**; or

(3) The witness is **unavailable**.

2. A witness is "unavailable" for purposes of FED. R. CIV. P. 32 if the witness is:

a) Dead;

b) Located outside the subpoena range of the court;

c) Unable to attend due to age, illness, infirmity, or imprisonment; or

d) Exceptional circumstances exist.

C. Rule 801(d) in application.

1. This rule defines certain out-of-court statements as not being hearsay. Included among these are two that apply to the use of depositions at an evidentiary hearing:

a) A prior statement by the witness that is inconsistent with the witness's testimony at the evidentiary hearing. FED. R. EVID. 801(d)(1)(A).

b) A statement by a party opponent under FED. R. EVID. 801(d)(2)(A). This can either be the party's own statement or a statement made by the party's agent concerning a matter within the scope of the agency or employment made during the existence of the relationship.

D. Rule 804(b)(1) in application.

1. This rule creates an exception to the hearsay rule with respect to former testimony given by a witness in a deposition if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by direct or cross examination if the party offering the deposition testimony can show that the witness is "unavailable."

2. "Unavailability" for purposes of Rule 804(b)(1) is broader than the same term as used in Fed. R. Civ. P. 32 and, in addition to the circumstances described therein, includes:

a) A witness exempted from testifying on the ground of **privilege**;

b) A witness who persists in **refusing to testify**;

c) A witness with a **lack of memory;**

d) A witness who is unable to be present or testify at the hearing because of **death** or then existing **physical or mental illness or infirmity**; and

e) A witness who is absent from the hearing and the proponent of the statement has been **unable to procure the declarant's attendance** by process or other reasonable means.

3. If a party seeks to offer a declarant's former testimony under Rule 804(b)(2) (statement under belief of impending death), (b)(3) (statement against interest), or (b)(4) (personal or family history), the declarant is not deemed unavailable under Rule 804(a)(5)—and the evidence therefore is not admissible—if the party offering the evidence had an opportunity to depose the declarant but refused to do so.[119]

4. A transcript of a debtor's section 341 examination is not admissible as the debtor's former testimony because the party against whom the transcript is offered ordinarily would not have had a similar motive to develop the testimony by direct or cross examination.[120] That transcript, however, may be admissible against the

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[119] FED. R. EVID. 804(a)(5) (unavailability includes a witness who "is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), (4), *the declarant's attendance or testimony*) by process or other reasonable means") (emphasis added); *United States v. Gabriel*, 715 F.2d 1447, 1450-51 (10th Cir. 1983) (explaining that the parenthetical added in Rule 804(a)(5) was "'designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable'") (citing H.R. Rep. No. 650, *reprinted in* 1974 U.S.C.C.AN. 7051, 7075, 7088).

[120] *Salven v. Mendez (In re Mendez)*, 2008 WL 597280, *7 (Bankr. E.D. Cal. Feb. 29, 2008).

debtor as a statement by an opposing party (Rule 801(d)(2)) or under another hearsay exception depending on the facts of the particular case.[121]

VII. Judicial Notice.

A. Defined.

"A court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact; the court's power to accept such a fact <the trial court took judicial notice of the fact that water freezes at 32 degrees Fahrenheit>."[122]

B. Applicable Rule

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

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

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

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

[121] *Id.* (admitting debtor's section 341 transcript under Rule 807's residual hearsay exception).
[122] BLACK'S LAW DICTIONARY 863-64 (8th ed. 2004) (also termed "judicial cognizance" or "judicial knowledge").

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

C. Adjudicative Facts.

1. As state in Federal Rule of Evidence 201(a)("Scope"), the Rule governs judicial notice of an adjudicative fact only, not a legislative fact.

2. Adjudicative Facts. "When a court…finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court…is performing an adjudicative function, and the facts so determined are conveniently called adjudicative facts."[123]

3. Legislative Facts. "When a court…develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which inform the [court's] legislative judgment are called legislative facts."[124]

D. Procedure.

1. Judicial notice may be taken at any stage of a proceeding[125] including appeal.[126]

2. However, a party is entitled to be heard with respect to the propriety of taking judicial notice and the nature of the fact to be noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.[127] Thus, for example, if a bankruptcy court implicitly took judicial notice, *sua sponte*, in considering the debtor's schedules in arriving at a ruling, on appeal, the matter may be remanded to allow the disadvantaged party to be afforded notice and opportunity to respond.[128]

3. Where judicial notice is taken without prior notice, the burden is on the disadvantaged party to make a request for a hearing to challenge the propriety of taking judicial notice.[129]

E. Scope—Adjudicative Facts.

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[123] Kenneth Culp Davis, *Judicial Notice,* 55 Columbia L. Rev. 945, 952 (1955).
[124] *Id.*
[125] FED. R. EVID. 201(f).
[126] *Nantucket Inv. II v. Cal. Fed. Bank (In re Indian Palms Assocs.)*, 61 F.3d 197, 204 (3d Cir. 1995).
[127] FED. R. EVID. 201(e).
[128] *Annis v. First State Bank of Joplin*, 96 B.R. 917, 920 (W.D. Mo. 1988).
[129] *Calder v. Job (In re Calder)*, 907 F.2d 953, 955 n.2 (10th Cir. 1990).

1. Judicial notice is limited to adjudicative facts. Adjudicative facts are ones that are not subject to reasonable dispute because they are either:

a) Generally known with the territorial jurisdiction of the trial court, or

b) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

F. Judicial Notice Categories.

1. *Varco v. Lee*[130] Category of Facts.[131]

a) In *Varco v. Lee,* the California Supreme Court took judicial notice for the first time in the case that Mission Street in San Francisco between Twentieth and Twenty-Second Streets was a business district.

b) As explained by the court, this judicial notice of this fact was properly subject to judicial notice because:

(1) The fact was one of "**common** and general **knowledge**";

(2) The fact was "well established and authoritatively settled, … practically **indisputable**"; and

(3) "This common, general, and certain **knowledge exists in the particular jurisdiction**."[132]

2. Almanac Type Facts.[133]

a) Almanac type facts are facts that are typically found in almanacs such as calendar, astronomical, and historical facts.

b) A good example of the use of almanac type facts was the cross examination of the key prosecution witness by then defense attorney Abraham Lincoln in the case of *People v. Armstrong*. Through the use of an almanac, young Lincoln was able to show that at the time that the critical prosecution eyewitness saw the shooting "by the light of the moon," the moon had already set.

3. Scientific Basis of Technical Concepts.[134]

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[130] *Varco v. Lee*, 181 P. 223, 225-26 (Cal. 1919).
[131] OLIPHANT, *Younger*, supra note 24, at 5-7.
[132] *Varco,* 181 P. at 226 (emphasis added).
[133] *Younger,* at 5-6.
[134] *Younger,* at 6-7.

a) When scientific concepts or devices first form the basis for testimony in a courtroom, their scientific basis must be shown by expert testimony.

b) At some point, however, appellate courts conclude that there is general agreement among the experts that there is a valid scientific basis in the laws of nature supporting the concept or device.

c) Examples: radar,[135] breathalyzer,[136] and blood grouping.[137]

4. Courts Records.

a) Generally. Requests for judicial notice of court records typically fall into one of three categories:

(1) Establishing the genuineness of the documents without going through the steps normally needed to authenticate documents. This is the equivalent of a certificate regarding custody by a judge of a court of record of the district in which the record is kept.[138] The fact the document is genuine does not mean that the court can automatically accept as true the facts contained in such documents. Statements in the documents must be otherwise admissible under the Federal Rules of Evidence, for example, as an evidential admission offered against a party.[139]

(2) Taking as true the recording of the judicial acts contained in the record. Commentators suggest that the better practice is to admit the record under the official records exception to the hearsay rule so that evidence of any inaccuracy in the record may be established.[140]

(3) The third, "and widely criticized," use of judicial notice of court records is to take as conclusively established the facts that are set forth in the records.[141] A previously filed court document will generally not be competent evidence of the truth of the matters asserted therein solely because the court has taken judicial notice of its existence.[142]

(4) That is, there is a crucial distinction between taking judicial notice of the fact that an entity has filed a document in the case, or in a related case, on a given date, i.e., the existence thereof, and the taking of judicial notice of the truth or

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[135] *State v. Graham,* 322 S.W.2d 188, 195-97 (Mo. 1959).
[136] *McKay v. State,* 235 S.W.2d 173, 175 (Tex. 1950).
[137] *State v. Damm,* 266 N.W. 667, 668-69 (S.D. 1936).
[138] *In re Bestway Prods., Inc.*, 151 B.R. 530, 540 (Bankr. E.D. Cal. 1993).
[139] *Id.*; FED. R. EVID. 801(d)(2).
[140] *In re Bestway Products, Inc.*, 151 B.R. at 540 n.33 (citing 21 WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5106 (1992 Supp.)).
[141] *In re Bestway Products, Inc.*, 151 B.R. at 540 n.33.
[142] *Nantucket Inv. II v. Cal. Fed. Bank (In re Indian Palms Assocs.)*, 61 F.3d 197, 204 (3d Cir. 1995).

falsity of contents of any such document for the purposes of making a finding of fact.[143] Accordingly, while a bankruptcy court may take judicial notice of its own records, it may not "infer the truth of facts contained in documents, unfettered by rules of evidence or logic, simply because such documents were filed with the court."[144]

b) Examples:

(1) Plan Votes. To establish whether the plan has received the votes needed to confirm the court may take judicial notice of the proofs of claim and the presence in the schedules of amounts due to other claimants who have not filed proofs of claim.[145]

(2) Omissions from Schedules. The court may take judicial notice of the debtor's statement of affairs and schedules as not listing certain assets alleged not to be disclosed in an action under Bankruptcy Code § 727(a)(4).[146]

(3) Absence of Pending Adversary. The court may take judicial notice of the failure of a Chapter 7 trustee to have filed an action to set aside a fraudulent conveyance.[147]

(4) Docket Sheets. The court may take judicial notice of the docket sheets in an adversary proceeding and the debtor's main case.[148]

(5) Debtor's Insolvency. Several opinions have held that a court may take judicial notice of the debtor's schedules in order to determine if the debtor was insolvent on the date of an alleged preferential transfer.[149] The better view, however, is that the contents of the schedules when used against a third party are hearsay and inadmissible to prove the truth of the matters asserted therein. In addition, the schedules may not be used for that purpose since the schedules are

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[143] *In re Earl*, 140 B.R. 728, 731 n.2 (Bankr. N.D. Ind. 1992).
[144] *Staten Island Sav. Bank v. Scarpinito (In re Scarpinito)*, 196 B.R. 257, 267 (Bankr. E.D.N.Y. 1996) (citing BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 201.5 (1995)).
[145] *In re Am. Solar King Corp.*, 90 B.R. 808, 829 n.41 (Bankr. W.D. Tex. 1988) (citing BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL, § 201. 5 (2007) ("Whether the information contained in the schedules is true is immaterial to this inquiry.").
[146] *Calder v. Job (In re Calder)*, 907 F.2d 953, 955 n.2 (10th Cir. 1990) ("In this case, the bankruptcy court, consistent with Rule 201(b)(2), simply took judicial notice of the contents of . . . [the debtor's] Statement of Affairs and Schedule B-1 and not the truthfulness of the assertions therein.").
[147] *Pruit v. Gramatan Inv. Corp. (In re Pruitt),* 72 B.R. 436, 440 (Bankr. E.D.N.Y. 1987).
[148]*Muzquiz v. Weissfisch*, 122 B.R. 56, 58 (Bankr. S.D. Tex. 1990).
[149] *See, e.g.*, *In re Trans Air, Inc.*, 103 B.R. 322, 325 (Bankr. S.D. Fla. 1988); *In re Claxton*, 32 B.R. 219, 222 (Bankr. E.D. Va. 1983); *In re Blue Point Carpet, Inc.*, 102 B.R. 311, 320 (Bankr. E.D.N.Y. 1989).

reflective of the debtor's financial condition on the date of the petition and not on the date of the transfers.[150]

VIII. Admissions.

A. Generally.

There are two types of admissions. The first type is an opposing party statement. This type is also discussed in Section II above in the context of hearsay. These types of admissions are commonly called evidentiary admissions. The second type of admission is a judicial admission.

B. Evidentiary Admissions.

1. Applicable Rule.

Rule 801(d)(2). Definitions that Apply to this Article; Exclusions from Hearsay

(d) Statements that are not Hearsay.

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

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

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

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

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

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

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

2. Rule 801(d)(2) classifies an opposing party's statement or evidentiary admission (formerly known as admissions by a party opponent) as not hearsay. This

[150] *In re Strickland*, 230 B.R. 276, 282 (Bankr. E.D. Va. 1999) (citing BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 201.8 (1988)).

is so even though they are out-of-court statements offered to prove the truth of the matter asserted and would otherwise fall squarely within the definition of hearsay.[151]

3. Simply stated, an evidentiary admission is a statement of a party or a party's agent offered against the party by an opposing party. It does not have to be "against interest" and is not to be confused with a "declaration against interest" which is an exception to the hearsay rule for statements made by unavailable witnesses.[152]

4. Even if a prior statement by a party is determined not to be a judicial admission and, therefore, not conclusive, it may still operate as an "adverse evidentiary admission" properly before the court in its resolution of the factual issue.[153] However, as evidentiary admissions, they may be controverted or explained by the party against whom they are being offered.[154]

5. Statements made by a debtor are admissible as admissions by a party opponent (or an opposing party's statement) against a chapter 7 trustee or liquidating trustee where the trustee stands in the shoes of the debtor when bringing the action.[155] After all, a trustee is "generally bound by the bankruptcy waivers, estoppels, and admissions" of a debtor.[156] But a debtor's statements may not be admissible against the trustee as an admission if the trustee is not standing in the shoes of the debtor but instead is bringing the action on behalf of creditors of the estate, such as a fraudulent transfer action.[157]

C. Judicial Admissions.

1. Defined.

"A formal waiver of proof that relieves an opposing party from having to prove the admitted fact and bars the party who made the admission from disputing it."[158]

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[151] FED. R. EVID. 801(c).
[152] FED. R. EVID. 804(b)(3).
[153] *White v. Arco/Polymers, Inc.*, 728 F.2d 1391, 1396 (5th Cir. 1983).
[154] BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 801.22 (2007).
[155] *In re Bayonne Medical Ctr.*, 2011 WL 5900960, at *11 & n.41 (Bankr. D.N.J. Nov. 1, 2011) (explaining that the "liquidating trustee, plaintiff here, cannot avoid the [debtor's] admission given that he stands in the place instead of [the Debtor] and the action . . . is derived directly from [the Debtor]").
[156] *In re Dancer*, 2 F. Supp. 634, 635 (D.C.N.J. 1932) (citing 4 Remington on Bankruptcy § 1419 (3d ed.)).
[157] *Bayonne Medical Ctr.*, 2011 WL 5900960, at *11 & n.41.
[158] BLACK'S LAW DICTIONARY 51 (8th ed. 2004) (also termed "solemn admission"; "admission injudicio"; "true admission").

2. Effect.

A judicial admission is an admission made by a party in pleadings, stipulations, and the like and do not have to be proven in the litigation in which they are made.[159] It is conclusively binding upon the party making the admission for purposes of the case in which made, provided that the admission is unequivocal.[160]

3. Scope.

Judicial admissions are restricted in scope to matters of fact which otherwise would require evidentiary proof.[161] Conclusions of law—e.g., that a party was negligent or caused an injury, do not lie within the scope of the doctrine of judicial admission.[162] For example, the admission that an agreement is a "true lease" is a conclusion of law and cannot constitute a judicial admission.[163]

4. Examples of Assertions That Are Judicial Admissions.

a) Factual assertions in pleadings.[164]

b) Contents of court orders.[165]

c) Statements in proofs of claim and in an objection to a proof of claim in a contested matter objecting to the claim are judicial admissions.[166]

d) Matters set out in the debtor's schedules may constitute judicial admissions. Thus by failing to qualify the schedule's description so as to include the term "disputed," the debtor may have waived the right to contest a debt's existence.[167] On the other hand, because schedules are filed in the "main" case as opposed to a particular adversary proceeding or contested matter, they may simply be considered evidential admissions rather than judicial admissions.[168] As evidential admissions, they would not be conclusive.[169]

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[159] *Gianne v. United States Steel Corp.*, 238 F.2d 544, 547 (3d Cir. 1956).
[160] *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir. 1972).
[161] *Id.*
[162] *Gianne*, 238 F.2d at 547.
[163] *In re Pittsburgh Sports Assocs. Holding Co.*, 239 B.R. 75, 81 (Bankr. W.D. Penn. 1999).
[164] *Myers v. Manchester Ins. & Indem. Co.*, 572 F.2d 134, 134 (5th Cir. 1978).
[165] *In re Camp*, 170 B.R. 610, 612 (Bankr. N.D. Ohio 1994).
[166] *Jenkins v. Tomlinson (In re Basin Resources Corp.)*, 182 B.R. 489, 493 (N.D. Tex. 1995).
[167] *Morgan v. Musgrove (In re Musgrove)*, 187 B.R. 808, 812 (N.D. Ga. 1995).
[168] *In re Cobb*, 56 B.R. 440, 442 n.3 (Bankr. N.D. Ill. 1985).
[169] *Id.*; *contra Larson v. Groos Banks*, 204 B.R. 500, 502 (W.D. Tex. 1996) (court granted summary judgment against the former Chapter 7 debtor in an action against a bank for violating the Fair Credit Reporting Act on the basis that the debtor's listing as "None" in response to the schedule category under which the debtor was required to list "Other contingent and unliquidated claims of

e) Statements of counsel, although not evidence, may be judicial admissions.[170]

f) Concessions made by counsel in open court are binding as judicial admissions.[171]

g) Contents of requests for admissions where no response is filed by the opposing party.[172]

5. Examples of Assertions That Are Not Judicial Admissions.

a) Admissions made in another proceeding are not conclusive and binding judicial admissions.[173] This includes admissions made in other motions or adversary proceedings, which were conducted in the same bankruptcy case. While these may be admissible as an admission of a party-opponent, they are not judicial admissions with conclusive effect because they were not made in the same proceeding.[174]

b) Admissions made in superseded pleadings are as a general rule considered to lose their binding force, and to have value only as evidentiary admissions.[175] However, where the amendment only adds allegations, deleting nothing stated in prior pleadings, admissions made in the prior pleadings continue to have conclusive effect.[176]

c) Statements of value in schedules relate to value and are matters of opinion as opposed to fact. Thus, they do not constitute judicial admissions but only evidential admissions.[177]

IX. Expert Opinion Testimony.

A. *Daubert*[178]

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every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims" constituted a judicial admission that he had suffered no damages in the case).

[170] BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 801.20 (2007); *In re Stephenson*, 205 B.R. 52 (Bankr. E.D. Pa. 1997).

[171] I*n re Menell*, 160 B.R. 524, 525 n.3 (Bankr. D.N.J. 1993); BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 801.22 (2007).

[172] *In re Tabar*, 220 B.R. 701, 703 (Bankr. M.D. Fla. 1998).

[173] *Universal Am. Barge Corp. v. J. Chen., Inc.*, 946 F.2d 1131, 1142 (5th Cir. 1991).

[174] *Jenkins v. Tomlinson (In re Basin Resources Corp.)*, 182 B.R. 489, 491 (N.D. Tex. 1995); *see also In re Cobb*, 56 B.R. 440, 442 n.3 (Bankr. N.D. Ill. 1985) (schedules are filed in the "main" case as opposed to a particular adversary proceeding or contested matter and, accordingly, are evidential admissions as opposed to judicial admissions).

[175] *Borel v. United States Casualty Co.*, 233 F.2d 385, 387-88 (5th Cir. 1956).

[176] *Dussour v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 601 (5th Cir. 1981).

[177] *In re Cobb*, 56 B.R. at 442 n. 3 (citing *Fairbanks v. Yellow Cab. Co.*, 346 F.2d 256 (7th Cir. 1965)).

[178] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993).

1. Opinion testimony arises in bankruptcy courts in numerous circumstances ranging from a chapter 13 debtor's testimony on the value of the debtor's furniture and appliances in a contested plan confirmation hearing to an accountant's testimony on the sufficiency of a fund to cover future personal injury claims in the context of confirmation of a chapter 11 plan of reorganization resolving mass tort claims.

2. One of the most important tools available to bankruptcy practitioners faced with the introduction of such opinion testimony is an objection under *Daubert*, as implemented through Rule 702 of the Federal Rules of Evidence. Unfortunately, this tool is often neglected based on a misconception that it has little application to the routine types of opinion testimony that regularly occur within the context of a bankruptcy case.

3. *Daubert* rejected the notion that the Federal Rules of Evidence placed "no limits on the admissibility of purportedly scientific evidence."[179] It established the trial judge as the "gatekeeper" in determining whether the expert is proposing to testify about scientific knowledge that will assist the trier of fact to understand the issue. As a gatekeeper, the trial court's inquiry must be "solely on principles and methodology, not on the conclusions they generate."[180]

B. Applicable Rules.

Rule 701. Opinion Testimony by Lay Witness

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

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702. Testimony by Expert Witnesses

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

[179] *Id*. at 589.
[180] *Id*. at 595.

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion--and give the reasons for it--without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross- examination.

FED. R. CIV. P. 26(a)(2)—Disclosure of Expert Testimony.

(A) In General. [A] party must disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Witnesses Who Must Provide a Written Report. [U]nless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report prepared and signed by the witness…. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

C. Application of Rule 702.

1. In determining whether a proffered expert is qualified under Rule 702, trial courts must consider whether:

a) the expert is qualified to testify competently regarding the matters he intends to address;

b) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert;* and

c) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.[181]

2. But "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."[182]

3. The reliability requirements of Rule 702(b), (c), and (d) are the following:

a) the testimony is based upon sufficient facts or data,

b) the testimony is the product of reliable principles and methods, and

c) the witness has applied the principles and methods reliably to the facts of the case.

4. Thus, Rule 702 requires that a witness who is qualified as an expert by knowledge, skill, experience, training or education may give opinion testimony provided the testimony satisfies three criteria. These criteria are:

a) The testimony must be based on sufficient facts or data. This is a quantitative rather than qualitative test—i.e., the issue is sufficiency of data relied upon by the expert. For example, what data in the form of comparable sales did the automobile appraiser rely upon?

b) The testimony must be the product of reliable principles and methods. This is a qualitative analysis. The principles must be reliable. Turning to the common example of an automobile appraiser—the principle generally relied upon by such appraisers is that comparable sales are a good predictor of what a willing buyer will pay a willing seller, thereby indicating the fair market value of an automobile.

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[181] *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (en banc).
[182] *Id*. at 1261 (emphasis omitted).

c) Finally, the witness must have applied the principles and methods reliably to the facts of the case. This is also a qualitative analysis. That is, the principles must not only be reliable, but also they must have been reliably applied to the particular facts relied upon by the expert. For example, just because the witness has reviewed numerous other sales in determining the value does not mean the principle has been reliably applied. For example, are the other sales really comparable? What were the dates of the other sales? Is the condition of the subject automobile similar to the comparables? What market changes have occurred post-petition that make recent comparables invalid as predictors of value as of the date of the petition?

D. Expert Qualification Not *Daubert* Focus.

1. While clearly only qualified witnesses may give expert opinion testimony under Rule 702, the focus of *Daubert* is on the judge's role as a gatekeeper for the admission of the opinion rather than on the judge's role in passing on the qualification of the expert. As aptly put by the Seventh Circuit in *Rosen v. Ciba-Geigy Corp.*,[183] "[u]nder the regime of *Daubert* . . . a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist."[184] Put another way, "[j]udges should not be buffaloed by unreasoned expert opinions,"[185] even from the most qualified of experts.

2. In fact, the qualification of the experts in *Daubert* and *Kumho Tire Company v. Carmichael*,[186] was not at issue. In *Daubert*, the Supreme Court noted that all the experts "possessed impressive credentials."[187] In *Kumho*, the Supreme Court noted that the district court, which excluded the expert's testimony, "did not doubt [the expert's] qualifications . . . ."[188]

E. *Daubert* in Practice.

1. The following is an all too common example of the direct examination of an expert on automobile value. (The context is the debtor's motion to determine the secured status of a creditor's claim that is secured by a lien on the debtor's automobile.) Here's how the testimony goes:

Debtor's Counsel: "Your Honor, I call Joseph Perrilli to the witness stand."

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[183] *Rosen v. Ciba-Geigy Corp.,* 78 F.3d 316, 318 (7th Cir. 1996).
[184] *Id.* at 318.
[185] *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1340 (7th Cir. 1989) (citing Paul Meier, *Damned Liars and Expert Witnesses,* 81 J. Am. Statistical Ass'n 269 (1986)).
[186] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (U.S. 1999).
[187] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 583 (1993).
[188] *Kumho,* 526 U.S. at 153.

Debtor's Counsel: "Mr. Perrilli, what experience do you have in the valuation of automobiles?"

Witness: "I've been in the car business for 40 years. During that time, I've bought and sold in the neighborhood of 10,000 cars."

Debtor's Counsel: "At my request, did you perform an appraisal of the Debtor's 1997 Ford Taurus?"

Witness: "Yes, I did."

Debtor's Counsel: "Based on your years of experience in buying and selling automobiles, were you able to form an opinion as to its value?"

Witness: "Yes, I was. In my opinion it has a fair market value of $9,700."

Debtor's Counsel: "Thank you, Mr. Pirrelli. Your Honor, no further questions."

2. This scenario unfortunately arises frequently in bankruptcy courts. It is clear, however, that no matter how qualified Mr. Perrilli is, the testimony he has given fails to meet the criteria of Rule 702. Specifically, there is no evidence as to the types of data Mr. Perrilli relied upon for his opinion. Examples of such data may include: anecdotal experience of the witness or others that the witness has consulted with concerning sales of similar automobiles,[189] market reports and commercial publications generally used and relied upon by the persons in the business of buying and selling used cars,[190] local auto auction reports, and advertisements.

F. *Daubert's* Application in Florida state courts.

1. In 2013, the Florida Legislature amended Fla. R. Evid. 90.702 to incorporate Daubert. Since July 1, 2013, Fla. R. Evid. 90.702 has stated:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness

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[189] These examples may be derived by the expert from discussions with other dealers:

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

FED. R. EVID. 703

[190] FED. R. EVID. 803(17) excludes from the hearsay rule market reports and commercial publications generally used and relied upon by the public or by persons in particular occupations (*e.g.*, N.A.D.A., Kelley Blue Book, Edmunds.com).

qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;
(2) The testimony is the product of reliable principles and methods; and
(3) The witness has applied the principles and methods reliably to the facts of the case.

2. Since July 1, 2013, Fla. R. Evid. 90.704 (entitled "Basis of opinion testimony by experts") has stated:

> The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

3. In 2017, the Florida Supreme Court declined to decide whether the Daubert amendments to sections 90.702 and 90.704 were constitutional and declined to adopt the amendments as part of the Florida Evidence Code.[191]

4. Soon thereafter, the Second District Court of Appeal explained that the Florida Supreme Court's rules decision declining to adopt a statutory amendment to the extent it is procedural does 'not vitiate or overturn the statute' and 'the statute remains the law in Florida.'"[192]

5. On October 15, 2018, the Florida Supreme Court resolved the question of whether *Frye* or *Daubert* would control on the admissibility of expert testimony in the Florida state courts in the case of *Delisle v Crane Co.*[193] The Court held: "*Frye* relies on the scientific community to determine reliability whereas *Daubert* relies on the scientific savvy of trial judges to determine the significance of the methodology

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[191] *In re Amendments to Fla. Evid. Code*, 210 So. 3d 1231, 1239–40 (Fla. 2017)("The Committee recommends the Court not adopt the Daubert Amendment, to the extent it is procedural. . . . [W]e [the Florida Supreme Court] decline to adopt the Daubert Amendment to the extent that it is procedural, due to the constitutional concerns raised, which must be left for a proper case or controversy.").

[192] *Clare v. Lynch*, 220 So. 3d 1258, 1262 (Fla. 2d DCA 2017) (citing *Bivins v. Rogers*, 207 F. Supp. 3d 1321, 1326 (S.D. Fla. 2016)).

[193] *Delisle v. Crane Co.*, No. SC16-2182 (Fla. October 15, 2018).

used. With our decision today, we reaffirm that *Frye*, not *Daubert*, is the appropriate test in Florida courts."[194]

G. Lay Opinion Testimony.

1. FED. R. EVID. 701 makes it clear that lay opinion testimony does not include opinions based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

2. Traditional Lay Opinions. The Rule 701 amendment was not intended to change the law concerning the traditional types of testimony properly offered as lay opinion. Most often this would be an owner testifying as to value.[195]

3. FED. R. CIV. PRO. 26(a)(2). The mandatory disclosure rules relating to expert witnesses do not apply to lay opinion testimony. Thus, the amendment to FED. R. EVID. 701 is designed to ensure that "lay opinion" testimony which nevertheless deals with scientific, technical or other specialized knowledge will not qualify as lay opinion testimony for purposes of the rules.

4. In bankruptcy court, oftentimes, it is the owner that gives the opinion of value. It is generally accepted that an owner is competent to give opinion testimony about the value of the owner's property.[196]

5. Rule 701 provides:

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

6. The advisory committee note to Rule 702 references that the types of witnesses who may provide expert testimony under Rule 702 are not limited to experts in the "strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values."[197]

7. Alternatively, an owner may testify as to value as a lay witness under Rule 701. If testifying under Rule 701, the owner "may merely give his opinion

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[194] *Id.* at 18.
[195] *See Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995).
[196] *In re Brown*, 244 B.R. 603, 611 (Bankr. W.D. Va. 2000); BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 701.2 (2007).
[197] BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 701.2 (2007).

based on his personal familiarity of the property, often based to a great extent on what he paid for the property."[198] Such testimony will be given little, if any, weight. On the other hand, if the owner truly has "knowledge, skill, experience, training or education" that would qualify the owner as an expert, then it is appropriate to require that the owner's testimony otherwise comply with Rule 702 and be based on reliable principles applied to sufficient data. As noted in the *Brown* case regarding such testimony, "Even though [the debtor's] testimony as to valuation is admissible, it should be subject to the same type of critical analysis as would the testimony of an independent 'expert.'" [199]

8. In *Brown*, the owner did not testify as to any specific values that she had found at "yard sales" for items similar in quality and condition to her property. In the court's view, her conclusion that her personal property had a value of $1,500 "was a figure just pulled out of the air."

9. In light of the 2000 amendments to Rule 702, it appears appropriate to determine whether the testimony of an owner is being offered as the opinion testimony of a lay witness or is being offered as a "skilled witness."[200] In the first instance, the testimony would be admissible but may receive little weight.[201] In the latter instance, where the owner is testifying as an expert and given greater weight, the plain meaning of Rule 702 requires that the testimony should be subject to the rigors of a showing of reliability under Rule 702.

X. Attorney-Client Privilege.

A. Defined.

"The client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney."[202]

B. Wigmore's Essential Elements.[203]

1. Where legal advice of any kind is sought,

2. From a professional legal adviser in his capacity as such,

3. The communications relating to that purpose,

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[198] *Id.*
[199] *Brown*, 244 B.R. at 612.
[200] Advisory Committee Note to Rule 702.
[201] BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 701.2 (2007) (explaining that "if [the owner] has very little or no real expertise, the testimony will be given little if any weight").
[202] BLACK'S LAW DICTIONARY 1235 (8th ed. 2004) ("privilege—*attorney-client privilege*").
[203] 8 JOHN HENRY WIGMORE, EVIDENCE § 2292 (1961).

4. Made in confidence,

5. By the client,

6. Are at his instance permanently protected,

7. From disclosure by himself or by the legal adviser, and

8. Except the privilege be waived.

C. Purpose of the Privilege

1. "The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."[204]

2. "The attorney client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[205]

D. Characteristics.

1. Ownership. "[T]he privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets."[206]

2. Waiver. "And if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney."[207]

3. Termination. The privilege survives the death of the client.[208]

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[204] *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).
[205] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
[206] *Hunt*, 128 U.S. at 470.
[207] *Id*.
[208] *Swindler & Berlin v. United States*, 524 U.S. 399, 406-07 (1998) (holding there is generally an exception in the area of testamentary disclosures based on a theory of implied waiver).

4. Burden. "The party invoking the attorney client privilege has the burden of proving that an attorney client relationship existed and that the particular communications were confidential."[209]

E. What does the Privilege Cover?

1. Confidential Communications by Client.

a) "The attorney-client privilege applies to 'confidential communications between an attorney and his client . . . .'" [210]

b) "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney: [T]he protection of the privilege extent only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."[211]

2. Relating to Legal Advice.

a) The attorney-client privilege is limited to communications ". . . relating to a legal matter for which the client has sought professional advice."[212]

b) "The attorney-client privilege attaches only to communications made in confidence to an attorney by that attorney's client for the purposes of securing legal advice or assistance. . . . Courts generally have held that the preparation of tax returns does not constitute legal advice within the scope of that privilege. . . . Admittedly, the preparation of a tax return requires some knowledge of the law . . . [but a] taxpayer should not be able to invoke a privilege simply because he hires an attorney to prepare his tax returns."[213]

F. Narrow Construction.

1. Courts have construed the privilege narrowly because it renders relevant information undiscoverable. As a result, it applies "only where necessary to achieve its purpose."[214]

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[209] *Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003).
[210] *Miccosukee Tribe of Indians v. U.S.*, 516 F.3d 1235, 1262 (2008) (internal citation omitted).
[211] *Upjohn Co.*, 449 U.S. at 395-96 (internal citation omitted).
[212] *Miccosukee Tribe of Indians*, 516 F.3d at 1262.
[213] *In re Grand Jury Investigation*, 842 F.2d 1223 (11th Cir. 1987).
[214] *Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L.Ed.2d 39 (1976).

2. The burden of establishing the applicability of the privilege rests with the party invoking it.[215]

G. Crime Fraud Exception.

"The attorney-client privilege is limited to confidential communications between the lawyer and the client made for the purpose of securing legal advice, not for the purpose of committing a crime or a tort."[216]

H. *Weintraub* and the Corporate Debtor.

1. In *Commodity Futures Trading Commission v. Weintraub,*[217] the issue of who controls the attorney-client privilege in a chapter 7 case. In considering the issue, the Supreme Court first recognized that as a general proposition, the authority to act on behalf of a corporation belongs to the officers and directors. And in a chapter 7, a trustee is most analogous to management.

2. As a result, the court concluded that when a corporation files a chapter 7, the trustee controls the privilege.[218]

I. Co-Client Exception.

1. The co-client exception to the attorney-client privilege provides that where a lawyer represents two clients in the same case, communications between the lawyer and one client are not confidential as to the other client.[219]

2. The co-client exception applies regardless of whether both parties are present when the communication is made.[220] The rationale behind the co-client

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[215] *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir.2000); *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., AFL–CIO,* 119 F.3d 210, 214 (2d Cir.1997).

[216] *In re Grand Jury Proceedings*, 689 F.2d 1352, 1352 (11th Cir. 1982) (commonly referred to as the "crime-fraud exception").

[217] 471 U.S. 343, 348–49 (1985).

[218] Id. *See also In re Fundamental Long Term Care, Inc.,* No. 8:11-BK-22258-MGW, 2012 WL 4815321, at *9 (Bankr. M.D. Fla. Oct. 9, 2012).

[219] *In re Fundamental Long Term Care, Inc.*, 489 B.R. 451, 463 (2013)(citing *In re Ginn–LA St. Lucie, Ltd.*, 439 B.R. 801 (Bankr. S.D. Fla. 2010)). *See also Transmark, USA, Inc., v. State of Florida*, 631 So. 2d 1112, 1116 ("Sections 90.502(4)(e) and 90.5055(4)(c) provide an exception to the attorney-client and accountant-client privileges…when a communication is relevant to a matter of common interest and made to a lawyer or accountant retained or consulted in common.").

[220] *Transmark, USA, Inc. v. State Dep't of Ins.*, 631 So. 2d 1112, 1116–17 (Fla. 1st DCA 1994). *Ashcraft & Gerel v. Shaw*, 126 Md. App. 325, 728 A.2d 798, 812–13 (1999).

exception is that co-clients have no expectation that their confidences concerning a joint matter will be kept secret.[221]

J. Common Interest doctrine.

1. The common interest doctrine—like the co-client exception—is typically referred to as an exception to the attorney-client privilege waiver rule rather than a privilege itself.[222] The "need to protect the free flow of information from attorney to client logically exists whenever multiple clients share a common interest about a legal matter."[223] The common interest doctrine protects that free flow of information by providing that "clients and their respective attorneys sharing common litigation interests may exchange information freely among themselves without fear that by their exchange they will forfeit the protection of the [attorney-client] privilege."[224]

2. The general rule is that parties that share information under the common interest doctrine cannot invoke the attorney-client privilege in subsequent adverse litigation between them; if there are multiple members that share information, and only two become adverse, the party seeking communications is entitled to all communications between members with common interests—not just communications with the adverse party.[225]

XI. "Work Product" Rule.

A. "Work Product" Defined.

> "Tangible material or its intangible equivalent—in unwritten or oral form—that was either prepared by or for a lawyer or prepared for litigation, either planned or in progress. . . . The term is also used to describe the products of a party's investigation or communications concerning the subject matter of a lawsuit if made (1) to assist in the prosecution or defense of a pending suit, or (2) in reasonable anticipation of litigation."[226]

B. Applicable Rule.

FED. R. CIV. P. 26(b)(3) Trial Preparation: Materials.

[221] *See, e.g., In re Ginn-LA St. Lucie Ltd., LLLP*, 439 B.R. 801, 806-07 (Bankr. S.D. Fla. 2010) (citing *Official Comm. of Unsecured Creditors v. Fleet Retail Fin. Group (In re Hechinger Inv. Co. of Del.*), 285 B.R. 601, 612 (D. Del. 2002)).
[222] *United States v. Gumbaytay,* 276 F.R.D. 671, 673–74 (M.D. Ala. 2011).
[223] *United States v. Almeida*, 341 F.3d 1318, 1324 (11th Cir.2003).
[224] *In re Indiantown Realty Partners Ltd. P'ship*, 270 B.R. 532 (Bankr. S.D. Fla. 2001) (*quoting Visual Scene, Inc. v. Pilkington Bros.*, 508 So. 2d 437, 440 (Fla. 3d DCA 1987)).
[225] *In re Fundamental Long Term Care, Inc.,* 489 B.R. 451, 470 (Bankr. M.D. Fla. 2013)(*citing Ohio–Sealy Mattress Mfg. v. Kaplan*, 90 F.R.D. 21, 29 (N.D. Ill. 1980).
[226] BLACK'S LAW DICTIONARY 1638 (8th ed. 2004).

> [A] party may obtain discovery of documents and tangible . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

C. Historical Basis—Hickman v. Taylor

1. When the Federal Rules of Civil Procedure originally took effect in 1938, Rule 26 did not contain the Work Product Exception now found in FED. R. CIV. PROC. 26(b)(3). Whether the work product of an attorney was discoverable under the new rules engendered a great deal of divergence among the lower federal courts dealing with the issue. In light of this, the Supreme Court granted certiorari to deal with the issue in the case of *Hickman v. Taylor*.[227]

2. The "basic question" before the court was whether any of new discovery devices could be used to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation.[228]The type of information dealt with in *Hickman v. Taylor* were the memoranda, statements and mental impressions of counsel that fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. That is, the "protective cloak" of the attorney client privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories.[229]

3. Notwithstanding the non-privileged and relevant nature of the information sought, the Supreme Court was concerned about "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties."[230] This work is reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal

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[227] *Hickman v. Taylor*, 329 U.S. 495, 500 (U.S. 1947).
[228] *Id.* at 505.
[229] *Id.* at 508.
[230] *Id.* at 509-510.

beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals as the 'Work product of the lawyer.'"[231]

4. Accordingly, *Hickman v. Taylor* established that although absent from the literal terms of the Federal Rules as initially implemented, the general policy against invading the privacy of an attorney's course of preparation was "so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted."[232]

D. Disclosure of Expert Testimony.

1. A party **in an adversary**[233] is required by Fed. R. Civ. P. 26(a)(2)[234] to disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

2. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—that contains:

a) a complete statement of all opinions the witness will express and the basis and reasons for them;

b) the facts or data considered by the witness in forming them;

c) any exhibits that will be used to summarize or support them;

d) the witness's qualifications, including a list of all publications authored in the previous 10 years;

e) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

f) a statement of the compensation to be paid for the study and testimony in the case.

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[231] *Id.* at 511 (citing *Hickman v. Taylor*, 153 F.2d 212, 223 (3d Cir. 1945)).
[232] *Id.* at 512.
[233] As discussed below, there is no requirement to disclose expert testimony in advance of a hearing on a contested matter governed by Fed. R. Bankr. P. 9014.
[234] Made applicable to adversary proceedings by FED. R. BANKR. P. 7026.

3. A party **in a contested matter** [235] is not required to provide the disclosures and expert report regarding expert testimony required by Fed. R. Civ. P. 26(a)(2)[236] for adversary proceedings.

E. Protecting Your Work Product

1. Material prepared by an attorney in preparation for trial falls within the Work Product Rule.[237]

2. The Work Product Rule applies only to documents created primarily to prepare for and assist in the defense or prosecution of an identifiable, specific lawsuit or contested matter which is either pending or threatened.[238] Documents that are prepared when no litigation is pending or impending at the time of their preparation is not considered within the Work Product Rule.[239]

3. The Attorney-Client Privilege or Work Product Rule can also attach to reports of third parties made at the request of the attorney or the client where the purpose of the report was to put into usable form as part of legal advice by attorney to the client.[240] However, where the information is turned over to the third party for reasons unrelated to seeking or rendering legal advice, the Attorney-Client Privilege is waived.[241]

4. In adversary proceedings, drafts of any reports required under Fed. R. Civ. P. 26(a)(2) are protected under the Work Product Rule. Communication between a party's attorney and any witness required to provide a report under Fed. R. Civ. P. 26(a)(2)(B) are likewise protected from disclosure under the Work Product Rule, except to the extent that the communications:

a) relate to compensation for the expert's study or testimony;

b) identify facts or data that the party's attorney provided and were considered in forming the expert's opinions to be expressed; or

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[235] As discussed below, there is no requirement to disclose expert testimony in advance of a hearing on a contested matter governed by Fed. R. Bankr. P. 9014.
[236] Made applicable to adversary proceedings by FED. R. BANKR. P. 7026.
[237] *United States v. Nobles*, 422 U.S. 225, 238-39 (1975); *In re Southwest Florida Telecomms.*, 195 B.R. 504, 506 (Bankr. M.D. Fla. 1996) (Paskay, C.B.J.) (holding that documents prepared by investigator in anticipation of bankruptcy court litigation are protected).
[238] *In re Hillsborough Holdings Corp.*, 132 B.R. 479, 481 (Bankr. M.D. Fla. 1991) (citing *In re Hillsborough Holdings Corp.*, 118 B.R. 866, 870 (Bankr. M.D. Fla. 1990); *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296-97 (Temp. Emer. Ct. App. 1985); *S. Film Extruders, Inc. v. Coca-Cola*, 117 F.R.D. 559, 562 (M.D.N.C. 1987).
[239] *Id.*
[240] *United States v. Kovel*, 296 F.2d 918, 920-21 (2nd Cir. 1961).
[241] *Eglin Fed. Credit Union v. Cantor*, 91 F.R.D. 414, 418 (N.D. Ga. 1981).

c) identify assumptions the expert relied upon in forming the opinions to be expressed that were provided by the party's attorney.[242]

5. The requirements for disclosure of expert testimony and preparation of a report by the expert only extends to reports required under Fed. R. Civ. P. 26(a)(2) in adversary proceedings. Because Fed. R. Civ. P. 26(a)(2) does not apply in contested matters under Fed. R. Bankr. P. 9014, there is no requirement to provide a report or disclose the identity of an expert witness in advance of trial on the contested matter absent order of the court.

6. However, in a contested matter, should an expert witness nevertheless prepare a report for the use at trial, there is no protection for such report under the Work Product Rule. This is because the work product protections extended to expert reports under Fed. R. Civ. P. 26(b)(4) for draft reports and communications between a party's attorney and the expert witness, only apply with respect to reports required to be furnished under Fed. R. Civ. P. 26(a)(2).[243]

7. Facts or opinions held by an expert specially employed or retained in anticipation of litigation or in preparation for trial and who is not expected to be called as a witness are not discoverable, except:

a) as provided under Rule 35(b)(dealing with physical and mental examinations); or

b) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.[244]

8. A party who inadvertently produced information in discovery subject to the protection of a claim of privilege or as trial-preparation material has the right to have the information returned, sequestered, or destroyed upon notifying the part that received the information of the claim and the basis for it. After being notified, a party must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.[245]

XII. Practice Pointers on Drafting Motions.

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[242] FED. R. CIV. P. 26(b)(4)(C).
[243] Jeffrey W. Linstrom, *Expert Witness Reports: Get The Draft?*, Am. Bankr. Inst. J. 52 (March, 2011).
[244] FED. R. CIV. P. 26(b)(4)(D).
[245] FED. R. CIV. P. 26(b)(5)(B).

A. Simplify, Simplify, Simplify. Your job as an advocate is to explain your position in simple terms. Toward that end, supply the court with aids that will assist the judge in understanding your position. I suggest you prepare an expendable hearing booklet containing these aids to distribute to the judge and all parties at the commencement of my argument. Examples of aids that might be included in this booklet are the following:

1. List of Players. It is difficult to keep track of the names of numerous parties and other players that are involved in the event or transaction that gives rise to your claim or defense. So list these parties out with their affiliations and an explanation of their role in the case.

2. Timeline of events. A chronology of the dates of events and transactions is helpful in understanding the whole story.

3. List of Acronyms and Industry Specific Terms. While generally the use of acronyms is to be avoided, in some cases they are an integral part of a business. If so, prepare a list of the acronyms and their definitions.

4. Excerpts from Key Exhibits. In commercial cases, documents are often lengthy and complex. While you will generally have to introduce the whole document into evidence, it is often helpful if you excerpt as a demonstrative aid the portions of the document that you will be referencing during trial.

5. Key Cases. While your motion may contain a number of cases, as a practical matter you most likely will be discussing a small portion of those during oral argument. Put copies of those in your booklet with the portions that you are relying on in bold.

6. Charts. It is often helpful in understanding complicated transactions to use a chart depicting the key transactions. For example, “before and after” charts depicting a complex corporate transaction that forms the basis of an alter ego or successor liability case is helpful.

B. Keep it Short. Few motions need to exceed three pages. Even if it is a really complex matter, try to keep the page count down to 10 pages. The more succinctly your writing, the better. Don't drag your motion out to the maximum page limit if you have nothing left to say. In the words of Chief Justice Roberts, "I've yet to put down a brief and say,’I wish that were longer.’"

C. Preview Relief Sought. Explain in the introductory paragraphs the relief you are seeking, and as simply as possible, factual and legal bases for the relief requested.

D. Avoid Legalese. Plain language is easier to understand. As Justice Scalia once said, “A good test is, if you use the word at a cocktail party, will people look at you funny?”

E. Avoid Minutiae. When drafting your motion, first ask yourself what the court needs to know, then include that information in the motion. You need to communicate the big picture in a fashion that it can be understood quickly by the reader. Avoid minutiae. For example, a tedious recitation of every document in the loan file is neither needed nor helpful. In a similar vein, do not cut and paste the identical case history and introductory paragraphs from earlier motions into later ones.

F. Avoid Excessive Case Citations. If there is a novel legal issue, cite a case or two that supports your position. One or two cases is ordinarily sufficient. Avoid long string cites unless you are trying to make a point. Also, citation of well-settled law is not helpful. For example, taking two pages to review the standards for summary judgment is a waste of space.

G. Never Disparage Your Opponent. As Justice Ginsburg once said, "You should aim to persuade the judge by the power of your reasoning and not by denigrating the opposing side." Using words such as "outrageous," "disingenuous," and the like reflects poorly on you.

H. Be Intellectually Honest. If you have weaknesses in your position, “pull the teeth” by addressing them in your motion explaining that while you concede that these weaknesses exist, they should not compel a different result. Similarly, address your opponent’s best argument in your motion.

I. Provide Copies of Cases. Many judges welcome the filing of cases that will be relied on at the hearing so long as the cases are furnished to opposing counsel. Depending on a judge’s practice, it is often useful to highlight the portions of the cases that you will be relying upon. Include those highlights in the cases you provide to opposing counsel.

J. Footnotes. Footnotes for citations generally makes for a motion that is easier to read. However, don't put substantive portions of your argument in footnotes. If it's substantively important, then it should be included in the text of your motion.

K. File Your Memo of Law Well Before Hearing. When you do file briefs or cases, they are of very little use to the court unless they are filed in a timely manner so as to allow sufficient opportunity for their review in advance of the hearing (delivery to chambers at the end of business hours on the eve of a hearing or on the day of the hearing is not timely). You should assume that the judge will rule from the bench, and briefs or cases filed at or immediately before the hearing will not be reviewed prior to the court’s making its ruling.

XIII. Trial Advocacy Tips.

A. General Trial Preparation.

1. Review the Pleadings. Pull the Complaint and Answer. List out on a pad of paper the causes of action that are at issue. Below each, list the elements of each cause of action. Do the same for the affirmative defenses contained in the answer.

2. List Witnesses. Next to each element of each cause of action list the names of the witnesses who will be called to give evidence relevant to each element.

3. List Documents. Next to each element of each cause of action, list the documents that will be introduced to support the element and, if necessary, the witness that will be used to authenticate the document.

4. Order of Witnesses. Once you have listed the elements that you need to prove in the witnesses and documents that would support your proof, decide on the order of the witnesses that you will call. Consider calling the opposing party as your first witness to establish facts that are undisputed or that have been established in the party's deposition.

5. Order of Documents. Put the documents in the general order in which you plan to introduce them. Make sure that you and your paralegal are familiar with the judge's particular practice when it comes to exhibits. Typically, an exhibit list should be prepared. Exhibits should each have a cover page or exhibit tag. If there are more than 10 exhibits, the exhibits should be put into binders for ease of access. Binders should be available for the witness on the stand, opposing counsel, the courtroom deputy, and the judge as well as for you and your client. Don't use oversized binders as they are difficult to manage in the courtroom. Label each binder both on the front cover and on the bookend with the designation of plaintiff or defendant and the numbered exhibits contained within that binder.

B. Witness Preparation.

1. Preparing and Reviewing Direct Examination. Go through direct testimony prior to trial as if your client were on the stand. Ask the questions the way you plan to at trial. Have the witness answer them. Listen to the answers.

2. Review of Deposition Testimony. Have your client read his or her deposition before coming to your office for the pre-trial preparation. You should also review your client's deposition before trial and highlight the areas that you can anticipate some cross-examination on. Review these areas with your client and role-play how the questions from the opposing side might be framed and have the client answer the questions.

C. Develop a Theme.

1. Concept—Presenting your case in a thematic package is more effective than any other approach. It gets your message across in 30 seconds. It takes a complicated case and by relating it to a recognizable theme, you make your position instantly recognizable.

2. Examples:

a) "This is a case about a debtor who bought a car two and a half months before the petition date and now says he could have bought the same car on the petition date for three thousand dollars less."

b) Cash collateral hearing representing the Bank: "This case is about our collateral being rapidly depleted by a hopelessly insolvent debtor that is still losing money and has no game plan to turn things around."

c) Cash collateral hearing representing the Debtor: "This is a case about what Chapter 11 was meant to be—a place where temporarily distressed but fundamentally strong companies can save their business to the benefit of hundreds of employees, a local community, and numerous trade creditors that continue to do business with the debtor."

D. Invoke the "Rule." See Exclusion of Witnesses, Section III.D. above.

E. Try Your Case.

Don't fall into the trap of trying the other person's case. Many times I've seen all of the energy in trying the weaker side's case. Then if they prove that case, they win. Counter a theme with a theme and try that case.

F. Things to Avoid.

1. Don't make disparaging remarks about opposing counsel or the opposing party. If the opposing counsel makes disparaging remarks about you or your client avoid responding in kind. Keep the high road. Two wrongs do not make a right. Avoid the word "disingenuous." It is almost always used in a disparaging manner.

2. Don't say, "With all due respect" to the judge. What the judge hears is, "With all due contempt."

3. Avoid expressions such as, "To tell you the truth" or "In all candor." It may raise the inference that the evidence that preceded was less than truthful.

4. Don't turn around and engage in a whispered conversation with co-counsel or your client while the judge or opposing counsel is speaking. It is rude.

You also may miss something that's important. If you need to speak with co-counsel or your client, ask for permission.

5. Be careful about using such terms as, "My client's position is…." The judge may infer that you don't really believe competent substantial evidence supports your client's position or believe that your client's position is reasonable.

6. Don't say, "We would argue…." Just make your argument.

7. Don't use acronyms. Using acronyms sometimes conveys a sense of superiority by the attorney using the acronyms. More often than not, the witness, opposing counsel, or the judge will not know what the acronym means. This then puts the judge in a position of having to admit openly his or her lack of "in the know" status by asking counsel to explain what the acronym means. If acronyms are unavoidable, prepare of list with definitions to hand out or include in your expendable trial booklet (see above, "Practice Pointers on Drafting Motions").

8. Don't use pronouns. Remember: a courtroom is a Pronoun Free Zone. Pronouns are often confusing to the listener and their use often results in misunderstandings.

9. Don't cross-examine. This is discussed in Section II.B. in more detail. At least don't cross examine unless you have some clearly achievable objectives such as bringing out a prior inconsistent statement or showing the witness's bias. Explain this to your client because your client has seen lawyers on television and they always cross examine the witness.

TRIAL AIDS

1. FEDERAL RULES OF EVIDENCE SUMMARY TRIAL GUIDE.
   This is a multi-page leaflet that summarizes key evidence objections.
   The cost is $25.00.
   www.elexpublishers.com/products/federal-evidence-summary-guide

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   This is a multi-page leaflet that also provides summary of procedures to make objections, including evidentiary objections.
   The cost is $20.00
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4. PRACTICAL EVIDENCE MANUAL. This is Judge Williamson's practical evidence manual. It is 69 pages and includes an index for easy reference.
   The cost is free! Available on the Middle District of Florida website in The Source.
   www.flmb.uscourts.gov/judges/tampa/williamson/practical_evidence.pdf

Faculty

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Dana L. Robbins-Boehner is a partner at Burr & Forman in Tampa, Fla., who represents banks, secured lenders, bondholders, landlords and financial institutions in complex commercial disputes, creditors' rights matters, high-value restructurings, and multi-jurisdictional workouts across real estate, retail, hospitality, health care, maritime and financial services. She is an experienced trial and appellate litigator who has tried high-stakes cases in federal district, bankruptcy and state courts, defended institutional lenders in class actions and lender-liability suits (including a successful defense of a $36 million action and a multi-million-dollar verdict upheld by the Eleventh Circuit), and previously served as a federal law clerk to Chief U.S. Bankruptcy Judge Caryl E. Delano in the Middle District of Florida. Ms. Robbins-Boehner is licensed in Florida and admitted to the U.S. Courts of Appeals for the Eleventh and Fourth Circuits, the U.S. District Courts for the Middle and Southern Districts of Florida, and the U.S. Bankruptcy Courts for the Southern and Middle Districts of Florida and the Middle District of Michigan. She is an ABI "40 Under 40" honoree and an NCBJ Next Generation designee, as well as an IWIRC Florida Emerging Leader. She is listed as one of *The Best Lawyers in America*'s "Ones to Watch" and is one of *Florida Super Lawyers*'s "Rising Stars." Ms. Robbins-Boehner received her B.S. in business management with honors from the University of Tampa, her M.B.A. from Stetson University and her J.D. *cum laude* from Stetson University College of Law. She also studied international comparative law at the University of Oxford.

Hon. Lori V. Vaughan is a U.S. Bankruptcy Judge for the Middle District of Florida in Orlando, sworn in on Feb. 25, 2020. She started her career as a law clerk to Hon. Karen S. Jennemann. Judge Vaughan then practiced bankruptcy law for 21 years at two law firms, representing debtors, creditors and trustees in jurisdictions across the country. Most recently, she was a shareholder at Trenam Law in Tampa, Fla., and before that, she practiced at Foley & Lardner, the last year of which she spent practicing out of its New York office. She currently teaches bankruptcy as an adjunct professor at Florida A&M University. Judge Vaughan previously served as president of the Tampa Bay Bankruptcy Bar Association, chair of the Bankruptcy/UCC Committee of the Florida Bar's Business Law Section, and board member for the International Women's Insolvency & Restructuring Confederation. She has also sat on the boards of the USF Financing Corp. and USF Property Corp. Before taking the bench, Judge Vaughan was recognized by *Florida Super Lawyers* as being among the top 100 Lawyers in Florida, the top 50 Lawyers in Tampa Bay and the top 50 Women Lawyers in Florida. She also has been recognized by *Chambers USA* and *The Best Lawyers in America*. Judge Vaughan received her B.A. with high honors from Eckerd College in 1995 and her J.D. with honors from the University of Florida, College of Law in 1998.