THE HON. JAMES G. MIXON TRIAL PRACTICES SEMINAR

Presented by

THE UNITED STATES BANKRUTPCY COURT

EASTERN AND WESTERN DISTRICTS OF ARKANSAS

March 11, 2022

William H. Bowen School of Law, Little Rock

CLE Credit Hours: 6 (including 1 hour of ethics)

PROGRAM AGENDA

AND

HANDOUT MATERIALS

THE UNITED STATES BANKRUPTCY COURT

EASTERN AND WESTERN DISTRICTS OF ARKANSAS

Presents

THE HON. JAMES G. MIXON TRIAL PRACTICES SEMINAR

March 11, 2022
William H. Bowen School of Law, Little Rock
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8:15 – 8:30
Welcome
Hon. Richard D. Taylor, *U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas*
Dean Theresa M. Beiner, *Dean, Nadine Baum Distinguished Professor of Law, Wm H. Bowen School of Law*

8:30-9:30
What Judge Mixon Taught Us About Ethics in the Courtroom
Hon. Phyllis M. Jones, *U.S. Bankruptcy Chief Judge for the Eastern and Western Districts of Arkansas*
Mardi Blissard, *Career Law Clerk to the Hon. James G. Mixon and Hon. Phyllis M. Jones*

9:30-10:30
Answers to Your Trial Practice Questions!
Hon. Mackie Pierce, *Circuit Judge, Sixth Judicial Circuit, Pulaski and Perry Counties, Arkansas*
Hon. Kristine G. Baker, *U.S. District Judge for the Eastern District of Arkansas*
Hon. Brian S. Miller, *U.S. District Judge for the Eastern District of Arkansas*

10:30–10:45 Break

10:45-11:45
Handling Experts
William M. Griffin III, *Friday, Eldredge, & Clark LLP*

11:45-12:45
LUNCH (Box Lunch Provided at Cost – Select Lunch Choice on Registration Form)

12:45-1:45
Domestic Support Obligations in Bankruptcy as Relates to State Court Proceedings
Mary-Tipton Thalheimer, *Rose Law Firm, P.A.*

1:45-2:45
Evidence
James F. Dowden, *James F. Dowden, P.A.*
Charles T. Coleman, *Wright, Lindsey & Jennings LLP*

2:45-3:00 Break

3:00-4:00
Proving Your Case in Bankruptcy Court
Hon. Phyllis M. Jones, *U.S. Bankruptcy Chief Judge for the Eastern and Western Districts of Arkansas*
Hon. Richard D. Taylor, *U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas*
Hon. Bianca M. Rucker, *U.S. Bankruptcy Judge for the Eastern and Western Districts of Arkansas*

THE HON. JAMES G. MIXON TRIAL PRACTICES SEMINAR

March 11, 2022

Presentation from 8:30 to 9:30

What Judge Mixon Taught Us About Ethics in the Courtroom

Hon. Phyllis M. Jones

United States Bankruptcy Chief Judge

For the Eastern and Western Districts of Arkansas

And

Mardi Blissard

Career Law Clerk to the Hon. James G. Mixon

And Career Law Clerk to the Hon. Phyllis M. Jones

Handout Materials

What Judge Mixon Taught Us About Ethics in the Courtroom

Phyllis M. Jones
and
Mardi Blissard

This presentation will focus on select rules of the Arkansas Rules of Professional Conduct, the United States Bankruptcy Code, and the Federal Rules of Bankruptcy Procedure.

The selection includes the following:

Selected Arkansas Rules of Professional Conduct

Rule 1.1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.5. Fees. (Subsection (a) only).

(a) A lawyer's fee shall be reasonable. A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Rule 1.7. Conflict of Interest: Current Clients. (Subsection (a) only).

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another clients; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rule 3.3. Candor Toward the Tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal; or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

. . . .

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.5. Impartiality and Decorum of the Tribunal. (Subsections (a) and (b) only).

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order[.]

Rule 3.7. Lawyer as Witness.

a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

United States Bankruptcy Code

11 U.S.C. § 105(a). Power of the Court.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 327. Employment of Professional Persons.

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

11 U.S.C. § 328. Limitation on compensation of Professional Persons.

(a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

(b) If the court has authorized a trustee to serve as an attorney or accountant for the estate under section 327(d) of this title, the court may allow compensation for the trustee's services as such attorney or accountant only to the extent that the trustee performed services as attorney or accountant for the estate and not for performance of any of the trustee's duties that are generally performed by a trustee without the assistance of an attorney or accountant for the estate.

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

Federal Rules of Bankruptcy Procedure

Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers.

(a) Signature
Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to the court
By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,1]—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions
If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate

sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated

(A) By motion
A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On court's initiative
On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of sanction; limitations
A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order
When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to discovery
Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.

(e) Verification
Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.

(f) Copies of signed or verified papers
When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

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March 11, 2022

Presentation from 9:30 to 10:30

Answers to Your Trial Practice Questions!

Hon. Mackie Pierce

Circuit Judge, Sixth Judicial Circuit, Pulaski County, Arkansas

Hon. Kristine G. Baker

United States District Judge for the Eastern District of Arkansas

Hon. Brian S. Miller

United States District Court for the Eastern District of Arkansas

Handout Materials

Questions to be Discussed by the Panel

Question 1:

It's a bench trial and you are confident your judge has fully reviewed the pleadings. When the court invites your opening, you should:

a. Waive your opening because the court is prepared.
b. Make an opening laying out the facts, the law, and the relief sought.
c. Argue, argue, argue.
d. Reevaluate all your life decisions.

Question 2:

You and opposing counsel have stipulated to the admissibility of all the exhibits for trial. You have a professional looking organized notebook with all your exhibits and another equally nice notebook with the opposing parties' exhibits. You should:

a. Begin the trial by letting the judge know how cooperative the parties have been and offer both exhibit notebooks into evidence before you make your opening statement.
b. Begin the trial by offering only your exhibit notebook into evidence and then proceed with your opening statement.
c. Make your opening statement first and then offer your exhibit notebook into evidence at the beginning of your case-in-chief.
d. Ask the judge how he/she would like you to proceed.

Question 3:

During trial, bench or jury, opposing counsel poses a question that invites a hearsay response which, in truth, is not that meaningful and merely establishes some background information. You should:

a. Always object to anything that remotely sounds like hearsay.
b. Save your hearsay objections for only the most meaningful issues.
c. See how the other lawyer treats you and your witnesses before you decide whether to object.
d. Remain tentative and uncertain because hardly anybody understands hearsay and why do we have it anyway.

Question 4:

Opposing counsel has handed the witness a document on the witness stand. The document was not on any of the exhibit lists. Opposing counsel has the witness identify the document and tells the witness to read the first two paragraphs of the document out loud for the court to hear. You don't want the information in the record because it is unfavorable to your client. You should:

a. Object to the witness reading from the document because it has not been introduced as an exhibit.
b. Object to the witness reading from the document because the document is not on the exhibit lists.
c. Both a and b.
d. Do nothing – since the document is not being introduced into evidence, the information in the document will not be considered evidence just by the witness reading it at trial.

Question 5:

You have a lengthy trial that is coming up soon. You don't want the other witnesses to hear all the testimony given at trial. You show your trial skills by invoking Rule 615 to exclude the witnesses. You should:

a. File a pre-trial motion asking that "the Rule" be invoked.
b. Ask for "the Rule" to be invoked before opening statements.
b. Ask for "the Rule" to be invoked before the first witness takes the stand.
d. Vehemently object when opposing counsel requests his/her expert witness to be allowed to stay in the courtroom.

Question 6:

You are in the middle of cross examining the plaintiff's primary witness and in response to your question the witness says, "I have papers over there on the table in my folder I brought to court and if I could just go over there and get my folder, I can answer your question." How do you respond?

a. Tell the witness to leave the witness stand and pick up the folder.
b. Ask the judge what he/she wants the witness to do.
c. Ignore the offer and ask a different question.
d. Pass the witness and sit down.

Question 7:

Federal Rule of Evidence 902 provides that to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. I am in a case involving a promissory note secured by a mortgage on certain real property. The mortgage is filed in the county real estate records. At the trial I can:

a. Offer both the note and mortgage into evidence without having to have a witness authenticate either of them.

b. Offer the note and mortgage into evidence by having a witness authenticate the documents.

c. Offer the note into evidence by having a witness authenticate the document and offer a certified copy of the mortgage without any testimony.

d. Sob gently.

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March 11, 2022

Presentation from 10:45 to 11:45

Handling Experts

William Mell Griffin III

Friday, Eldredge & Clark LLP

Handout Materials

HANDLING EXPERTS

by William M. Griffin III

I. KNOW THE LAW - RULE 702

A. Arkansas Rule 702. The basis for expert testimony is contained in the Arkansas Rules of Evidence and the Federal Rules of Evidence. Arkansas Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

B. Federal Rule of Evidence 702 states as follows:

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

It should be noted that the Federal Rule was amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and in many cases applying *Daubert*, including *Kumho Tire Company vs. Carmichael*, 119 S. Ct. 1167 (1999). In *Daubert* the court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony. *Kumho Tire* clarified this ruling to the effect that the gatekeeper function applies to all expert testimony, not just testimony based on science.

Therefore, there are two steps in determining whether an expert's testimony will be allowed. First, is the expert qualified? That step must be answered in the affirmative before reaching the second step which is assessing the reliability of the theory.

First, an expert must be qualified by knowledge, skill, experience, training or education. In other words, an individual must have some special knowledge and must have acquired it in some way, shape or form to testify as to the subject matter.

Secondly, the *Daubert* challenge is to assess the reliability of expert testimony. The United States Supreme Court, in *Daubert*, set forth several factors to consider:

1. Whether the expert's technique or theory can be or has been tested – that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot be reasonably assessed for reliability;
2. Whether the technique or theory has been subject to peer review and publication;
3. The known or potential rate of error of the technique or theory when applied;
4. The existence and maintenance of standards and controls; and
5. Whether the technique or theory has been generally accepted in the scientific community.

The court in *Daubert* emphasized that the factors were neither exclusive nor dispositive. Other factors that must be considered are as follows:

1. Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying" *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).
2. Whether the expert has unjustifiably extrapolated an accepted premise to an unfounded conclusion.

3. Whether the expert has accounted for obvious alternative explanations.

4. Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting. Daubert recognized that the trial court must assure itself that the expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

5. Whether the field of expertise claimed by the expert is known to reach a reliable result with the type of opinion the expert would give.

C. Why is It Important to Know the Law:

Whether you are preparing to cross-examine an expert witness or preparing to present an expert witness, it is important that you analyze whether the expert's testimony qualifies and whether the expert himself is qualified. In civil cases, the risk of having your expert excluded may well be dispositive of the case. Pursuing a products liability case or a medical malpractice case without an expert is almost impossible. A *Daubert* motion on your own expert can result in the loss of the case without even reaching the summary judgment hearing. Also, remember that the standards are different. To obtain summary judgment, the moving party must establish that there is no genuine issue as to any material fact and the party is entitled to judgment as a matter of law. On the other hand, in *Daubert* proceedings, the non-moving party has the burden of establishing, by a preponderance or proof, that a proper foundation exists for the admissibility of that party's proffered expert testimony. See, e.g., *Daubert* at 509 U.S. 592, note 10; *Cooper vs. Smith & Nephew, Inc.*, 259 F.3d 194, 1999 (4th Cir. 2001); *Allison v. McGhand*, 184 F.3d at 1306 (11th Cir. 1999). See also, an article by Martin C. Calhoun entitled "Setting the Procedural Stage for Success" appearing in "For the Defense" magazine, February 2003 at page 19.

II. SELECTION OF EXPERTS.

A. How do you select an expert?

1. Word of mouth is usually the best method. This can come in several forms. If your client is a professional, ask your client who might be the experts in the area. Look at individuals who have written articles on the subject matter. For instance, if your case involves marketing, you may select a professor who specializes in marketing.

2. Another method of word of mouth is learning from other lawyers what experts they have used and what success they have had with that expert or lack of success. It is important to discuss with the attorney whether that particular expert will make a good appearance in the court in which you are appearing. For instance, experts from New York often do not make the best experts in an Arkansas court. That can often be evaluated by talking with other attorneys.

3. Other methods for obtaining experts.

a. The internet. There are internet websites for various experts and specialties. Remember that your opposition will also have access to these same websites and may be using it to cross-examine your witness.

b. Authors. If one of the important treatises or articles on the subject matter was written by an individual, you might retain that person as your expert.

c. Expert Witness Services. These services can supply you with an expert in your particular field. However, often, these experts are not "vetted." Consequently, you cannot be sure of what you are getting and how often that individual as testified previously.

B. Assessing the expert. You must research the expert's background. Look at websites, read articles. What has your expert put in writing? Prior deposition testimony also should be reviewed.

C. Interview the expert. Find out what type of appearance the witness makes, how often they have testified on the subject, how likely is it they are going to be painted as a prostitute witness, which is an expert who really has no practice other than testifying.

D. Sources of Information for your own expert.

There are numerous expert witness data bases. You may obtain prior depositions of your own expert and of course, the other side's experts. You can obtain prior reports and the names of attorneys who have opposed the expert. You may also learn the names of the attorneys who hired the expert. In doing so, you can conduct discussions with those attorneys to determine how effective the witness might be.

III. PREPARATION OF YOUR EXPERT

Your witness should be provided with all of the materials of any value in the case. Do not leave out materials; otherwise they are exposed to questions about whether they have fully reviewed all of the material. It is also important for the expert "visit the scene." In addition, they should be provided with exemplars or products if they are an expert witness testifying about a device or produce. The complaint and answer should be fully reviewed. The other side's science experts' depositions or reports should be provided to your own expert. Under Federal Rule of Evidence 702, the testimony must be based upon sufficient facts or data. Consequently, all of the facts should be provided to the experts so that they can reach a decision.

Once the expert has reviewed all of the materials, it is important to interview the expert to determine the bases for his opinions. He or she should be asked carefully to go over what the weaknesses or problems are prior to disclosing the expert.

At this point, it is important to tell the expert your theme of the case and how the expert's testimony will fit into the theme.

Finally, before presenting the expert for deposition or at trial, it is important that you cross-examine your own expert. The expert should be fully cross-examined to see if he or she will "hold up." Your cross-examination should be better than any other lawyer's cross-examination will be in the case. Any weaknesses should be exposed and carefully thought out. Appropriate answers should be discussed.

IV. DIRECT EXAMINATION OF YOUR EXPERT

A. Organization.

John L. Jeffers in an article entitled, "How to Present Complex Economic Evidence to a Jury," published in the Litigation Manual, American Bar Association, 1983, sets forth the following organization:

The techniques of communication are important, but the substance of expert testimony must weave together a myriad of details and concepts. Organize the testimony as follows:

1. An elaborate statement of expert's background and qualifications so that he would be well set for any voir dire.

2. A statement by the expert of his testimony's purpose and a disclaimer about any substantive issues not being addressed.

3. A full description of the sources on which he has based his testimony.

4. An orderly statement of the expert's conclusions.

5. A step-by-step explanation of how the expert reached his conclusions, reviewing the work done and the calculations made.

6. A restatement or conclusion.

In other words, prepare a general overall outline of how you want the testimony to be presented to a jury. Then you fill in the details. Each of the above-numbered paragraphs will have subparagraphs that set forth exactly what you want to elicit from your expert.

B. Qualifications.

It is important to fully qualify your expert. An expert's ability to testify can be challenged on voir dire before you ever get to present the witness' testimony. Consequently, you need to go through each qualification and show why it is important for this case. For instance, a statement that a medical doctor, is "board certified" does not mean anything unless there is an explanation of what "board certification" means.

Specific qualifications, for instance, that the engineer has designed a product similar to the one he will be testifying about in this case. Whether a medical doctor performs the same procedure as what is to be testified about.

Next, it is important to outline all of the material upon which the expert relied. What depositions, what medical records, what reports he or she reviewed. Next, did the expert go to the scene, did the expert take measurements, calculations or any other pertinent information. Did the expert then review treatises, reports, or articles?

Finally, there should be a statement of what the expert's conclusions are and why the expert reached those conclusions. At this point, the expert witness' testimony should be presented as a lecture. The expert should be prepared to use various visual aids such as blow-

ups, animations, PowerPoint, drawings, or any other device which the witness can use to illustrate his opinions. The expert should have helped you select the visual aids he or she needs to present the testimony. For instance, if the individual is going to testify about a product and it is not too large to be in the courtroom, the individual might take it apart and show how it works underneath an Elmo or overhead projector-type device. Likewise, the expert could stand in front of the jury and explain how a surgery is performed by using a videotape of the procedure being performed. There are numerous ways for the expert to illustrate his or her points.

As a lawyer, you will ask general, open-ended questions to present his testimony. However, your questions should be unobtrusive and avoid getting in the way of the testimony.

C. Examples of Approaches to Setting Forth the Direct Testimony of an Expert.

1. Expert is an engineer for the plaintiff in a civil products liability suit.

The expert reviews the drawing of a product or an exemplar and shows how the product was manufactured or designed. Explain why it was designed in the particular fashion it was and show other possibilities of designing it. Other reasonable alternative designs that would have prevented the incident. The expert could show how another design would be feasible and cost effective. Each one of these things could be demonstrated with an exemplar or a drawing of a change in the design that would have prevented the accident at issue.

2. Expert is a physician testifying for a defendant in a medical malpractice case.

(a) Good qualifications.

(b) He performs the same procedures.

(c) He performs the same procedure in the same fashion.

(d) Use a film of the procedure or a drawing of the procedure to show how it was done and why it was done in that fashion.

(e) Use actual anatomical models to show how the injury or problem occurred.

(f) Use an anatomical drawing so that the actual procedure is demonstrated.

(g) Show why the doctor did the procedure in the fashion it was done and why it was done in that particular fashion.

(h) If the defendant doctor varied from the appropriate procedure, explain why.

(i) Use the expert to explain causation factors.

3. Construction expert.

(a) Establish the facts of the accident.

(b) Examination of the scene.

(c) What do the facts and the evidence found at the scene mean?

(d) Skid marks equals speed and why?

(e) Damage equals speed and why?

(f) Calculations – demonstrate them on a board.

D. Other Matters of Presenting your Expert.

If your expert has "warts," get them out in the open. For instance, if the expert is charging $500 or has always testified for one side or the other, you may well consider putting that forth in direct examination.

V. OPPOSING EXPERT

A. Research, Research.

1. Review prior articles. See if the expert has written articles and obtain copies and review them.

2. Prior testimony. Obtain prior depositions, review depositions and index them. Look at any inconsistencies. Prepare a chart of varying testimony the witness has given on numerous issues. This can be as varied as qualifications to subject matter testimony.

3. Review websites where the expert's name appears.

4. Review criminal or civil court records in the jurisdiction where the expert lives.

5. Talk to attorneys who have seen the expert testify at trial.

B. Deposition of Expert.

1. Cross-examine the expert completely. Many older attorneys believe that you should save certain things for trial in cross-examining an expert. However, with the advent of the *Daubert* challenge, it is critical that a full cross-examination be done. In addition, that expert's deposition can be read in certain instances. Consequently, you want to go ahead and fully cross-examine the witness. The expert's deposition may help you if you are going to file a motion for summary judgment, and it also gives your own expert a chance to see where the weaknesses are in the other side's case.

2. A full cross-examination allows you to see how the witness responds and to see what examination techniques work best with the expert. For instance, you should vary your pace and see which pace works best for that particular witness.

3. The downside of a full cross-examination is the expert now has a chance to review it and prepare himself for trial. However, in my opinion, that is a small risk to take for the advantages of fully examining the witness.

VI. CROSS-EXAMINATION OF EXPERT WITNESS AT TRIAL

A. Preparation.

1. Outline. It is critical that you outline your cross-examination questions. Each question should have a source so that the witness is locked in. Use only leading questions that do not allow a witness to "wonder" or squirm out of control. For each question, there should be other deposition testimony, an article or something that supports the question you asked. For instance, if you are asking the witness his opinion that the color red is bright, you should have prior testimony that the witness has said the color red is bright. In that way, no matter what answer the witness gives, whether it is yes or no, you have either obtained the affirmation of the fact you wish to elicit or he has contradicted himself on prior testimony.

2. In your outline, there should be general themes. I think it is best to set forth the three or four areas that you wish to either prove a point that is favorable to your side or impeach the witness. In that regard, set forth the points and then do subparagraphs that get you to the point that you wish to get across to the jury.

B. Rules for Cross-Examination.

Some of the rules for cross-examining an expert are also the same as general cross-examination rules. In reviewing Irving Younger's commandments of cross-examination, almost all of them are useful for examining an expert witness.

Robert G. Beshears in an article entitled "Cross-Examination of Expert Witnesses" in the "Defense Counsel Training Manual" published by the International Association of Defense Counsel set forth a number of rules. A summary of those rules are helpful in cross-examining an expert at trial.

1. Stay in control. You can do this by having all of your cross-examination materials readily indexed and at hand. Make a list of the points to be made on cross-examination of each witness. Prioritize the points to be covered and spend appropriate time on each point in order of strength. Do not feel the need to cross-examine every expert witness, and make sure that your cross-examination flows in a logical sequence.

2. Obtain concessions. All experts will concede certain facts that will be beneficial to your case. Get those on the table early.

3. In attempting to show bias or lack of qualifications, you may want to show:

(a) The witness appears only for the plaintiff or for the defendant or for the prosecution or for the criminal defendant.

(b) The witness is academician with no industry experience.

(c) The witness is industry-trained and has no academic or research experience.

(d) The witness has never seen the product or the patient or the accident scene.

(e) The witness has never testified that any product was good, that any doctor operated correctly or that any professional behaved according to standard. On the other hand, the witness may have

testified that every product was good or that no doctor is guilty of medical malpractice.

(f) The witness attests on numerous topics. As a cross-examiner, you might want to list all of the different areas in which the expert has testified and show how the expert's opinion can be bought.

(g) Show that the expert's education is not in his area of claimed expertise.

(h) The expert has not served on any commissions, boards, or committees.

(i) The witness has not employed recognized tests or experiments to analyze the product, system or technique on which he or she is testifying.

(j) The witness is no longer active professionally in the claimed area of expertise.

(k) The witness has had a license revocation or suspension.

(l) The witness is not a member of any specialty group or professional group.

(m) The expert does not subscribe to and read trade or professional journals.

(n) The expert has no prior experience with the product.

(o) The expert does not know any other person or entity that approves or utilizes what he now suggests as a desirable alternative.

Robert G. Beshears, "Cross-Examination of Expert Witnesses," Supra at p. 244.

VII. OTHER FACTORS TO CONSIDER

If the expert witness has been ineffective in direct examination, limit your cross-examination to prevent the witness from rehabilitating himself or herself. You might even want to avoid cross-examining the witness if they were that ineffective.

A. Many experts are quite vulnerable and have testified more times than you have tried lawsuits. Wit those experts, it is best to develop a plan of exactly what information the expert will have to concede to and elicit it. Do not try to go too far with an expert of this type because they will look for openings to restate their case or attempt to gut your case or your theory of the case.

B. Probably the most important matter to consider in cross-examining an expert witness at trial is to determine the timing or your approach in examination of the expert. In other words, do you wish to impeach the witness first or do you want to obtain your concessions. Most older trial articles and commentators suggest you obtain the concessions first before the witness is defensive. It also has the added advantage of getting concessions from the witness before you have made the witness look like they don't know what they are talking about. On the other hand, if an expert witness has closed on a particularly high note on direct examination, you might want to consider showing from the very start that the witness does not know what he is talking about. It may be due to lack of qualifications or lack of understanding of the subject matter.

THE HON. JAMES G. MIXON TRIAL PRACTICES SEMINAR

March 11, 2022

Presentation 12:45 to 1:45

Domestic Support Obligations in Bankruptcy as Relates to State Court Proceedings

Mary-Tipton Thalheimer

Rose Law Firm, P.A.

Handout Materials

Domestic Support Obligations in Bankruptcy as Relates to State Court Proceedings

Bankruptcy Code Sections Relevant to Divorce Proceedings – Generally.

- Definition of a Domestic Support Obligation **(11 U.S.C. § 101(14A))**:

The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

(A) owed to or recoverable by--

(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of--

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record; or

(iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.

- Automatic Stay as Relates to Divorce Proceeding **(11 U.S.C. §§ 362(a)(1) and (b)(2))**:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay--

(2) under subsection (a)--

(A) of the commencement or continuation of a civil action or proceeding--
(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate.

- Relief from the Automatic Stay as Relates to Divorce Proceeding **(11 U.S.C. § 362(d)(1))**:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

- No Discharge for Domestic Support Obligation (**11 U.S.C. §§ 523(a)(5) and 1328(a)(2)**):

  (a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

  (5) for a domestic support obligation.

- No Discharge for Divorce Property Settlement in Chapter 7 (**11 U.S.C. § 523(a)(15)**):

  (a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

  (15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit.

- Proof of Claim for Prepetition Domestic Support Obligation (**11 U.S.C. § 507(a)(1)(A)**):

  (a) The following expenses and claims have priority in the following order:

  (1) First:

  (A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

- No Proof of Claim for Post-Petition Domestic Support Obligation (**11 U.S.C. § 502(b)(5)**):

  (b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

  (5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title.

- Domestic Support Obligations Not Subject to Avoidance as Preference **(11 U.S.C. § 547(c)(7))**:

  (c) The trustee may not avoid under this section a transfer—

  (7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation.

Bankruptcy Code Sections Relevant to Divorce Proceedings – Chapter 13.

- Failure to Pay Domestic Support Obligation – Conversion or Dismissal **(11 U.S.C. § 1307(c)(11))**:

  (c) Except as provided in subsection (f) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including—

  (11) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

- Failure to Pay Prepetition Domestic Support Obligation through Plan – Denial of Confirmation **(11 U.S.C. §§ 1322(a)(2) and 1325(a)(1))**:

  (a) The plan—

  (2) shall provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim;

  (a) Except as provided in subsection (b), the court shall confirm a plan if—

  (1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title.

- Failure to Pay All Post-Petition Domestic Support Obligations – Denial of Confirmation **(11 U.S.C. §§ 1325(b)(1)(B) and (b)(2)(A)(i))**:

  (b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

  (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

  (2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19), child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—

  (A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed.

- Failure to Pay all Post-Petition Domestic Support Obligations – Denial of Discharge **(11 U.S.C. § 1328(a))**:

  (a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title.

THE HON. JAMES G. MIXON TRIAL PRACTICES SEMINAR

March 11, 2022

Presentation from 1:45 to 2:45

Evidence

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Wright, Lindsey & Jennings LLP

Handout Materials

SOUTHEASTERN BANKRUPTCY LAW INSTITUTE
MARCH 21-23, 2019
ATLANTA, GA

I Object! Evidence in Bankruptcy Court

Evidence Issues in Bankruptcy: Beyond the Federal Rules

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Evidence Issues in Bankruptcy: Beyond the Federal Rules

I. Introduction

When thinking about evidence in bankruptcy practice or other areas of federal law, one naturally focuses on the Federal Rules of Evidence ("FRE")[1]. The Rules are comprehensive; there are 68 rules, excluding sub-parts[2]. Some are general, such as the test for relevance set forth in FRE 401. Other rules, like FRE 609 (impeachment by evidence of a criminal conviction), are specific and tailored to a particular type of evidence. In contested matters and adversary proceedings, counsel's ability to provide admissible evidence in support of a legal position will be more persuasive than mere posturing. Knowing what is admissible and demonstrating the ability (through a competent and available witness) to introduce that evidence can obviate the need for an actual court hearing. This is where a command of the Federal Rules of Evidence will be most valuable. But there are many other "evidence rules" (some are found in Code sections, others in case law) that are just as important.[3] The Federal Rules of Civil Procedure ("Fed. R. Civ. P.") and the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") invoke evidentiary standards and proof requirements in a variety of ways. There are also specific provisions of the Bankruptcy

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1 Congress has established the rule-making authority of courts at 28 U.S.C. §§ 2071 - 2077. "The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals." 28 U.S.C. § 2072(a). The FRE are made applicable to bankruptcy courts under FRE 1101(a).

2 We have included a list of the FRE in the Appendix "A" as a quick reminder of their scope.

3 Pursuant to Bankruptcy Rule 9017, "[t]he Federal Rules of Evidence and Rules 43, 44 and 44.1 FR Civ P apply in cases under the Code." Fed. R. Bankr. P. 9017. Interestingly, Fed. R. Civ. P. 43 and 44 are evidentiary rules. Rule 43 provides that witnesses' testimony generally must be taken in open court, but that "[w]hen a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions." Fed. R. Civ. P. 43(c). Rule 44 sets forth how to prove an official record. And Rule 44.1 governs the determination of foreign law.

Code that address evidence. Underlying all these rules are burdens of proof and presumptions that impact both the requirements to produce evidence and the sufficiency of that proof. This paper will invite the bankruptcy lawyer to think about evidence issues from a broader perspective and to become attentive to levels of proof that a court may require on particular matters and at particular stages of litigation. A leading evidence treatise begins with the admonition that the planning and preparation of proof is as important as the rules of evidence:

> The law of evidence is the system of rules and standards regulating the admission of testimony and exhibits at the trial of a lawsuit.... However, the trial stage, when evidentiary rules govern, is a relatively late phase in a long litigation process.

Kenneth S. Broun, *McCormick on Evidence* § 1 (7th ed. 2016). As this quote suggests, a lawyer should begin thinking about how to prove his or her case long before trial. This short paper is not intended as a comprehensive survey of all the evidence rules applicable to bankruptcy cases.[4] Instead, we will highlight some of the pretrial stages at which counsel's need for, and use of, evidence will come into play. Along the way we will talk about some specific evidence issues that arise frequently in bankruptcy cases, including evidentiary problems at trial.

Whether the legal issue arises in a motion for stay relief or an adversary proceeding seeking denial of discharge, every evidence problem can be viewed in light of the following questions: (1) what are the elements of a cause of action (i.e. what do you need to prove); (2) which party has the burden of proof (and on what issues) and does the burden shift; (3) what presumptions, inferences, or things "deemed" to be true exist that may benefit your case; and

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4 For further reading, *see* Hon. Barry Russell, *Bankruptcy Evidence Manual* (2018 ed.); Kenneth S. Broun, *McCormick on Evidence* (7th ed. 2016); David P. Leonard et al., *The New Wigmore: A Treatise on Evidence* (2018 ed.); Paul F. Rothstein, *Federal Rules of Evidence* (2018 ed.); Imwinkelreid, *Evidentiary Foundations* (Lexis-Nexis 2012); *Objections at Trial* (NITA 7th ed. 2015); *Instant Evidence: A Quick Guide to Federal Evidence and Objections* (find on the NCLC's website); Bocchino and Sonneshien, *Federal Rules of Evidence with Objections* (Lexis-Nexis).

(4) what are the foundational requirements for getting your evidence in the record. We will consider burdens of proof and presumptions first.

II. Burdens of Proof

Factual disputes can arise in many different contexts in a bankruptcy case, and when such disputes arise it is important for the parties, and the court, to consider which party has the burden of proof. Consistent with our theme, these burdens of proof are *evidence rules* that do not appear in the FRE. Let's begin with a consideration of two types of burdens of proof: (1) the burden of production and (2) the burden of persuasion.

A. Burden of Production and Burden of Persuasion

"The term 'burden of proof' is one of the "slipperiest member[s] of the family of legal terms." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005). As McCormick explains, that is because "'[p]roof' is an ambiguous word." Kenneth S. Broun, *McCormick on Evidence* § 336 (7th ed.). Sometimes it means evidence, and sometimes it means "the end result of conviction or persuasion produced by the evidence. Naturally, the term 'burden of proof' shares this ambivalence." *Id.* The term encompasses two different burdens: the burden of production and the burden of persuasion.

The burden of production refers to "a party's obligation to come forward with evidence to support its claim." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994). Also known as the "burden of going forward," the burden of production is a lesser standard than the burden of persuasion. It "asks simply whether sufficient evidence has been put forth to sustain a peremptory challenge [i.e. a motion to dismiss or motion for directed verdict] on any issue material to the disposition of the case." *Baker v. Reed (In re Reed)*, 310 B.R. 363, 369 (Bankr. N.D. Ohio 2004).

In contrast, the burden of persuasion refers to a party's obligation to "convinc[e] the trier-of-fact as to the overall truth of the proposition...." *In re Reed*, 310 B.R. at 369. "[I]f the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. at 272. The term "risk of non-persuasion" refers to "the consequence that flows if a burden of persuasion is not met." Lawrence B. Solum, *You Prove It! Why Should I?*, 17 Harv. J.L. & Pub. Pol'y 691 (Summer 1994).

There are different standards of evidence (also known as standards of proof) that a litigant must meet to satisfy the burden of persuasion. The most common standards are "proof beyond a reasonable doubt" (criminal cases), "proof by clear and convincing evidence" (certain exceptional civil cases), and "proof by a preponderance of the evidence" (most civil cases). *McCormick on Evidence* § 339. Proof beyond a reasonable doubt means "that the jury will acquit if they have a reasonable doubt of the defendant's guilt of the crime charged in the indictment." *McCormick on Evidence* § 341. The "clear and convincing" standard is an intermediate standard that lies somewhere between the "beyond a reasonable doubt" and "preponderance of the evidence" standards. It has been described as "plac[ing] in the ultimate factfinder an abiding conviction that the truth of [the] factual allegations [is] 'highly probable.'" *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). Proof by a preponderance of the evidence means "proof which leads the [trier-of-fact] to find that the existence of the contested fact is more probable than its nonexistence." *McCormick on Evidence* § 339. As with other areas of the law, bankruptcy cases present the parties with varied burdens of proof.

One of the more comprehensive treatments of burdens of proof may be found in Judge Barry Russell's 2-volume *Bankruptcy Evidence Manual* (2018 ed.). As the author of that treatise observes, the Bankruptcy Code and Bankruptcy Rules contain several provisions specifically

allocating the burden of proof in certain circumstances. Judge Russell identifies nine Code provisions and three Bankruptcy Rules which set forth specific burdens of proof. *See* Appendix "B." Judge Russell's list of explicit references to burdens of proof in the Code and Rules seems surprisingly limited. Surely there are other rules on the burden of proof. In fact, there are many such rules, all derived from case law interpreting a vast number of statutory provisions. Judge Russell has also canvassed these judge-made rules on the burdens of proof.[5] A few examples will give the reader an idea of how these burdens have been articulated by the courts in bankruptcy cases.

1. Jurisdiction of the court

The plaintiff, as the party asserting subject matter jurisdiction, has the burden of demonstrating its existence. *See In re MF Global Holdings Ltd.*, 561 B.R. 608 (Bankr. S.D. N.Y. 2016). Bankruptcy court jurisdiction must be proven by a preponderance of the evidence. *See Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214 (3d Cir. 2005). Likewise, the burden of establishing personal jurisdiction, also by a preponderance of the evidence, is always on the party asserting it. *See In re Pintlar Corp.*, 127 F.3d 1182 (9th Cir. 1997), *opinion amended and superseded*, 133 F.3d 1141 (9th Cir. 1998).

2. Standing

Article III of the Constitution requires a "case or controversy," meaning that all parties to an action must have an interest in the outcome of the case. *See Summers v. Financial Freedom Acquisition LLC*, 807 F.3d 351 (1st Cir. 2015) (A plaintiff suing in federal court has the burden to establish standing.). A federal court must initially determine the standing of the parties before

5 Hon. Barry Russell, *Bankruptcy Evidence Manual* § 301:22, § 301:24, § 301:25, § 301:26, § 301:68 (2018 ed.).

asserting jurisdiction over the action, and the burden of proving standing is on the party whose standing is questioned. *See Delgado Oil Co., Inc. v. Torres*, 785 F.2d 857 (10th Cir. 1986). On appeal, the burden of proving that a party is a "person aggrieved" is on the appellant asserting standing to pursue the appeal. *See In re Amir*, 436 B.R. 1 (B.A.P. 6th Cir. 2010).

3. Capacity to File Bankruptcy Petition

"[T]he initial burden of proof is on the party objecting to capacity to file.... [O]nce the objecting parties made a prima facie case, the burden shifts and the ultimate burden of persuasion is on the party who signed the Petition—establishing that under the applicable law he or she had the capacity to sign...." *In re Zaragosa Properties, Inc.* 156 B.R. 310 (Bankr. M.D. Fla. 1993).

4. Eligibility under 11 U.S.C. § 109

Section 109 sets forth the eligibility requirements for relief under the Bankruptcy Code. The burden of proof is on the party filing the bankruptcy petition. *See In re Pantazelos*, 540 B.R. 347 (Bankr. N.D. Ill. 2015) (Burden of establishing eligibility for chapter 13 relief is on the party filing bankruptcy); *Cottonport Bank v. Dichiara*, 193 B.R. 798 (W.D. La. 1996) (Debtors have burden of proving their eligibility for relief under Chapter 12); *In re City of Detroit, Mich.*, 504 B.R. 97 (Bankr. E.D. Mich. 2013) (City had burden of establishing eligibility for chapter 9 relief by preponderance of the evidence).

5. Undue Hardship Exception to Nondischargeability of Student Loans

The creditor bears the initial burden of proving both that a debt is owed and that such debt is the type contemplated by § 523(a)(8). *Roe v. The Law Unit, et al. (In re Roe)*, 226 B.R. 258, 268 (Bankr. N.D. Ala. 1998). Once proven, the burden shifts to the debtor to show that repayment of the debt would cause an undue hardship. *Id.* The appropriate standard of proof for § 523(a)(8) is a preponderance of the evidence. *Grogan v. Garner*, 498 U. S. 279, 290 (1991); *Wright v. RBS*

Citizens Bank (In re Wright), Adversary No. 13-00025-TOM, 2014 WL 1330276, at *3 (Bankr. N.D. Ala. Apr. 2, 2014). *See also In re Rumor*, 469 B.R. 553 (Bankr. M.D. Pa. 2012) (collecting cases).[6]

B. How Burdens of Proof are Impacted by Nonbankruptcy Law

As discussed in the four cases summarized below, sometimes the applicable rule on the burden of proof in a bankruptcy case comes from nonbankruptcy law.

1. *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15 (2000)

Raleigh is the seminal case illustrating the principle that the burden of proof can come from nonbankruptcy law. An Illinois company with the debtor (William J. Stoecker) as its president purchased an airplane out of state and moved it to Illinois. Ordinarily, the purchase would have been subject to Illinois' use tax. But by the time the Illinois Department of Revenue discovered that the tax was unpaid and issued a Notice of Penalty Liability against the president as the responsible corporate officer, the company was defunct, and the president had filed Chapter 7. The Chapter 7 trustee objected to the State's untimely proof of claim for the unpaid use tax. The only evidence presented to the bankruptcy court was that a person named Pluhar was the company's financial officer. There was no evidence that the debtor was responsible for or willfully evaded payment of the use tax. The bankruptcy court ruled in favor of the Chapter 7 trustee and disallowed the claim, and the case was appealed. When the Seventh Circuit reversed, finding in favor of the Illinois Department of Revenue, the United States Supreme Court granted certiorari.

At issue was the burden of proof as to the validity of the tax claim, about which the

6 Note that the initial burden of proof under § 523 is *always* on the creditor, even where the debtor files the complaint. *See In re Bryen*, 433 B.R. 503 (Bankr. E.D. Pa. 2010).

Bankruptcy Code was silent. The trustee argued that the burden of proof was on the Illinois Department of Revenue because pre-1978 bankruptcy practice placed the burden on those seeking a share of the bankruptcy estate. The Supreme Court disagreed, explaining that "the 'basic federal rule' in bankruptcy is that state law governs the substance of claims." *Raleigh*, 530 U.S. at 20. The Supreme Court had long held that the burden of proof is a "substantive" aspect of a claim. In other words, "the burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it." *Raleigh*, 530 U.S. at 21. Under the Illinois tax code, the burden of proof was on a corporate taxpayer's responsible officer (in this case, the debtor) following the issuance of a Notice of Penalty Liability. The Supreme Court therefore affirmed the Seventh Circuit's ruling that the Chapter 7 trustee failed to satisfy the burden of proof.

2. *In re Nora*, 581 B.R. 870 (Bankr. D. Minn. 2018)

Another example of a burden of proof derived from nonbankruptcy tax law is found *In re Nora*. There, the Chapter 13 debtor—an attorney—had filed a tax return claiming deductions for the destruction of business records following her eviction from her residence. The I.R.S. rejected the deductions and filed a proof of claim in the Chapter 13 case. In response, the debtor filed both a motion to disallow the claim and an objection to the proof of claim contending that she was entitled to deductions under 26 U.S.C. § 165(c)(1) for a loss that arose from theft or casualty and under § 165(c)(3) for a loss incurred in a trade or business. Regarding the burden of proof, the bankruptcy court explained:

> On tax matters, the Bankruptcy Code does not alter the burden of proof imposed by substantive law. Rather when the substantive law governing a tax claim puts the burden of proof on a taxpayer in a challenge to the amount of tax owing, the taxpayer will also have the burden of proof when challenging a claim for taxes filed in a bankruptcy case. Specifically, § 7491 of the Internal Revenue Code

> provides that the burden of proof will only shift to the IRS '[i]f in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B....' 26 U.S.C. § 7491(a)(1). The Tax Code goes on to provide that this burden shifting is limited and will only apply if '... (A) the taxpayer has complied with the requirements under this title to substantiate any item; and (B) the taxpayer has maintained all records required under this title and has cooperated with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews ....' 26 U.S.C. § 7491(a)(2)(A)&(B).

In re Nora, 581 B.R. at 878-79 (internal citations omitted). The court found that the debtor failed to satisfy the relevant burden of proof and therefore denied her motion to disallow the claim and overruled her objection to the proof of claim.

3. *Gyalpo v. Holbrook Development Corp.*, 577 B.R. 629 (E.D.N.Y. 2017)

In *Gyalpo*, the claimant worked as a cashier at the Chapter 11 debtor's gas station business. The bankruptcy court rejected the cashier's claim based on his failure to present sufficient evidence that he was an employee of the debtor. On appeal, the cashier argued that he qualified as an employee under the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") and that the bankruptcy court applied the wrong burden of proof. The district court recited the general rule that under § 502 and Bankruptcy Rule 3001, a proof of claim is deemed allowed unless a party in interest objects, and that a proof of claim filed in accordance with the rules constitutes prima facie evidence of the validity and amount of the claim. *Gyalpo*, 577 B.R. at 641. If the creditor makes out a prima facie case, the objecting party then bears the burden of putting forth sufficient evidence to rebut the claim, at which point the burden shifts back to the claimant to produce additional evidence to prove the validity of the claim by a preponderance of the evidence. *Id.* at 642. However, as noted above, state law governs the substance of claims. The cashier's claims for unpaid wages arose under the FLSA and NYLL, and those statutes played a significant role in determining whether he was an employee of the debtor.

Accordingly, the district court remanded with instructions for the bankruptcy court to consider the rules governing burdens of proof under those statutes.

4. *In re Tallerico*, 532 B.R. 774 (Bankr. E.D. Cal. 2015)

State law may also determine the burden of proof on a claim of exemptions. In *Tallerico*, the Chapter 7 debtor—a bicycle mechanic—filed a motion for turnover of levied personal property on a theory of impairment of exemptions. The creditor objected to the claims of exemption and argued that under California's exemption statute, Cal. Code of Civ. Proc. § 703.580(b), the exemption claimant has the burden of proof. The debtor, however, relied on Bankruptcy Rule 4003(c), which states that the "objecting party has the burden of proving that the exemptions are not properly claimed." The court ruled in favor of the creditor, explaining as follows:

> Federal Rule of Bankruptcy Procedure 4003(c) is invalid to the extent it assigns the burden of proof on an objection to a state-law claim of exemption in a manner contrary to state law.
>
> The Bankruptcy Rules Enabling Act, 28 U.S.C. § 2075, forbids rules that alter substantive rights. The Supreme Court clarified in *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 20–21, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000), that burden of proof is substantive, not procedural. It follows that Rule 4003(c), which was first adopted in 1973 on the assumption that burden of proof was procedural, offends § 2075.
>
> The state law governing the state exemptions claimed in this case specifies that exemption claimants have the burden of proof. This state-law rule of decision also triggers state rules of evidentiary presumptions per Federal Rule of Evidence 302.

In re Tallerico, 532 B.R. at 776. Having found that the debtor had the burden of proof under California law, the court ruled that the debtor failed to satisfy that burden. Thus, the court sustained the creditor's objection to the claims of exemption. It bears emphasizing that under *Tallerico*, Bankruptcy Rule 4003(c) does not always mean what it says.

III. Presumptions, Inferences, and "Things Deemed to Be True"

Just as rules on burdens of proof can impact how evidence is received in a bankruptcy case, and the quantum of proof required, so too can certain presumptions and inferences recognized in the Code, the Rules, and case law impact the proof required in particular cases.

A. Presumptions

The Federal Rules of Evidence address presumptions in FRE 301 and 302.

> Rule 301. Presumptions in Civil Cases Generally
>
> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.
>
> Rule 302. Applying State Law to Presumptions in Civil Cases
>
> In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.[7]

FRE 301 & 302. Judge Russell identifies a number of presumptions in the Bankruptcy Code and elsewhere. These include the following:

1. § 547(f) (Preferences) and § 553(c) (Setoff)

"[T]he debtor is presumed to have been insolvent on and during the 90 days immediately

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7 Note that presumptions *may* be subject to constitutional attack. In *Western & Atlantic R.R. v. Henderson*, 279 U.S. 639 (1929), the United States Supreme Court struck down a Georgia statute imposing liability on railroads for damage caused by trains. The statute imposed a presumption of negligence on the railroad company. The Supreme Court held that the presumption was invalid, thus arguably "imposing constitutional limitations on the effect of at least some presumptions." *McCormick on Evidence* § 345 (7th ed. 2016). In a subsequent case, however, the Supreme Court upheld a state presumption fixing the burden of persuasion. *See Dick v. New York Life Ins. Co.*, 539 U.S. 437 (1959). According to *McCormick*, "[t]he questionable status of *Henderson* in light of recent developments in tort law, the holding of the Court in *Dick*, and the illogic of treating presumptions differently from other rules of law allocating the burden of persuasion, make it relatively unlikely that there are now serious constitutional limits on the effect that may be given to presumptions in civil cases." *McCormick on Evidence* § 345 (7th ed. 2016).

preceding the date of the filing of the petition." 11 U.S.C. § 547(f) & § 553(c).

2. § 523(a)(2)(C) (Dischargeability of Consumer Debt)

"[C]onsumer debts owed to a single creditor and aggregating more than $675 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable;" and "cash advances aggregating more than $950 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable . . . ." 11 U.S.C. § 523(a)(2)(C).

3. § 707(b)(2) (Presumption of Abuse)

Under § 707(b)(2), "[a]fter notice and a hearing, the court ... may dismiss a case filed by an individual debtor under [Chapter 7] whose debts are primarily consumer debts ... if it finds that the granting of relief would be an abuse of the provision of this chapter." 11 U.S.C. § 707(b)(1). "In considering ... whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists" if the debtor fails the means test. 11 U.S.C. § 707(b)(2).[8]

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8 The Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") significantly changed this section of the Bankruptcy Code. Section 707(b) previously stated that "[a]fter notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a *substantial abuse* of the provisions of this chapter. There shall be a *presumption in favor of granting the relief requested by the debtor*. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4))." 11 U.S.C 707(b) (pre-BAPCPA) (emphasis added). Importantly, the term "substantial abuse" was changed to "an abuse," and the presumption in favor of granting relief to the debtor was eliminated.

4. § 362(c)(3)(C) Case Presumptively Filed Not in Good Faith

Where the debtor filed a previous case under Chapter 7, 11, or 13 that was dismissed within the preceding one-year period, a party in interest may file a motion to extend the automatic stay based upon a showing that the filing of the later case is in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(3)(B). Under certain circumstances, a case is presumptively filed not in good faith, although this presumption may be rebutted by clear and convincing evidence. 11 U.S.C. § 362(c)(3)(C).

5. Chapter 13 Debtor's Home is Necessary for Effective Reorganization

Some courts have held that there is an *irrebuttable* presumption that a Chapter 13 debtor's home is necessary for an effective reorganization. *See In re Donahue*, 221 B.R. 105, 112 (Bankr. D. Vt. 1998), *opinion amended and superseded*, 231 B.R. 865 (Bankr. D. Vt. 1998), *rev'd*, 232 B.R. 610 (D. Vt. 1999). *But see In re Huggins*, 357 B.R. 180, 185 (Bankr. D. Mass. 2006) ("[T]he Court rejects the argument that there is an irrebuttable presumption that the Property is necessary to an effective reorganization.").

6. Transfers to Relatives

Regarding 11 U.S.C. § 727(a)(2)(A), the Fifth Circuit has held that "a presumption of actual fraudulent intent necessary to bar a discharge arises when property is either transferred gratuitously or is transferred to relatives." *Matter of Chastant*, 873 F.2d 89, 91 (5th Cir. 1989). *But see Robertson v. Dennis (In re Dennis)*, 330 F.3d 696 (5th Cir. 2003) (distinguishing *Chastant*).

B. Evidence Needed to Rebut a Presumption

Most courts hold that a presumption is rebutted and has no further effect once evidence is introduced sufficient to raise a substantial doubt in the mind of the trier of fact as to the existence

of the presumed fact. In other words, "the presumption simply disappears from the case." *In re Ran*, 390 B.R. 257, 300-01 (Bankr. S.D. Tex. 2008), aff'd, 406 B.R. 277 (S.D. Tex. 2009). But while the presumption is dispelled, "the underlying evidence remains in the case." *Id.* at 301. That means that "a fact finder could still credit the evidence of the party in favor of whom the rebutted presumption operates despite the existence of contrary evidence and despite the resultant destruction of the presumption."[9] *Id.*

C. Conclusive Presumptions

Some presumptions are conclusive. As Judge Russell observes, "[a] conclusive presumption is actually a substantive rule of law." *Bankruptcy Evidence Manual* § 301:19 (2018 ed.). He identifies a single conclusive presumption in the Bankruptcy Code. That presumption is found in § 1126(f): "Notwithstanding any other provision of this section, a class that is not impaired under a plan and each holder of a claim or interest of such class, are *conclusively presumed* to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required." 11 U.S.C. § 1126(f) (emphasis added).

Judge Russell also identifies two conclusive presumptions in the Bankruptcy Rules. First, under Bankruptcy Rule 2002(g)(4) ("Notices to Creditors, Equity Security Holders, United States, and United States Trustee"), "an entity and a notice provider may agree that when the notice provider is directed by the court to give a notice, the notice provider shall give the notice to the entity in the manner agreed to and at the address or addresses the entity supplies to the notice provider. That address is *conclusively presumed* to be a proper address for the notice." Fed. R. Bankr. P. 2002(g)(4) (emphasis added). Second, under Bankruptcy Rule 5003(e) ("Records Kept

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9 *See* the "bursting bubble" discussion in the Advisory Committee Notes to FRE 301.

By the Clerk"), "[t]he mailing address in the register is *conclusively presumed* to be a proper address for a governmental unit, but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law." Fed. R. Bankr. P. 5003(e) (emphasis added).

D. Inferences

Like presumptions, there are recognized inferences that may be drawn from the admission of (or from the failure to provide) certain evidence. "The failure of a party to provide evidence peculiarly available to that party supports the inference that the truth would be damaging to that party." *Bankruptcy Evidence Manual* § 301:2 (2018 ed.). One such inference is the "uncalled witness" rule, which permits an inference that the testimony of a witness available to a party, but who is not called by that party, would be unfavorable to the party's case. *In re Supplement Spot, LLC*, 409 B.R. 187, 205 (Bankr. S.D. Tex. 2009). The rule only applies when the witness has information "peculiarly within his knowledge" rather than merely "cumulative" testimony. *Id.* The rule does not apply when the witness is "equally available to both parties." *Id.* For examples, *see In re Albanese*, 96 B.R. 376, 380 (Bankr. M.D. Fla. 1989) (in § 523(a)(2)(B) case, debtor's failure to call her accountant as a witness created an inference that the accountant's testimony would have been adverse) and *In re McGohan*, 75 B.R. 10, 13 (Bankr. N.D. N.Y. 1986) (in § 523(a)(2), (4), & (6) case, debtor's failure to attend the trial and testify created an inference that his testimony would have been unfavorable to his case).

Inferences may also arise in the context of a complaint under 11 U.S.C. § 548 to avoid a fraudulent conveyance. In order to attack transfers made with actual fraudulent intent, a trustee must often rely on circumstantial evidence.

To aid in the examination of the circumstances of the transaction in order to

> determine whether the transfer was made with the requisite intent, courts have developed what are known as "badges of fraud." Circumstances from which courts have been willing to *infer* fraud include concealment of facts and false pretenses by the transferor, reservation by the transferor of rights in the transferred property, his or her absconding with or secreting the proceeds of the transfer immediately after their receipt, a transfer for no consideration when the transferor and the transferee know of the claims of creditors and know the creditors cannot be paid, the existence of an unconscionable discrepancy between the value of the property transferred and the consideration received therefor, the fact that the transfer was made to satisfy or secure a debt long since forgiven, the fact that the transferee was an officer or an agent or creditor of an officer of an insolvent corporate transferor, and the creation by an oppressed debtor of a closely-held corporation to receive the transferred property.

Collier on Bankruptcy ¶ 548.04[2][6] (emphasis added).

E. Things "Deemed" to Have Been Done

Judge Russell also identifies dozens of things "deemed" to have been done pursuant to the Bankruptcy Code and Bankruptcy Rules. "[N]ot only do [these things] not require further evidence, but evidence is not allowed to rebut that which has been 'deemed' to have been done." *Bankruptcy Evidence Manual* § 301:20 (2018 ed.). Thus, they are similar to conclusive presumptions. Examples include the following:

1. Section 365(d)(4). Executory contracts and unexpired leases

"An unexpired lease of nonresidential real property under which the debtor is the lessee shall be *deemed* rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of: (i) the date that is 120 days after the date of the order for relief; or (ii) the date of the entry of an order confirming a plan." 11 U.S.C. § 365(d)(4) (emphasis added).

2. Section 502(a). Allowance of claims or interests

"A claim or interest, proof of which is filed under section 501 of this title, is *deemed* allowed, unless a party in interest objects." 11 U.S.C. § 502(a) (emphasis added).

3. Section 522(b)(1). Exemptions

If the spouses cannot agree on whether to take their state exemptions or the § 522(d) exemptions, they are *deemed* to have elected the federal exemptions. *See* 11 U.S.C. § 522(b)(1).

4. Section 1111(a). Claims and interests

"A proof of claim or interest is *deemed* filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated." 11 U.S.C. § 1111(a) (emphasis added).

5. Section 1126(b). Acceptance of plan

Under certain circumstances, prepetition acceptances or rejection of a plan are *deemed* to be binding. See 11 U.S.C. § 1126(b).

6. Bankruptcy Rule 5001(a). Courts and Clerks' Office

"The courts shall be *deemed* always open for the purpose of filing any pleading or other proper paper, issuing and returning process, and filing, making, or entering motions, orders and rules." Fed. R. Bankr. P. 5001(a) (emphasis added).

IV. Stages of Litigation Where Evidence Must Be Produced

It is in the context of actual trials and evidentiary hearings that the FRE become most prominent. The FRE are not applied in isolation. They are intertwined with the Federal Rules of Civil Procedure. But let's look first at the earlier stages of an adversary proceeding where counsel will be called upon to produce evidence. It turns out that drafting the adversary complaint presents one of the first opportunities to confront evidence problems.

A. Pleading Requirements Under *Twombly* and *Iqbal*: Surviving a Motion to Dismiss

Under Fed. R. Civ. P. 8(a)(2), a plaintiff need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Important to many bankruptcy cases is the more specific pleading requirement of Fed. R. Civ. P. 9(b) which provides that "[i]n alleging fraud ... a party must state with particularity the circumstances constituting fraud...." Fed. R. Civ. P. 9(b). It is common, but not inevitable, for a Defendant to challenge your complaint in an adversary proceeding with a Fed. R. Civ. P. 12(b)(6) motion to dismiss.[10] A complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) only where it appears that the facts alleged fail to state a "plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In ruling on a motion to dismiss, the court must accept factual allegations as true and construe them in the light most favorable to the plaintiff. *Iqbal*, 556 U.S. at 678. However, allegations in the form of legal conclusions, as well as "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The rule "does not impose a probability requirement at the pleading stage," but instead "asks for more than a sheer possibility that a defendant has acted unlawfully." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," a complaint is insufficient under Fed. R. Civ. P. 8(a) because it has merely "alleged" but not "show[n] . . . that the pleader is entitled to relief."

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10 "In deciding a motion [for judgment on the pleadings] under Rule 12(c), a court applies the same standards that govern a motion to dismiss for failure to state a claim under Rule 12(b)(6) . . . . Accordingly, the court must accept all factual allegations by the non-moving party as true, and draw all reasonable inferences in his favor." *Al-Hamdani v. Al-Akwaa (In re Al-Akwaa)*, 585 B.R. 82, 85 (Bankr. S.D.N.Y. 2018).

Iqbal, 556 U.S. at 679.

In order to appreciate the above-recited pleading standards now required under Fed. R. Civ. P. 8(a)(2), it is important to understand a little history of how pleadings standards were substantially changed by the Supreme Court's decisions in *Twombly* and *Iqbal* in a stark departure from the Court's earlier *Conley v. Gibson*[11] "no set of facts" standard. The following excerpt from an excellent 2016 law review article[12] (in which the author cleverly coined the shorthand "Twiqbal") very succinctly traces the development of the new standards:

> With the adoption of the Federal Rules of Civil Procedure in 1938, the flexible "notice pleading" standard replaced a more rigid code pleading regime. Emblematic of this transition, the notably simple requirements of Rule 8 were meant to de-emphasize pleadings and refocus on the merits of a claim. Under the text of the Rule, a plaintiff was required only to provide a "short and plain statement" of the court's jurisdiction, the claim, and the grounds for relief. This dramatic departure from past pleading practices was cemented by *Conley*, where the Supreme Court held that a pleading providing a "defendant [with] fair notice of what the plaintiff's claim is and the grounds upon which it rests" should survive a motion to dismiss. Only where it "appear[ed] beyond doubt that the plaintiff c[ould] prove no set of facts" to support his claim would dismissal be appropriate. Under this liberalized pleading standard, the time for fact revelation and issue formulation would come during later pretrial proceedings.
>
> In the decades following *Conley*, the decision served as the foundation for the Supreme Court's new pleading paradigm.
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> . . .
>
> Finally, as the Court entered the new millennium, the *Conley* standard seemed firmly entrenched. In *Swierkiewicz v. Sorema N.A.*, the court of appeals affirmed the district court's dismissal of the plaintiff's allegations under a heightened pleading standard used by the Second Circuit in the employment discrimination context. But a unanimous Supreme Court reversed, consistent with *Conley*, *Scheuer*, *Hishon*, and *Leatherman*, and found the heightened pleading standard to

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11 355 U.S. 41, 45-46 (1957).

12 Justin Rand, *Tightening Twiqbal: Why Plausibility Must Be Confined to the Complaint,* The Federal Courts Law Review, Vol. 9, Issue 2, pp. 79-102.

be in "conflict[] with Federal Rule of Civil Procedure 8(a)(2)." Eliminating any doubt, Justice Thomas emphasized that "Rule 8(a)'s simplified pleading standard applies to all civil actions" outside of a limited set of exceptions like pleading fraud or mistake under Rule 9(b). Almost fifty years after being decided, *Conley* was cited approvingly by the unanimous *Swierkiewicz* Court.

. . .

The Supreme Court decided *Bell Atlantic Corp. v. Twombly* in 2007. The plaintiffs in the putative class action alleged that established communications providers had violated [S]ection 1 of the Sherman Antitrust Act by engaging in parallel conduct aimed to prevent new market entrants. According to the plaintiffs, the established providers agreed to refrain from competing against each other outside of their respective markets. As a result of this alleged parallel conduct, trade was restrained, competition impaired, and prices inflated.

The United States District Court for the Southern District of New York originally dismissed the plaintiffs' claim. Even accepting the allegations as true, Judge Lynch reasoned, the complaint alleged "nothing more than parallel conduct" wholly consistent with the individual economic incentives of each defendant. The Court of Appeals for the Second Circuit reversed, however, finding the District Court's requirement of "plus factors" for Sherman Antitrust Act claims to be reversible error. Indeed, after tracing the fifty-year development of *Conley* and its progeny, the Second Circuit result seemed consistent with--and correct under-- the Supreme Court's pleading standard jurisprudence. But the Supreme Court reversed the judgment of the Second Circuit in an opinion that is both infamous and controversial.

Writing for a divided Court, Justice Souter laid the seeds for a new era of pleading practices. Stating a claim under [S]ection 1, he wrote, would require a complaint "with enough factual matter ... to suggest that an agreement was made." The first step in assessing the sufficiency of the complaint, therefore, was separating the plaintiffs' factual allegations from their conclusory statements. Second, in assessing the factual allegations, the plaintiffs' claim had to be "plausible" and "possess enough heft to 'sho[w] that the pleader [wa]s entitled to relief.'" Under this newly articulated pleading standard, the *Twombly* plaintiffs' complaint failed to state a claim.

The majority acknowledged that this bifurcated "plausibility" analysis seemed inconsistent with common understandings of the *Conley* standard developed and reaffirmed over a fifty-year span. But these understandings were attributed to lower courts and commentators taking *Conley*'s "no set of facts" language out of

context. After the majority "pile[d] up" citations demonstrating that the *Conley* standard had been "questioned, criticized, and explained away long enough," Justice Souter reasoned that the language had "earned its retirement." Yet, in dismissing the complaint for not being "plausible on its face," the *Twombly* majority seemingly created more questions than it answered.

The most important question left unanswered by *Twombly*--whether the more demanding "plausibility standard" extended beyond the antitrust context-- was resolved just two short years later. In *Ashcroft v. Iqbal*, the plaintiff brought a *Bivens* action against federal officials including John Ashcroft and Robert Mueller. The allegations claimed that the plaintiff was subjected to certain conditions of confinement (to which the general inmate population was not subjected) because of his Pakistani citizenship and Islamic faith. Ashcroft and Mueller, the plaintiff alleged, played key roles in developing the unconstitutional policy that led to his confinement based on his religion and national origin. After the court of appeals affirmed the denial of the defendants' motions to dismiss, the Supreme Court granted certiorari.

In a 5-4 decision, Justice Kennedy wrote for the majority, applying *Twombly*'s two-part "plausibility" analysis for the first time outside of the antitrust context. At the first step, he found the plaintiff's allegations that Ashcroft was the "principal architect" of the unconstitutional policy, and that Mueller was "instrumental" in the policy's execution, to be conclusory and not entitled to a presumption of truth. After excluding these implausible conclusory statements, the complaint's factual allegations were found to fail to "'nudge[]" the plaintiff's claims "across the line from conceivable to plausible." Using "its experience and common sense," the Court found that "more likely explanations" existed to explain the allegations contained in the complaint. Because the plaintiff's allegations were not the most likely explanation for his confinement and detainment, his allegations against Ashcroft and Mueller could not survive.

To outside observers, the *Twombly* and *Iqbal* decisions seemed like wholesale departures from the notice pleading practices developed under *Conley* and its progeny. After *Iqbal*, it was clear that plausibility pleading was to be applied to all civil actions. Yet, "experience and common" sense—both seemingly absent from the Court's violent swing away from *Conley*—were the only guideposts provided to the lower courts who suddenly found themselves thrown into a new plausibility paradigm.

This interesting history[13] of the new pleading standards ushered in under *Twombly* and *Iqbal* is relevant to our discussion of evidence, for this reason: courts will be examining the "factual allegations" to determine whether the plaintiff's claim for relief is plausible. Factual allegations, in turn, must be based on *evidence*.

B. Elements of a Cause of Action

One starting point to satisfy the requirements of *Twombly* and *Iqbal* is to make sure you understand the elements of a cause of action (or relief sought by motion).[14] Breaking down a case in this fashion helps to highlight where factual matters must be alleged and for which proof must be available. (But remember, to satisfy *Twombly/Iqbal*, more than a mere recitation of elements is necessary.) To illustrate this point, we have set forth below the elements of four causes of action in bankruptcy cases.

1. 11 U.S.C. § 547(b) Voidable Preference

There are five elements to a § 547(b) claim. First, the transfer must have been made "to or for the benefit of a creditor." 11 U.S.C. § 547(b)(1). Second, the transfer must have been made "for or on account of an antecedent debt owed by the debtor before such transfer was made." 11

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13 Rand's article discusses whether *Twombly/Iqbal* should be applied to affirmative defenses. The federal courts have not resolved this question. For example, "[t]he Eleventh Circuit has not decided whether the *Twombly-Iqbal* pleadings standard[] applicable to claims under Rule 8(a) applies to affirmative defenses under Rule 8(c), but it has stressed that notice is the main purpose of Rule 8(c)." *Willis v. Arp*, 165 F.Supp.3d 1357,1365 (N.D. Ga. 2016) (quoting *Hassan v. U.S. Postal Serv.*, 842 F.2d 260, 263 (11th Cir. 1988)). *See also Super98, LLC v. Delta Air Lines, Inc.*, 1:16-CV-1535-LMM, 2016 WL 11247639, at *1 (N.D. Ga. Sept. 28, 2016) (collecting cases); *Hernandez-Hernandez v. Hendrix Produce, Inc.*, No. 6:13-cv-53, 2014 WL 726426 (S.D. Ga. Feb. 24, 2014) (declining "to import Twombly's heightened pleading standard into the Rule 8(c) arena" because "a plaintiff may have years to develop and research her claims before filing a complaint, while a defendant often has only twenty-one days to respond").

14 While Fed. R. Civ. P. 12(b)(6) is not applicable to contested matters (*see* Bankruptcy Rule 9014(c)), it is still useful to consider the *Twombly/Iqbal* pleading standards in contested matters.

U.S.C. § 547(b)(2). Third, the transfer must have been "made while the debtor was insolvent." 11 U.S.C. § 547(b)(3). Fourth, the transfer must have been made "on or within 90 days before the date of the filing of the petition" or "between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider." 11 U.S.C. § 547(b)(4)(A) and (B). Fifth, the transfer must have enabled the creditor to receive more than he would have received if the case were a chapter 7 case, the transfer had not been made, and the creditor received payment of the debt "to the extent provided by the provisions of this title." 11 U.S.C. § 547(b)(5)(A) and (B). *Williams v. McNabb (In re McNabb)*, 567 B.R. 326, 335 (Bankr. W.D. Tenn. 2017).

For an example of a § 547(b) complaint that failed to satisfy *Twombly/Iqbal*, *see In re PostRock Energy Corp.*, Adv. Pro. 18-01023, 2018 WL 4279477 (Bankr. W.D. Okla. Sept. 6, 2018): "In order to satisfy the minimum pleading requirements of *Iqbal* and *Twombly*, '[a]t the very least, the rules of procedure require the pleader of a preferential or fraudulent transfer claim to reasonably identify the types of transfers sought to be avoided. Some courts have held that such identification must include the amount and date of the transfers together with the name of the transferor and transferee'.... A preferential transfer complaint must also contain sufficient factual allegations to show that the debtor's insolvency is plausible.... Because the Complaint primarily regurgitates the elements of Trustee's alleged cause of action, it does not permit this Court to infer that any of the Transfers might plausibly be preferential transfers." *Id.* at *4.

2. 11 U.S.C. § 362(k) Willful Violation of the Automatic Stay

"Claims under § 362(k) consist of three basic elements: the violation of the stay, the defendants' willfulness, and the plaintiffs' injury.... Violations of the automatic stay are willful if the violator (1) knew of the automatic stay and (2) intentionally committed the violative act,

regardless of whether the violator specifically intended to violate the stay." *Thomas v. Seterus, Inc. (In re Thomas)*, 554 B.R. 512, 519 (Bankr. M.D. Ala. 2016).

For an example of an adversary complaint[15] under § 362(k) that failed to satisfy *Twombly/Iqbal*, see *Anderson v. McCowan (In re McCowan)*, Adversary No. 12-5416, 2014 WL 457781 (Bankr. N.D. Ga. Jan. 10, 2014). There, the Chapter 7 trustee asserted that the unauthorized postpetition sale of real property in which the estate held a one-half interest violated the automatic stay. The court found, among other things, that the trustee failed to make any factual allegations regarding the defendant's knowledge of the debtor's bankruptcy, and thus the trustee failed to make out a plausible claim for willful violation of the stay.

In the Eleventh Circuit "emotional distress damages fall within the broad term of 'actual damages' in § 362(k)." *Lodge v. Kondaur Capital Corp.*, 750 F.3d 1263, 1271 (11th Cir. 2014). However, establishing a right to such damages is not a simple matter. "[A]t a minimum, to recover 'actual' damages for emotional distress under § 362(k), a plaintiff must (1) suffer significant emotional distress, (2) clearly establish the significant emotional distress, and (3) demonstrate a causal connection between that significant emotional distress and the violation of the automatic stay." *Id.* Proving a causal connection may be particularly difficult. In *Lodge*, for example, the Eleventh Circuit held that in light of the joint debtors' multi-year bankruptcy proceedings, they failed to show a connection between a foreclosure notice published in the newspaper and the husband's stress and physical maladies. Moreover, the debtors did not attach to their motion for summary judgment any evidence of their doctor visits. (*See* Section IV.F. below.)

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15 Bankruptcy Rule 7001 does not require an adversary proceeding to recover damages under § 362(k). *In re Ballard*, 502 B.R. 311 (Bankr. S.D. Ohio 2013). Nevertheless, litigants frequently bring adversary proceedings under § 362(k).

3. 11 U.S.C. § 523(a)(2)(B) Fraud Nondischargeability:

Section 523(a)(2)(A) excepts from discharge debts arising from "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition." 11 U.S.C. § 523(a)(2)(A). Section 523(a)(2)(B) bars discharge of debts arising from a materially false "statement ... respecting the debtor's ... financial condition" if that statement is "in writing." 11 U.S.C. § 523(a)(2)(B). Thus, "[i]n order for its debt to be declared non-dischargeable under § 523(a)(2)(B), a creditor must prove by a preponderance of the evidence that the debtor owes the creditor a debt for money, property, or the extension of credit that was obtained by the debtor through the use of: (1) a written statement; (2) the written statement was materially false; (3) the written statement [was 'respecting'] the debtor's financial condition;[16] (4) the plaintiff reasonably relied on the statement; and (5) the debtor published the writing with the intent to deceive the plaintiff." *Hurston v. Anzo (In re Anzo)*, 547 B.R. 454, 465 (Bankr. N.D. Ga. 2016).

For an example of a § 523(a)(2)(B) complaint that failed to satisfy *Twombly/Iqbal*, *see Shelzi v. Foistner (In re Foistner)*, Adv. No. 17-1083-BAH, 2018 WL 3532900 (Bankr. D.N.H. July 20, 2018). There, the plaintiff did "little more than parrot the elements" of § 523(a)(2)(B). *Id.* at *9. Although the plaintiff alleged that the debtor obtained funds through materially false statements, she did not identify what those statements were or how they were false. Accordingly, the court found that the plaintiff did not state a plausible claim for nondischargeability.

16 In *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752 (2018), the United States Supreme Court ruled that a statement about a single asset can be a statement "respecting the debtor's financial condition" under § 523(a)(2)(B).

4. 11 U.S.C. § 523(a)(8)(A)(i) Student Loan Nondischargeability

Student loans are excepted from discharge "unless excepting such debt from discharge ... would impose an undue hardship on the debtor and the debtor's dependents[.]" 11 U.S.C. § 523(a)(8)(A)(i). Under the *Brunner* test set forth in *Brunner v. New York State Higher Educ. Serv. Corp.*, 831 F.2d 395 (2d Cir. 1987), the debtor must demonstrate undue hardship by showing "(1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans." *Nightingale v. North Carolina State Educ. Assistance Auth. (In re Nightingale)*, 529 B.R. 641, 648 (Bankr. M.D.N.C. 2015).

For an example of a § 523(a)(8)(A)(i) complaint that failed to satisfy *Twombly/Iqbal*, *see Dunlap v. Edu. Credit Mgmt. Corp. and College Found. (In re Dunlap)*, A.P. No. 15-03150, 2016 WL 93805 (Bankr. W.D.N.C. Jan. 6, 2016). There, the debtor maintained a minimal standard of living for himself and for his dependent while repaying his student loans at the rate of $640.57 per month. He was highly educated and gainfully employed. The court found that he failed to allege the elements of an undue hardship claim under the *Brunner* test.

C. Motions to Dismiss can be Converted to Motions for Summary Judgment

Motions to dismiss are decided based upon the allegations set forth in the complaint, not upon evidence. Sometimes, however, the plaintiff may attach documents to the complaint. "The district court generally must convert a motion to dismiss into a motion for summary judgment if it considers materials outside the complaint." *Day v. Taylor*, 400 F.3d 1272, 1275-76 (11th Cir. 2005). However, "the court may consider a document attached to a motion to dismiss without

converting the motion into one for summary judgment if the attached document is (1) central to the plaintiff's claim and (2) undisputed. In this context, 'undisputed' means that the authenticity of the document is not challenged . . . Our prior decisions also make clear that a document need not be physically attached to a pleading to be incorporated by reference into it; if the document's contents are alleged in a complaint and no party questions those contents, we may consider such a document provided it meets the centrality requirement imposed in [*Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002)]." *Id.* at 1276.

D. Default Judgment

If the defendant fails to timely respond to the complaint, and that failure is shown by affidavit or otherwise, the clerk of court must enter the defendant's default. Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55(a). A defaulted defendant is deemed to admit the plaintiff's well-pleaded allegations of fact. *Cotton v. Massachusetts Mut. Life Ins. Co.*, 402 F.3d 1267, 1278 (11th Cir. 2005). However, a defaulted defendant is *not* deemed to admit facts that are not well-pleaded or to admit conclusions of law. *Id.* Thus, the fact that the defendant is in default does not necessarily mean that a default judgment is warranted. *Nishimatsu Constr. Co. Ltd. V. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). Rather, the court has discretion in determining whether to enter a default judgment. *Hamm v. Dekalb Cnty.*, 774 F.2d 1567, 1576 (11th Cir. 1985). Under Fed. R. Civ. P. 55(b)(2), the court may conduct an evidentiary hearing when necessary to conduct an accounting, to determine the amount of damages, *to establish the truth of any allegation by evidence*, or to investigate any other matter. Fed. R. Civ. P. 55(b)(2).[17]

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17 Interestingly, Fed. R. Civ. P. 55(d) states that "[a] default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court." In *Owens v. U.S.*, No. A08-61790-PWB, 2009 WL 2480773 (Bankr. N.D. Ga. Apr. 9, 2009), the court cited Fed. R. Civ. P. 55(d) in declining to

E. Discovery

Evidence will, of course dominate everything that happens in the discovery process. Without attempting to catalogue every evidence problem that may arise, we have identified below a few specific areas where evidence rules impact discovery.

As a preliminary matter a glance at the structure of Fed. R. Civ. P. 26 reveals the various manners in which evidence issues will arise. As Judge Norton has explained, "Rule 26 should be read in conjunction with [Bankruptcy] Rule 1001, which says that the rules shall be construed 'to secure the just, speedy, and inexpensive determination of every case and proceeding.'"[18] What follows is an outline of Fed. R. Civ. P. 26:

Rule 26(a) Required Disclosures
(a)(1) initial (not applicable in a contested matter unless otherwise ordered)
(a)(2) expert (not applicable in a contested matter unless otherwise ordered)
(a)(3)pretrial (not applicable in a contested matter unless otherwise ordered)
(a)(4) form of disclosure
Rule 26(b) Discovery Scope and limits
(b)(1) scope in general
(b)(2) limitations on frequency/extent
(b)(3) trial preparation; materials
(b)(4) trial preparation; experts
(b)(5) claiming privilege or protecting trial-preparation materials
Rule 26(c) Protective Orders
(c)(1) in general
(c)(2) ordering discovery
(c)(3) awarding expenses

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sustain an objection to the Internal Revenue Service's proof of claim based on that government agency's failure to respond to the objection. *Id.* at *1 n.1 ("As the Internal Revenue Service well knows, because it regularly declines to respond to objections and other motions affecting its interests in this Court, [Fed. R. Civ. P. 55(d)] provides" that a default judgment cannot be entered against the United States "unless the claimant establishes a claim or right to relief by evidence that satisfies the court.").

18 Much of the following material is adapted from Chief Judge Cynthia A. Norton, Chief Bankruptcy Judge, Western District of Missouri, *Evidence for the Trustee Staff Attorney* (Presented to the NACTT July 2017).

Rule 26(d) Timing and Sequence of Discovery
(d)(1) timing
(d)(2) early Rule 34 requests
(d)(3) sequence
Rule 26(e) Supplementing Disclosures and Responses
(e)(1) in general
(e)(2) expert witness
Rule 26(f) Conference of the Parties; Planning for Discovery (not applicable in a contested matter unless otherwise ordered)
(f)(1) conference timing
(f)(2) conference content; parties' responsibilities
(f)(3) discovery plan
Rule 26(g) Signing Disclosures and Discovery Requests
(g)(1) signature required; effect of signature
(g)(2) failure to sign
(g)(3) sanctions for improper certification

1. Fed. R. Civ. P. 26(a) Disclosures (Initial, Expert and Pretrial)

The earliest stages of an adversary proceeding will reveal the strength or even viability of the parties' respective legal positions. Counsel's various obligations under Fed. R. Civ. P. 26(a) place a premium on knowing, in advance, precisely how you expect to prove your case, including damages. Fed. R. Civ. P. 26(a)(1)(A) requires a party to make certain initial disclosures "without awaiting a discovery request" by providing to the other parties:

> (a) Required Disclosures.
>
> (1) *Initial Disclosure.*
>
> **(A)** *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:
>
> **(i)** the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
>
> **(ii)** a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would

be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Fed. R. Civ. P. 26(a)(1)(A). Although these disclosure requirements are not, strictly speaking, rules of evidence, it is impossible to comply with them without producing evidence.

2. Assertions of Privilege in Discovery Responses

One of the limitations on discovery is that matters are not discoverable, under certain circumstances, if they are privileged. *See* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter...."). A privilege is the right to refuse to disclose certain information. FRE 501, which governs privilege, provides as follows:

Rule 501. Privilege in General

The common law--as interpreted by United States courts in the light of reason and experience--governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

FRE 501. Thus, state law privileges may apply in federal court. Examples include attorney-client privilege, physician-patient privilege, and marital privileges.

One interesting concept related to the attorney-client privilege is the common interest doctrine. Under the general rule, disclosure of privileged information to a third party constitutes waiver of the privilege. Under the common interest doctrine, however, privileged information may be shared with third parties, without waiving the privilege, to facilitate the rendition of legal services. To invoke the common interest doctrine, a party must show that (1) the communication was made by separate parties in a matter of common interest; (2) the communication was designed to further that effort; and (3) the privilege has not otherwise been waived. *In re Leslie Controls, Inc.*, 437 B.R. 493 (Bankr. D. Del. 2010). For example, in *In re Int'l Oil Trading Co., LLC*, 548 B.R. 825 (Bankr. S.D. Fla. 2016), Mohammad Al-Saleh and his attorney shared information with Burford Capital, LLC, which funded his litigation against IOTC USA. The court held that a party's communications with a litigation funder are protected by the common interest doctrine.

3. Requests for Admission

Under Fed. R. Civ. P. 36, a party may serve on any other party a written request to admit the truth of any matters within the scope of Fed. R. Civ. P. 26(b)(1) relating to (A) facts, the application of law to fact, or opinions about either; and (B) the genuineness of any described documents. Fed. R. Civ. P. 36(a)(1). A matter admitted under Fed. R. Civ. P. 36 is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Fed. R. Civ. P. 36(b). Unlike interrogatories, there is no fixed limit on the number of requests for admission that a party may serve. This is an effective and inexpensive way to generate evidence. That said, requests for admission must be narrowly tailored to avoid objection.

A party's failure to respond to requests for admission means that those matters are deemed admitted and thus are conclusively established under Fed. R. Civ. P. 36(b). *Sec'y U.S.*

Dep't of Labor v. Kwasny, 853 F.3d 87, 91 (3d Cir. 2017). For example, in *Sicherman v. Rivera (In re Rivera)*, Adversary No. 05-1629, 2007 WL 1110749, at *4 (Bankr. N.D. Ohio Apr. 10, 2007), the Chapter 7 trustee filed an adversary complaint seeking to avoid and recover certain postpetition transfers. The defendant filed an answer but failed to respond to the trustee's requests for admissions. The defendant's failure to respond conclusively established the trustee's allegation that the debtor transferred certain funds to the defendant after the filing of the petition.

Note that some courts may consider a defaulting defendant who has never appeared in the litigation as a *non-party* for the purposes of requests for admission. In *Lu v. Liu (In re Liu)*, 282 B.R. 904 (Bankr. C.D. Cal. 2002), the debtor failed to respond to the creditor's nondischargeability complaint. The creditor then served a set of requests for admission, to which the debtor never responded, and sought to use the debtor's failure to respond as a deemed admission of each of the requests, and to obtain judgment based thereon. Fed. R. Civ. P. 36, however, provides for requests for admission directed only to a "party" in the suit. "In choosing not to answer, a defaulting defendant has relinquished the opportunity to challenge the plaintiff's claim and thereby avoided the burdens associated with defending the lawsuit." *Id.* at 909. Such a defendant should not be expected "to comply with a discovery procedure that is intended to 'expedite trial by establishing certain material facts as true and thus narrowing the range of issues for trial.'" *Id.* The court therefore found that "a defendant who has not filed an answer to the complaint or otherwise appeared in the adversary proceeding is not a 'party' for the purpose of Rule 36 and may not be required to respond to requests for admission."[19] *Id.*

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19 *But see Minx, Inc. v. West*, No. 2:11-CV-00895-BSJ, 2011 WL 5844486, at *2 (D. Utah Nov. 21, 2011) (holding that "a party should still be considered a party, even after entry of default" for purposes of post-default subpoenas).

F. Summary Judgment

The summary judgment stage of litigation requires the production of evidence. Under Fed. R. Civ. P. 56, made applicable by Bankruptcy Rule 7056, the court may grant summary judgment, disposing of the case without the need for a trial. Summary judgment is proper if the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). Not all factual disputes render summary judgment inappropriate; only a *genuine* issue of material fact will defeat a properly supported motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). This means that summary judgment may be granted if there is insufficient evidence for a reasonable jury to return a verdict for the nonmoving party or, in other words, if reasonable minds could not differ as to the verdict. *See id.* at 249-52.

On summary judgment, the court must view the evidence and all justifiable inferences in the light most favorable to the nonmoving party; the court may not make credibility determinations or weigh the evidence. *See id.* at 254-55. The moving party "always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact" and that entitle it to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party discharges this burden, the burden then shifts to the nonmoving party to respond by setting forth specific evidence in the record and articulating the precise manner in which that evidence creates a genuine issue of material fact or that the moving party is not entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(e); *see also Celotex*, 477 U.S. at 324-26. This evidence must consist of more than mere conclusory allegations or legal

conclusions.[20] *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991).

G. Pretrial Matters

In the later stages of an adversary proceeding, parties may be called upon to produce the evidence they intend to offer at trial. Pursuant to Fed. R. Civ. P. 16(a), made applicable by Bankruptcy Rule 7016, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences to expedite disposition of the case, to establish control over the case, to discourage waste, to improve preparation for trial, or to facilitate settlement. Fed. R. Civ. P. 16(a). After any such conference, the court should issue an order reciting the action taken. Fed. R. Civ. P. 16(d). Pursuant to Fed. R. Civ. P. 16(e), the court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. Fed. R. Civ. P. 16(e). The pretrial order requires the parties to exchange and to file with the court a list of witnesses to be called, a list of exhibits to be introduced, and a marked set of the exhibits themselves.[21] This allows the court to prepare for trial and, more importantly, prevents the proverbial "trial by ambush" where the opposing party "has [not] the slightest idea what is coming at trial." *Michael v. Khan (In re Khan)*, 321 B.R. 709, 710 (Bankr. N.D. Ill. 2005).

Fed. R. Civ. P. 16(f), made applicable to adversary proceedings by Bankruptcy Rule 7016, authorizes the court to sanction a party for failure to obey the pretrial order. For example, the court may bar that party from introducing any exhibits or from calling any witnesses at trial. *See Bibby Fin. Serv. (Midwest), Inc. v. Weadley (In re Weadley)*, Adversary No. 07 A 683, 2008 WL

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20 A motion for summary judgment may be denied if the supporting evidence is deemed inadmissible. *See BancorpSouth Bank v. Avery (In re Avery)*, — B.R. —, 2018 WL 6287988 (Bankr. S.D. Miss. 2018) (denying plaintiff's unopposed motion for summary judgment based on inadmissible § 341 meeting transcript).

21 For a useful Exhibit Checklist/Cheat Sheet, *see* Appendix "C."

2397590, at *2 (Bankr. N.D. Ill. June 11, 2008) ("With the plaintiff unable to introduce any evidence at trial, there no longer seems to be much point in having one."). *See also Callies v. O'Neal (In re O'Neal)*, Adversary No. 10-06052-TLM, 2012 WL 6107492, at *3-4 (Bankr. D. Idaho Dec. 10, 2012) ("Plaintiffs serially 'amended' their disclosures to add further proposed exhibits . . . [t]he exhibits for trial are therefore limited to those disclosed on or before" the date set forth in the pretrial order.). Parties should also refrain from concealing the identities of potential witnesses, or else they will suffer the consequences. *See Rybolt v. Carrington Mortg. Serv. (In re Rybolt)*, 550 B.R. 422, 426 (Bankr. N.D. Ind. 2016) (excluding defendant's witness identified in pretrial disclosures only as the "30(b)(6) representative," a practice the court compared to Lord Voldemort's epithet "He Who Must Not Be Named.").

H. Proposed findings of fact and conclusions of law

Fed. R. Civ. P. 52, made applicable to adversary proceedings by Bankruptcy Rule 7052, requires the court to find facts specially and to state its legal conclusions separately following a bench trial, the grant or denial of an injunction, or a judgment on partial findings, but not following a motion unless otherwise required by the Federal Rules of Civil Procedure. To assist the court in fulfilling this duty, the court may require or request that the parties submit proposed findings of fact and conclusions of law for the court's review. *See, e.g.,* U.S. Bankr. Ct. Rules D. Utah, LBR 7052-1 ("Except as otherwise directed by the court, in all non-jury proceedings, the attorney for each party must prepare and lodge with the court, at least 2 days before trial, proposed findings of fact and conclusions of law consistent with the theory of the submitting party and the facts expected to be proved. Proposed findings must be concise and direct, recite ultimate rather than mere intermediary evidentiary facts, and be suitable in form and substance for adoption by the court."). Appellate courts, however, review with special scrutiny findings and

conclusions drafted by the prevailing party and adopted wholesale by the court. *Alvernaz Farms, Inc. v. Bank of California (In re T.H. Richards Processing Co.)*, 910 F.2d 639, 643 n.2 (9th Cir. 1990) (criticizing this "regrettable practice").

I. Motions to Compromise

Many adversary proceedings and contested matters are settled prior to trial. Under Bankruptcy Rule 9019(a), "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a). On a motion to compromise, the trustee's business judgment can serve as a substitute for evidence. To determine the reasonableness of a proposed settlement, the court will consider such factors as "(a) the probability of success in the litigation; (b) the difficulties to be encountered, if any, in the matter of collection; (c) the complexity, expense, inconvenience, and delay of the litigation involved; and (d) the paramount interest of the creditors and a proper deference to their reasonable views." *Coleman v. Abdulla (In re Sportsman's Link)*, No. 07-10454, 2011 WL 7268047, at *11 (Bankr. S.D. Ga. Dec. 20, 2011) (Davis, J.).

In ruling on a motion to compromise, an evidentiary hearing (or a "mini-trial") is not required. *Id.* Instead, the court will usually defer to the Trustee's business judgment. *Id.* (citing *McMasters v. Morgan (In re Morgan),* 439 F. App'x 795 (11th Cir. 2011)). The Trustee "stands before the [c]ourt, bearing a fiduciary responsibility to the creditors . . . and a professional obligation of candor advising the [c]ourt that in his professional judgment this settlement is in the best interest of creditors." *Id.* at *19. The court's role is merely to "canvass the issues and determine whether the Trustee's proposed settlement is above the lowest point in the range of reasonableness." *Id.*

J. Trial

Finally we come to the trial stage, where evidence is presented[22] and where the FRE govern. Chief Judge Cynthia A. Norton has prepared the following helpful materials offering guidance to the bankruptcy practitioner during this crucial stage of an adversary proceeding:[23]

Before you file the complaint:

- Interview the client thoroughly; take good notes. Make sure you know who the real party in interest is who has the standing to bring the action.
- Ask who else has knowledge of the events and who might be a good witness.
- Immediately determine if there is a statute of limitations for filing the complaint and calendar it, along with several pre-deadline reminders (e.g., S/L in Johnson case expires on 4/15 – 90 days to go). Err on the side of caution in calculating the statute of limitations (e.g., if it is a one-year statute that begins running on Jan. 17, don't calendar Jan. 17 – the deadline may be Jan. 16, or earlier, depending on how the days are counted.
- Gather all pertinent documents and keep them in one place; make copies of the original documents (so you can make notes on them if you need to) and safeguard the originals in a secure location (firm safe deposit box) so they aren't lost or defaced for the trial. Make sure not to rearrange original documents, such as a file folder. If what is in a file folder and/or the order the documents are in may be important, then make a copy and bate-stamp the pages so you have a record.
- Remember to ask for relevant electronic documents, such as calendars, emails, cell phone records, etc., and remind the client of the duty not to erase, discard, throw away, etc., anything relating to the litigation (explain spoliation and sanctions) until you advise it is OK to do so. Remind the client to let you know immediately if he or she finds other documents that may be pertinent.
- Make an initial timeline of the pertinent events with references to where in the file/record you obtained the date/event.
- Ask the client who he or she has talked to about the case or given a statement too (if so, obtain the statement). Remind the client that he or she should not talk to other people about the case or what you have advised as that may waive the attorney-client privilege.
- Ask the client specifically what his or her goals for the litigation may be and make clear you are sure about the goal and that the goal is something you can legally and ethically accomplish.
- Consider whether there may be other related causes of action and discuss with the client the advantages and disadvantages of including those. For example, do you really need FDCPA and FRCA if you have a strong discharge injunction violation? Do you want a

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22 A subpoena may be required to command a witness to appear at trial or to produce certain evidence. Fed. R. Civ. P. 45 governs subpoenas. Note that there is no Bankruptcy Rule 7045. Instead, Federal Rule 45 is made applicable by Bankruptcy Rule 9016.

23 Adapted from Chief Judge Cynthia A. Norton, Chief Bankruptcy Judge, Western District of Missouri, Evidence for the Trustee Staff Attorney (Presented to the NACTT July 2017).

jury trial?

- Decide what court is appropriate to bring the action in. Ask yourself: does this court have the authority to do what I want it to do?
- Research the relevant law to make sure you know all the elements so that you can tailor your factual allegations to make sure all relevant elements have been pled.
- Make sure you understand the nature of the remedies you are seeking (Injunctive relief? Declaratory relief? Money judgment? Attorneys' fees? Indemnity? Prejudgment interest? etc.).
- Review Fed. R. Bankr. P. 7008, 7009, and 7010, and any local rules implementing Rule 8 pleading requirements.
- Manage the client's expectations, by having an engagement letter that clearly specifies the scope of the engagement (does it include appeals?); how the attorney's fees and costs will be dealt with; what decisions you are authorized to make on the client's behalf (e.g., you have the authority to consent to requests for extensions, whether to depose a witness, what witnesses or evidence to adduce at trial, etc.); that you cannot guarantee a particular result; that the client has the duty to respond timely to discovery requests from the other side and to court orders, among other things.
- If ethically required and otherwise appropriate, send a demand letter to the opposing side. Sometimes it is even better to pick up the phone! Maybe this is something that can be settled without litigation?
- Draft the complaint and send it to the client for review and approval before you file it; consider whether the complaint should be verified by the client.
- Double-check the name and organization type of the defendant(s).
- Double-check Rule 7004 to make sure you know how to obtain good service over the defendant(s).
- As a gut check, ask your client what he or she thinks about what the defendant will say in response to the complaint – sometimes surprising things the client "forgot" to tell you pop out at this stage.
- As a final gut check, ask again how you/your client are going to be able to prove what the complaint alleges.

Before you file the answer (in addition to the relevant steps outlined above):

- Calendar the answer date immediately.
- Review the complaint with the client and keep good notes.
- Review the summons/service to make sure service was good.
- Ask if there is any insurance coverage and obtain any applicable policies immediately; calendar any deadlines for making a claim.
- Review Rule 8 regarding pleading and Rules 9(b) and 12 to see what defenses if any may apply.
- Consider whether there are counterclaims or third parties to add (Rules 13 and 14).
- Consider whether there is a jury trial right.
- Consider whether you have a right to attorney fees.
- Draft answer, answering each paragraph separately, keeping in mind the Rule 8 and 11

duties to answer allegations in good faith.

At the time the complaint is filed:

- If you have not already, make a trial notebook. It will eventually include the complaint, the answer, the PTO order, witness outlines, exhibit list, pertinent case law, etc.
- Send a copy of the filed complaint to the client and ask the client to review and let you know if there is anything that needs to be amended.
- Request the alias summons and calendar 7 days to serve along with the dates in the pretrial order you receive from the court.
- Calendar other pertinent procedural dates: 21 days to amend once the complaint is served without leave of court (Rule 7015); 35 days for the answer date; 90 days to achieve service (Rule 4(m)).
- Map out discovery strategy; discuss with client for buy-in (not consent, because client doesn't have to consent); calendar potential dates.
- Once the court has set deadlines, then calendar all dates, starting with the trial date and working backwards, e.g., 30 days till trial -- start witness prep; 20 days till trial – subpoena witnesses; 60 days to discovery cut off – send interrogatories; 30 days till dispositive motions – start summary judgment motion, etc.
- Send all the dates to your client and the witnesses you intend to call well in advance!

General Observations Regarding Litigation Preparation

- You must prepare as though you are really going to have to go to trial.
- Trial preparation should be prospective, which involves a different skill set from being a flat fee consumer lawyer.
- Deadlines are important in litigation! Blown discovery deadlines may result in sanctions.
- Rules of Procedure are important in litigation!
- Rules of Evidence are doubly important in litigation!
- Be prepared at all status conferences with the Court – consider how much time you need for discovery, whether you will be filing a dispositive motion, what a deadline for amendments should be, what a deadline for designating experts should be, and discuss these with opposing counsel before hearing.
- Take the time to write a trial brief at the start of your trial preparation. It will cause you to focus on the facts you need to prove and what the law is (and a well-written succinct trial brief will really assist the judge). It will also help you order the exhibits in the order they will naturally come into evidence.
- Make sure your client and all your friendly witnesses know in advance (and in plenty of time) when the trial will be and that you will want time to prepare with them.
- Consider whether you need to subpoena hostile witnesses.
- Consider whether to file motions in limine (such as to address an evidence issue in advance).
- Consider bringing a nervous client to the courtroom in advance (ask the CRD to open the courtroom for you) to show the client where he or she will sit, get sworn, and testify. Be

sure to tell the client what to wear, how to act (no grimacing or making faces at the opposing side), to remember to bring a picture ID, etc.

- If using courtroom technology, make a trial run to make sure everything works.
- Prepare a witness outline that tells the story, incorporates your exhibits, and contains the elements necessary to lay the foundation for each exhibit (even if you anticipate stipulating to them by the date of trial).
- Prepare a separate outline of potential cross-examination points for each witness and important exhibit; include references to the FRE you anticipate using to challenge a witness or exhibit.
- Put the exhibits in a notebook marked on each page (in Adobe Professional, use the footer function which has a built-in numbering mechanism, e.g., EXH A p.1 of 8). Remember to have an original exhibit notebook for the witness for the record, in addition to one for you, the judge, perhaps the law clerk, and the client to follow along with.
- NOTE: Since exhibit tabs and notebooks are expensive, scavenge them from other matters and save them to reuse.
- Draft a short opening (what the case is about; how many witnesses you intend to call and briefly what they will testify about; what relief you will be asking for).
- If appropriate, draft a closing.
- Rehearse, rehearse, rehearse, but don't drink the Kool-Aid so much that you don't focus on what the other side's case is going to be and how you are going to defeat it.
- At this point, you will be prepared, so you can tell yourself, I'm just going to go have fun!

CAVEAT: These are practice tips only, and the discussion barely scratches the surface of the issues. Reading this outline should not be considered a substitute for reviewing the relevant rules and any cases interpreting the rules in your court.

1. Correspondence/Emails - Authentication

Edward Imwinkelreid, in his seminal book *Evidentiary Foundations* (2012) writes: "The reader should develop the habit of automatically thinking of a trilogy of doctrines - authentication, best evidence, and hearsay - whenever a document is used in the courtroom." § 4.02 [1], at p. 46-47. But first you must start with "authentication," meaning that the item (e.g., a letter from the debtor to the trustee) must be proved that it is what it purports to be (a letter written by the debtor to the trustee - and not something else). FRE 901(a). FRE 901 provides examples of how to authenticate a document; the most common is FRE 901(b)(1): "testimony of a witness with knowledge." NOTE: FRE 902 sets forth what documents are "self-authenticating," such as

certified copies of a public record [FRE 902(4)] or acknowledged documents [FRE 902(8)].

There generally is no dispute about correspondence in bankruptcy cases. But if you anticipate a problem (debtor denying that he sent the letter or email), then you have several options: (1) Send a request for admission that a copy of the attached letter is a genuine copy of a letter you sent the Trustee, etc. *See* Fed. R. Civ. P. 36(a)(2). (2) Ask opposing counsel to stipulate to the letter's authenticity (which would reserve the opposing counsel's rights to argue that the letter is not admissible on other grounds, such as relevance, hearsay, etc.). NOTE: Consult case law authority in your district about the binding effects of stipulations, and under what circumstances a party may seek leave to be relieved of a stipulation. *See, e.g., Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 32 (1st Cir. 2007). (3) Ask opposing counsel to stipulate to the letter's admission into evidence (meaning it would be considered authentic as well as relevant, etc.) SEE NOTE ABOVE. (4) Consider the "Reply Letter Doctrine," which recognizes that a letter received in reply to an earlier letter creates a sufficient circumstantial inference that the letter is authentic under FRE 901. *See generally* Imwinkelreid, *Evidentiary Foundations* § 4.02[4].

To lay the foundation to authenticate a letter you received from the debtor under the Reply Letter Doctrine, you might ask: "Are you the Trustee? Do you have the responsibility for investigating the financial affairs of David Smith, the debtor in this case? Did you conduct a meeting of the debtor pursuant to 11 U.S.C. § 341 on April 1, 2016? Did the debtor attend the meeting you conducted? At the meeting, did you examine the debtor under oath about whether he owned any motorcycles? What did the debtor say? [NOTE: not hearsay, because not being admitted for the truth and/or is an admission under FRE 802(d)]. Did you ask the debtor at the meeting to provide you a letter with information about his motorcycles? Did you give the debtor a deadline to respond? What was that deadline? Let me hand you what has been marked as

Trustee's Exhibit 1; can you identify this? [a letter from the debtor dated April 10, 2016 saying it is in response to my request for information about motorcycles]. Your honor, I move to admit Trustee's Exhibit 1."

A Note About Emails: For emails, the process of authentication is more difficult, since you might also have to show (1) you emailed the debtor or attorney; (2) you emailed to a specific email address that you know to be his or her email address; (3) how you know it is the correct email address; (4) the details of the email you sent; and (5) the details that would fit the "Reply Letter Doctrine." *See* Imwinkelreid, *Evidentiary Foundations* § 4.03[4].

As noted by the court in *In re Ward*, 558 B.R. 771, 780 (Bankr. N.D. Tex. 2016), "[a] proponent may authenticate a document with circumstantial evidence, including the document's own distinctive characteristics and the circumstances surrounding its discovery. This Court does not require conclusive proof of authenticity before allowing the admission of disputed evidence[, and FRE] 901 does not limit the type of evidence allowed to authenticate a document. It merely requires some evidence that is sufficient to support a finding that the evidence in question is what its proponent claims it to be. The standard for authentication is not a burdensome one." *Ward*, 558 B.R. at 780 (citations omitted).

2. Schedules, Claims, Other Documents filed in the court record

You may want to introduce into evidence the debtor's schedules (or introduce the omission of a schedule or an amendment of a schedule). How you admit the schedules depends on the purpose for which you want to admit them.

a. Judicial notice under FRE 201

See generally Hon. Barry Russell, *Bankruptcy Evidence Manual* § 201:5 (2016 -2017

edition).[24] Many attorneys wanting to prove the truth or falsity of the contents of the schedules (e.g., the value of an asset, a debtor's income or expenses) ask the court to take judicial notice of the schedules. This is an improper use of FRE 201. Judicial notice of the schedules is notice that they are in existence and filed as of a certain date (it is a short cut for authenticating them under FRE 901and 902 instead of providing a certified copy or overcoming an objection under the "best evidence rule" [FRE 1002] that your copy of the schedules is not the original). Judicial notice does not cure hearsay or other objections and is not a substitute for proof of the truth or falsity of the contents of the schedules.

b. Admissions under FRE 801(d)(2)

Filed, signed schedules are admissions of a party opponent under FRE 801(d)(2). *See In re Earl*, 140 B.R. 728, 730 n.2 (Bankr. N.D. Ind. 1992) ("The Court is aware that there is a very 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 falsity [of the] *contents* of any such document for the purposes of making a finding of fact. However, the verified Schedules and Statements filed by a debtor are not just pleadings, motions or exhibits thereto. They are evidentiary admissions." *In re Cobb*, 56 B.R. 440, 442 n. 3 (Bankr. N.D.I ll. 1985). *See* FRE 801(d)(2) (admission by a party opponent not hearsay).").

3. Payment histories/Business Records

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24 FRE 201(b) provides that "[t]he 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." FRE 201(b). Further, "[t]he 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." FRE 201(c) [emphasis added].

Records of a "regularly conducted activity" are not hearsay under FRE 803(6) and are self-authenticating under FRE 902(11) (meaning, no live witness is required to admit them) [NOTE: This is a change in the rules since 2000]. The theory is that when a business regularly keeps records as part of its business there is a circumstantial guarantee of trustworthiness. *See* Imwinkelreid, *Evidentiary Foundations*, at § 10.04. To lay the foundation, you must simply follow the elements set out in both rules (e.g., to show that records are not hearsay, you follow FRE 803(6)): Was the record made at or near the time or from information transmitted by someone with knowledge? FRE 803(6)(A). Was the record kept in the ordinary course of a regularly conducted activity of a business, organization, occupation, or calling? FRE 803(6)(B). Was making the record a regular practice of that business's regularly conducted activity? FRE 803(6)(C). Has all of this been shown by the testimony of a custodian of the records [FRE 803(6)(D)] OR by a certification that complies with FRE 902(11) or (12)? For the certification, you need a verified statement [under 28 U.S.C. § 1746] of a custodian of the records of the business that he or she is the custodian of the records at the business with personal knowledge; these are accurate copies of the business records of the business; it is the business' regular practice to prepare records of [the activity]; the records are prepared at or near the time of the activity; and the business maintains the records in the regular course of its business. Plus, you must provide reasonable written notice before the trial of the intent to offer this record, and make the record and certification available for inspection, so that the adverse party has a fair opportunity to challenge. FRE 902(11).

4. Deposition Transcripts

Use of deposition transcripts at trial is governed by Fed. R. Civ. P. 32. Some practice tips: Fed. R. Civ. P. 32(a) states the general rule that "[a]t a hearing or trial, all or part of a deposition

may be used against a party on these conditions: (A) the party was present or represented at the taking of the deposition or had reasonable notice of it; (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and (C) the use is allowed by Fed. R. Civ. P. 32(a)(2) through (8)." In multi-party bankruptcy proceedings, you should not assume that a deposition transcript from, say, an adversary proceeding will automatically be admissible. *See In re Senior Cottages of America, LLC*, 399 B.R. 218, 224 (Bankr. D. Minn. 2009). Depositions may also be independently admitted under FRE 804(b) (former testimony by a declarant who is unavailable). Your court may have local rules requiring that the original transcript be filed with the court, or that you designate in advance which portion of a deposition you intend to use. As a practical matter, designating the portions is more effective, rather than dumping the whole transcript on the judge to read (which some judges may not be willing to do).

Remember Fed. R. Civ. P. 32(a)(6) - fairness rule! "If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts."

Under Fed. R. Civ. P. 32(a)(8), "[a] deposition lawfully taken . . . may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest." *See In Re Brooke Corporation*, Adv. No. 12-6043, 2016 WL 3582370, at *2 (Bankr. D. Kan. June 24, 2016) (although "same-parties requirement" is not strictly applied, deposition from earlier action would not be admitted).

5. Recordings

Imwinkelreid explains in *Evidentiary Foundations* § 4.06[2] that originally courts were skeptical of recordings, since recordings can be manipulated, and that earlier cases required the

lawyer introducing the tape to lay a foundation about the competency of the operator to operate the equipment, the nature of the equipment, the chain of custody of the tape, in addition to the normal elements of authentication (that it is the tape from the hearing; that it is a true and accurate recording of the testimony at the hearing, etc.). Evidentiary issues may arise if recorded testimony is too soft or difficult to understand; if so, and a party wishes to create a transcript of the proceeding, then a further foundation is needed: that the witness listened to the tape, and, as best the witness can tell, the exhibit is an accurate transcription of the recording. *See In re Brown*, 531 B.R. 236, 263 (Bankr. W.D. Mo. 2015) (Chapter 13 § 341 transcript typed up by assistant in Trustee's office after listening to the tape did not contain any recitation that debtor was sworn in before he testified; court not willing to assume debtor was sworn when the transcript does not contain it and there has been no other evidence that debtor was sworn before testifying; discharge could not be denied as a false oath under § 727(a)(4) based on the transcript, although discharge was denied on other grounds).

6. Social Media/Internet Printouts

A party may want to introduce a printout of the debtor's Facebook page showing assets that were not scheduled, for example, or a website the debtor has created for a business. In addition to hearsay and best evidence issues (that the original is required to prove the content under FRE 1002), there are two foundational elements to satisfy: (1) That the exhibit is a genuine printout from the social media profile page as of that date, which requires the witness to testify he or she personally printed out the posting, recalls the appearance of the printout, and recognizes the exhibit as the printout. (2) That the posting is attributable to a certain person, usually shown by circumstantial evidence or stipulation. *See* Imwinkelreid, *Evidentiary Foundations* § 4.02[6].

7. Appraisals

An expert witness may give an opinion of value[25] under FRE 702. But the appraisal report the expert prepared is hearsay (a statement the declarant does not make while testifying in the current trial or hearing and offered in evidence to prove the truth of the matter asserted in the statement—FRE 801(c)). Many lawyers stipulate to the admission of the appraisal reports and dump the reports on the judge to weigh which is more credible. In so doing, are you missing an opportunity to present your expert as the more credible one? You need to be prepared to present the opinion without the crutch of having the report handy if the opposing counsel objects.

8. Other Financial Documents of the Debtor, such as tax returns, paystubs, etc.

See In re Ward, 558 B.R. 771 (Bankr. N.D. Tex. 2016) (unsigned copies of tax returns marked "copy" not sufficiently authenticated)

V. Some Common FRE Objections You Need to Know

Bankruptcy Rule 9026 provides that Fed. R. Civ. P. 46 applies in cases under the Bankruptcy Code. Under Fed. R. Civ. P. 46, "[a] formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was

25 Bankruptcy courts "have consistently held that valuation of assets is not an exact science." *Hernandez v. TCF Banking & Savings*, 493 B.R. 46, 50 (Bankr. N.D. Ill. 2013) (internal quotations omitted). "Rather, it requires consideration of the purpose of the valuation and all the factual elements of a particular case . . . Valuation is necessarily an approximation. . . A judge should look to the accuracy, credibility and methodology employed by the appraisers . . . However, a court is not bound by values determined by appraisals and may form its own opinion as to the value of the subject property." *Id.* (internal quotations omitted).

made." Fed. R. Civ. P. 46.

- Judicial Notice Improper: FRE 201
- Lack of Foundation: No personal knowledge FRE 104(b), 602 (witness to a fact or event must possess personal or firsthand knowledge)
- Relevance: That evidence possesses some probative worth. FRE 401, 402
- Hearsay: An out of court statement offered for the truth. FRE 803
- Lay Witness Opinion: FRE 701
- Unqualified Expert: FRE 104(a): preliminary question: whether expert testimony could assist the trier of fact in understanding the evidence or determining a fact in issue; whether the witness called is properly qualified to give the testimony sought; whether expert testimony is subject to exclusion under FRE 403 on grounds of unfair prejudice or waste of time. *See Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 570, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (under FRE 104, the court must make a preliminary assessment of whether the testimony's underlying methodology is scientifically valid and can properly be applied to the facts of the case).
- Excluding Relevant Evidence: FRE 403: The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.
- Summaries under FRE 1006: The summary must include a showing that it accurately reflects the underlying records, and that the underlying records have been made available, and court may require the underlying records be produced in court.

VI. Preparing For and Controlling Hostile or Difficult Witnesses

A. Reasons to Cross-Examine

You are not required to cross-examine—sometimes the best strategy with a witness you know to be difficult is to just say you have no questions. But, the following are reasons to consider cross-examining: (1) to explore bias (witness has a pecuniary or other interest in seeing one side win, witness has been paid, etc.) - do this to impair the witness's credibility, to argue to the fact finder you should not believe this witness; (2) to impeach (prove the witness lied or contradicted himself); (3) to have the witness admit/deny an essential element of your or opposing party's case; and (4) to expose gaps in the witness's knowledge/testimony that support your case.

B. FREs to know particularly with respect to difficult witnesses

(1) FRE 103(a)(1): moving to strike an answer as unresponsive (NOTE: there is a split of authority about whether only the questioning party or other parties may move to strike). (2) FRE 403: Excluding relevant evidence. (3) FRE 607: Any party may impeach (attack the credibility of) a witness. (4) FRE 611(a): Control by the court (objections to argumentative, repetitious, harassing or embarrassing questions). (5) FRE 611(b): Objections to exceeding the scope of direct. (6) FRE 611 (c): Leading questions of a hostile witness or adverse party. (7) FRE 613: Prior Inconsistent Statement. (8) FRE 615: Excluding nonparty witnesses. (9) FRE 801(d)(2): Opposing party's statement not hearsay under certain conditions.

C. General Tips

Ask short, concise, simple, factual questions requiring a yes or no answer. Do not use legalese or complicated language. Use good judgment on when to impeach (the prior inconsistent statement must be important and clear-cut). Impeach properly: (1) "confirm" the witnesses' testimony (you just testified that you never owned a motorcycle, is that correct?); (2) "credit" the prior testimony (e.g., you remember receiving a subpoena for a deposition; remember coming to

my office, remember your attorney was there, remember there was a court reporter, remember that the court reporter asked you to swear to tell the truth, remember that you swore to tell the truth, I asked you questions, you answered them truthfully, the court reporter sent you a transcript, you had an opportunity to review, you didn't make any corrections, etc.; (3) "confront" the witness about the prior testimony and contrast the discrepancy (let me show you your deposition, that's your signature, on page 23, line 4, I asked you if you had ever owned any motorcycles, do you see that? And your answer then was "Yes, I own a dozen," is that correct? You reviewed your deposition for errors? And you didn't change that testimony, correct? (4) STOP. NOTE: This requires you to have the paper trail with the prior inconsistent statement ready to go so you can quickly ascertain whether it is a prior inconsistent statement that was not later corrected.

Do not argue with the witness; be nice and be polite. Listen to the answer. Develop a series of responses that come easily to you so you are not left feeling angry and flabbergasted, such as: (1) Mr. Smith, I'm sorry, but that's not the question I asked you, let me ask you again … (2) Yes, but my question is … (3) That is not my question … (4) I understand, and we will get to that in a bit, but my question now is … (5) So, that means a "no," correct? (6) [To the yes, but], Mr. Smith, let me interrupt you there. I'm asking you for a yes or no answer … (7) Mr. Smith, this is a simple question—you understand the question, don't you? (8) Your Honor, please direct (or I move to direct) Mr. Smith to answer my question…."

D. <u>For a witness who claims not to remember</u>

(1) Didn't you say at the 341 hearing that you didn't own any motorcycles? [If you say so]. (2) It's not if I say so, Mr. Smith: Yes or no, did you say … (3) [The prod]: It is important that we get this correct, Mr. Smith, so let me ask again … (4) [Exhaust possible methods of trying to find out]: Is there a document I could show you to refresh your recollection? Any people to talk to you

to determine the answer?

E. Expert Witnesses:

Use your expert witness to help you prepare for cross-examination of an opposing expert. Ask about assumptions - show that any change in the assumption would result in a change of opinion. Question the expert about anything he/she failed to do.

VII. Contested Matters - Frequently Litigated Issues

So far, the discussion has focused mainly on the stages of an adversary proceeding. But similar issues will arise in contested matters. As Judge Norton has explained, "[Bankruptcy] Rule 9014 governs contested matters. The Federal Rules of Civil Procedure selectively apply to contested matters pursuant to Bankruptcy Rule 9014(c),[26] which provides that the testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding; [Bankruptcy] Rule 9014(e) provides that '[t]he court shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify.'"[27]

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26 Bankruptcy Rule 9014(c) provides that "[e]xcept as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order." Fed. R. Bankr. P. 9014(c).

27 Note that sometimes no evidentiary hearing is required. It is not necessary to conduct an evidentiary hearing on a contested matter unless there are disputed issues of material

Chief Judge Cynthia A. Norton, Chief Bankruptcy Judge, Western District of Missouri, Evidence for the Trustee Staff Attorney (Presented to the NACTT July 2017). Below, we highlight a few evidentiary issues that frequently arise in contested matters.

A. Claim Objections

"A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest ... objects." 11 U.S.C. § 502(a). Under Bankruptcy Rule 3001(f), "[a] proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f). The amount of proof necessary to rebut the prima facie showing of validity of a claim is not difficult to meet. *In re Mineral Resources Int'l, Inc.*, 565 B.R. 684 (Bankr. D. Utah 2017). The objecting party must produce facts sufficient to show that an actual dispute regarding the validity or amount of the claim exists. *In re Hydorn*, 94 B.R. 608 (Bankr. W.D. Mo. 1988). Once the objecting party submits sufficient evidence to place the claimant's entitlement at issue, the burden of producing evidence to sustain the claim shifts to the claimant. *In re Harrison*, 987 F.2d 677 (10th Cir. 1993).

What is the evidentiary impact of attachments to the proof of claim? Bankruptcy Rule 3001(d) states that "[i]f a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected." Fed. R. Bankr. P. 3001(d). Failure to attach the required documentation results in the loss of the prima facie validity of the claim but does not automatically render the claim invalid. *In re Mibatiwalla*, 424 B.R. 104, 112 (Bankr. S.D.N.Y. 2010). "Courts are divided about documentation required to be attached to a proof of claim for a secured claim based on a mortgage to establish a prima facie case....

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fact that a bankruptcy court cannot decide based on the record. Moreover, generally a bankruptcy court is under no obligation to hold an evidentiary hearing where the movant fails to affirmatively request such a hearing. *See In re AMR Corp.*, 490 B.R. 470, 479 (S.D.N.Y. 2013).

Bankruptcy courts generally require ... evidence that the security interest has been perfected, but do not specify what that evidence should be.... They generally require that the claimant attach a copy of the promissory note and the mortgage, or, at least, an explanation as to why the note is not provided." *Id.* at 113. *See also In re Ahmadi*, 467 B.R. 782 (Bankr. M.D. Pa. 2012) (creditor's failure to attach proper evidence that the security interest was perfected meant that the presumption of prima facie validity did not apply).

B. Motions to Determine (Bankruptcy Rules 3002.1(c) & (e) and 3002.1(f),(g),&(h))

Bankruptcy Rule 3002.1 applies in Chapter 13 to claims that are (1) secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or debtor will make contractual installment payments. Fed. R. Bankr. P. 3002.1(a). Under Bankruptcy Rule 3002.1(c), a claimant is required to file "a notice itemizing all fees, expenses, or charges (1) that were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence." Fed. R. Bankr. P. 3002.1(c). The debtor or trustee may then file a motion to "determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable non-bankruptcy law to cure a default or maintain payments in accordance with § 1322(b)(5) of the Code." Fed. R. Bankr. P. 3002.1(e).

The burden of proof under Bankruptcy Rule 3002.1(e) falls on the creditor asserting the fee, expense, or charge. *In re Trudelle*, 16-60382-EJC, 2017 WL 4411004, at *3 (Bankr. S.D. Ga. Sept. 29, 2017) (Coleman, J.). The creditor must establish (1) that payment of the fees is required by the underlying agreement; (2) that the fees were actually incurred; and (3) that the fees were reasonable. *Trudelle*, 2017 WL 4411004, at *10.

There are similar notice and proof requirements as to final cure payments under

Bankruptcy Rule 3002.1 (f), (g), & (h), which provide as follows:

> (f) Notice of final cure payment
>
> Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.
>
> (g) Response to notice of final cure payment
>
> Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with § 1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).
>
> (h) Determination of final cure and payment
>
> On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

Fed. R. Bankr. P. 3002.1(f), (g), & (h). "The mortgage holder has the burden to establish the prepetition cure amounts and outstanding obligations on the mortgage" under Bankruptcy Rule 3002.1(h). *In re Howard*, No. 10-52527 SLJ, 2016 WL 8222335, at *3 (Bankr. N.D. Cal. Aug. 14, 2016).

C. Motions for Stay Relief

Under 11 U.S.C. § 362(d), "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the [automatic] stay provided under [§ 362(a)], such as by terminating, annulling, modifying, or conditioning such stay–(1) for cause, including the lack of adequate protection of an interest in property of such party in interest...." 11 U.S.C. § 362(d). The party seeking stay relief must establish a prima facie case that cause for such relief exists, at which point the burden shifts to the debtor to show that such relief is not warranted. *In re Pederson*, 563 B.R. 327 (Bankr. D. Mont. 2017). Under § 362(g), "[i]n any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section–(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and (2) the party opposing such relief has the burden of proof on all other issues." 11 U.S.C. § 362(g).

D. Exemptions

Bankruptcy Rule 4003(b) sets forth the procedure for objecting to a debtor's claim of exemptions. Under Bankruptcy Rule 4003(c), "[i]n any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections." Fed. R. Bankr. P. 4003(c). As discussed in Section II.B.1. above, however, the burden of proof of an exemption is a substantive aspect of a claim. Therefore, if a state has opted out of the federal exemptions, the law of those states will supply the burden of proof. Bankruptcy Rule 4003(c) only supplies the burden of proof in those states that have not opted out. *See Bankruptcy Evidence Manual* § 301:61 (2018 ed.).

E. Chapter 13 Plan Confirmation

Sections 1322 and 1325 set forth the requirements for confirmation of a Chapter 13 plan.

A Chapter 13 debtor has the burden of proof on every element of plan confirmation. *In re Wark*, 542 B.R. 522, 533 (Bankr. D. Kan. 2015). If a party objects to confirmation under the "disposable income" requirement of § 1325(b)(1)(B), the initial burden is on the objecting party to produce evidence that the debtor is not devoting his projected disposable income to the plan. Once this burden is met, the burden shifts to the debtor to show compliance with § 1325(b) by a preponderance of the evidence. *In re Martellini*, 482 B.R. 537, 541 (Bankr. D.S.C. 2012). The proponent of plan modification has the burden of proof that the statutory requirements have been met. *In re Eckert*, 485 B.R. 77, 80 (Bankr. M.D. Pa. 2013).

F. Attorneys' Fees Applications

Under 11 U.S.C. § 330, a bankruptcy court may award "reasonable compensation for actual, necessary services rendered" and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a). In determining the amount of compensation, "the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including–(A) the time spent on such services; (B) the rates charged for such services; (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title; (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cased other than cases under this title." 11 U.S.C. § 330(a)(3).

The party requesting compensation has the burden of demonstrating that the requested

fees are reasonable. *In re Recycling Indus., Inc.*, 243 B.R. 396, 403 (Bankr. D. Colo. 2000). "The court may draw on its own experience with the present case and similar cases to determine a reasonable fee." *In re Burton*, 278 B.R. 645, 649-50 (Bankr. M.D. Ga. 2001).

VIII. Conclusion

There is one last "evidence" rule for counsel to consider, and it is the most important: the duty of candor. Under the Georgia Rules of Professional Conduct, "[a] lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." Georgia Rules of Professional Conduct 3.3 ("Candor Toward the Tribunal").

Similarly, Bankruptcy Rule 9011 provides in pertinent part:

> . . .
>
> (b) Representations to the court
>
> By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

> (3) the allegations and other factual contentions have **evidentiary support** or, if specifically so identified, are likely to have **evidentiary support** after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

. . .

Fed. R. Bankr. P. 9011(b) (emphasis added). In effect, this rule provides two separate grounds for sanctions: (1) where a pleading is frivolous, legally unreasonable, or without factual foundation; and (2) where a pleading a filed in bad faith or for an improper purpose. *See Matter of Nicholson*, 579 B.R. 640, 649 (Bankr. S.D. Ga. 2017). "[O]ur adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process." *U.S. v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993).

Appendix "A" - Federal Rules of Evidence

Article I: General Provisions
- Rule 101: Scope; Definitions
- Rule 102: Purpose
- Rule 103: Rulings on Evidence
- Rule 104: Preliminary Questions
- Rule 105: Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes
- Rule 106: Remainder of or Related Writings or Recorded Statements

Article II: Judicial Notice
- Rule 201: Judicial Notice of Adjudicative Facts

Article III: Presumptions in Civil Cases
- Rule 301: Presumptions in Civil Cases Generally
- Rule 302: Applying State Law to Presumptions in Civil Cases

Article IV: Relevance and Its Limits
- Rule 401: Test for Relevant Evidence
- Rule 402: General Admissibility of Relevant Evidence
- Rule 403: Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons
- Rule 404: Character Evidence; Crimes or Other Acts
- Rule 405: Methods of Proving Character
- Rule 406: Habit; Routine Practice
- Rule 407: Subsequent Remedial Measures
- Rule 408: Compromise Offers and Negotiations
- Rule 409: Offers to Pay Medical and Similar Expenses
- Rule 410: Pleas, Plea Discussions, and Related Statements
- Rule 411: Liability Insurance
- Rule 412: Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
- Rule 413: Similar Crimes in Sexual-Assault Cases
- Rule 414: Similar Crimes in Child-Molestation Cases
- Rule 415: Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

Article V: Privileges
- Rule 501: Privileges in General
- Rule 502: Attorney-Client Privilege and Work Product; Limitations on Waiver

Article VI: Witnesses
- Rule 601: Competency to Testify in General
- Rule 602: Need for Personal Knowledge
- Rule 603: Oath or Affirmation to Testify Truthfully
- Rule 604: Interpreter
- Rule 605: Judge's Competency as a Witness
- Rule 606: Juror's Competency as a Witness
- Rule 607: Who May Impeach a Witness
- Rule 608: A Witness's Character for Truthfulness or Untruthfulness
- Rule 609: Impeachment by Evidence of a Criminal Conviction
- Rule 610: Religious Beliefs or Opinions

APPENDIX "B" - Burdens of Proof [28]

Bankruptcy Code Provisions:

Section 362(g)(1). Automatic stay
"In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section, the party requesting such relief has the **burden of proof** on the issue of the debtor's equity in property."

Section 362(g)(2). Automatic stay
"In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section, the party opposing such relief has the **burden of proof** on all other issues."

Section 363(p)(1). Use, sale, or lease of property
"In any hearing under this section, the trustee has the **burden of proof** on the issue of adequate protection."

Section 363(p)(2). Use, sale, or lease of property
"In any hearing under this section, the entity asserting an interest in property has the **burden of proof** on the issue of the validity, priority, or extent of such interest."

Section 364(d)(2). Obtaining credit
"In any hearing under this subsection, the trustee has the **burden of proof** on the issue of adequate protection."

Section 502(k)(2). Allowance of claims or interests
"The debtor shall have the **burden of proving**, by clear and convincing evidence, that: (A) the creditor unreasonably refused to consider the debtor's proposal; and (B) the proposed alternative repayment schedule was made prior to expiration of the 60-day period specified in paragraph (1)(B)(i)."

Section 547(g). Preferences
"For the purposes of this section, the trustee has the **burden of proving** the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the **burden of proving** the nonavoidability of a transfer under subsection (c) of this section."

Sections 562(c)(1) and (c)(2). [provisions regarding swap agreements make reference to a "burden of proving that there were no commercially reasonable determinants of value"]

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28 This appendix is limited to explicit references to burdens of proof in the Bankruptcy Code and Bankruptcy Rules. The numerous judge-made burdens of proof are catalogued in Judge Barry Russell, *Bankruptcy Evidence Manual* § 301.

Timing of damage measurement in connection with swap agreements, securities contracts, forward contracts, commodity contracts, repurchase agreements, and master netting agreements

Section 1129(d). Confirmation of plan
"Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933 [15 U.S.C.A. § 77e]. In any hearing under this subsection, the governmental unit has the **burden of proof** on the issue of avoidance."

Bankruptcy Rules:

Rule 4003(c). Exemptions
"In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections."

Rule 4005. Burden of Proof in Objecting to Discharge
"At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection."

Rule 6001. Burden of Proof As to Validity of Postpetition Transfer
"Any entity asserting the validity of a transfer under ' 549 of the Code shall have the burden of proof."

APPENDIX "C" - Exhibit Checklist/Cheat Sheet[29]

1. Identifying Which Exhibits You Will Need. Figuring out what evidence you will need to prove your case should not start the week before the trial or hearing - it starts at the beginning of the case with a well-thought-out, well-drafted pleading (motion, objection, complaint, answer, etc.). And to have a well-drafted pleading, you need to know the elements of what you need to prove or disprove to determine which exhibits you need. As you get closer to trial, you can refine your thoughts by drafting a trial brief with proposed findings of fact as part of your initial trial preparation. The process of telling the story in writing can help focus your attention on which exhibits you need to prove which elements. If you forget an element and corresponding exhibit or other evidenced needed to prove it and remember it only at trial, the judge may not let it your evidence or exhibit in, particularly if the opposing counsel objects.

2. Organization of Exhibits. It makes the most sense to put the exhibits in the order in which they will be introduced. Possible ways to organize: chronologically, by element, or by witness. Grouping the exhibits in this way will make it easier for you to find them quickly, and for the witness and the judge to follow the story you are trying to tell.

3. Pre-Marking. Mark all exhibits before the hearing - it wastes valuable court time to mark the exhibits on the fly (and some courts require pre-marking by local rule).

4. Letters or Numbers. Determine if your court/judge has a local rule about which party marks exhibits with letters (e.g., Exhibit A, Exhibit B, etc.) and which with numbers (e.g., Exhibit 1, Exhibit 2, etc.). If in doubt, call the courtroom deputy and/or discuss with opposing counsel or the judge.

5. Page Numbers: It is particularly helpful, especially with multi-page exhibits, to mark each page, e.g, Exhibit 1, P. 1 of 10, Exhibit 1, P. 2 of 10, and so on. That makes it easier for you, the witness, and the judge to find a particular page of a particular exhibit quickly. You can do this easily by scanning or converting the exhibit to an Adobe PDF and using the tools in Adobe Professional to add a footer to each page. It is also helpful (and many courts require) additional information, such as the party's name and case number, e.g.,

In re Smith, Case No 10-12345
Debtor's Exh 1, P. 1 of 10

6. Redaction of Certain Information. Remember that § 107 and Rule 9018 require redaction of certain identifying information, such as the names of minor children, social security numbers, account numbers, etc. Discuss with the judge in advance how to handle this issue if the particular case requires for some reason evidence of what the social security number is.

7. Binders & Tabs. Put the exhibits in a binder with tabs with a copy of the exhibit index in the front. This is particularly important if the exhibits are voluminous (and many courts require

29 Compiled by Chief Judge James Smith and Chief Judge Cynthia A. Norton.

exhibit binders in any event). NOTE: You can save money by reusing and recycling exhibit binders and tabs as they can be costly.

8. Electronic or Other Nondocumentary Exhibits. Discuss with the judge, CRD, and opposing counsel in advance how the marking, sharing, and introduction of electronic or other nondocumentary evidence such as audio recordings should be handled. Be sure to arrange a trial run in the courtroom with the assistance of the courtroom deputy to make sure, for example, your audio recording can be played and heard.

9. Copies. In addition to the original exhibits for the witness (which will become part of the record and retained by the court if necessary), remember to bring sufficient copies of the original for all counsel and a copy for the judge. It is an appreciated gesture to also bring a copy for the law clerk.

10. Stipulations for Admission. Many of the typical exhibits used in bankruptcy cases should not be disputed (e.g., loan documents). Share exhibits with opposing counsel to try to agree on what documents can be admitted without objection. You risk irritating the judge and again wasting valuable court time if you do not have an agreement to admit exhibits that are not in dispute.

11. Foundation. Be sure to have thought out in advance how to lay a foundation for admission and obtaining a ruling on admission for each exhibit you want to introduce. Lay that foundation and request the judge to admit the exhibit before you begin soliciting testimony from the witness about that exhibit. If you are unsure of how to lay a foundation for a particular exhibit, consult one of the many resources on how to admit evidence, such as Evidentiary Foundations by Edward Imwinkelreid, or any of the helpful publications for trial organizations such as NITA, and write out in your witness outline each element of the foundation so that you don't forget one.

12. Lay Foundation First as the Examining Attorney; As the Opposing Attorney, Timely Object if the Examining Attorney Doesn't. Many attorneys jump right into asking the witness to testify about the document or even asking the witness to read the document before laying the foundation and having it admitted. Later, when the attorney moves to introduce the exhibit, the opposing attorney objects for lack of foundation, which is then sustained. The problem for the opposing attorney who failed to object when the witness first started testifying about the unadmitted document is that the judge has already heard testimony about the contents - that bell cannot be unrung. But it may also be a problem for the attorney who failed to lay the proper foundation - the judge has the authority under FRE 403 to deny that attorney the opportunity to try again if doing so would be a waste of time.

13. And Don't Forget to Bring a Copy of the FREs!

THE HON. JAMES G. MIXON TRIAL PRACTICES SEMINAR

March 11, 2022

Presentation from 3:00 to 4:00

Proving Your Case in Bankruptcy Court

Hon. Phyllis M. Jones

United States Bankruptcy Chief Judge for the

Eastern and Western Districts of Arkansas

Hon. Richard D. Taylor

United States Bankruptcy Judge for the

Eastern and Western Districts of Arkansas

Hon. Bianca M. Rucker

United States Bankruptcy Judge for the

Eastern and Western Districts of Arkansas

Handout Materials

Questions to Ponder and Discuss

Bankruptcy Judges Panel

Comments and Questions Welcomed

Question 1:

You just successfully tried a three-day jury trial on the issue of fraud. The favorable judgment awarded you damages. Then, the defendant files bankruptcy. You are confident you can deny the dischargeability of your specific debt and accordingly file an adversary proceeding. You should:

a. Completely rely on res judicata.
b. Completely rely on collateral estoppel.
c. Rely on both.
d. Call your first witness and retry the case.

Question 2:

You represent a chapter 11 debtor-in-possession, and you file the petition on April 1. Prior to filing, the DIP hires an accountant to assist with monthly reporting requirements. Preparing the bankruptcy filing was very time-consuming and complicated. While you handle everything else perfectly, four months after the bankruptcy filing you realize you forgot to file an application to approve the employment of the accountant under 11 U.S.C. § 327 that has been working diligently on the case. What do you do?

a. Ignore it, nbd, lol.
b. Tell the accountant that she will not be paid for pre-petition or post-petition work to date. Oops.
c. File an application to employ the accountant requesting that her employment be approved nunc pro tunc.
d. File an application disclosing when the debtor hired the accountant and requesting the court approve her employment as of the date of employment (if the date was pre-petition, the date that the petition was filed).

Question 3:

You have a proceeding in bankruptcy for which the reference has been withdrawn and is now pending before a Federal District Court in Arkansas. One or both parties note, however, that there are some bankruptcy centric issues and perhaps some other pre-trial matters that might be more expeditiously considered in the bankruptcy court where the judge is more knowledgeable about the entirety of the bankruptcy case. Should you:

a. Congratulate yourself for thinking so hard and then go home for the day.
b. Consider filing a motion or otherwise asking the District Court to leave part or parts of the proceeding with the bankruptcy court for their disposition and you have case law support for asking for this relief.
c. Not file that motion because of your considered view that the bankruptcy court is without jurisdiction to do so.
d. Given the difficulties attendant to jurisdictional questions, wonder why you did not go into banking.

Question 4:

You have a witness on the stand who, in an earlier deposition or related proceeding, made a statement very favorable to your case. You should:

a. Hand him the transcript and have him read it into the record.
b. Ask him the same or similar question that elicited the response.
c. Read the statement to the witness and have him agree or disagree.
d. Ask for a medal to be struck in honor of your legal prowess.

Question 5:

We all know that court hearings have been held telephonically and by video due to the Covid-19 pandemic since early 2020 with some exceptions for in person hearings and trials. The courts and bar have become quite proficient in using the equipment and the court business has been conducted very successfully using these alternative methods of holding court hearings. Once court hearings and trials are routinely heard in person again you will:

a. Continue to be able to appear as counsel by telephone or video upon request.
b. Continue to be able to call your witness by telephone or video upon request.
c. Both a and b.
d. Be expected to appear in person along with your client and witnesses like pre-Covid days.

Question 6:

A chapter 11 debtor has failed to produce account numbers and login credentials for its accounts requested by the chapter 11 trustee (one was previously appointed). The trustee files an Emergency Motion for Order Holding the debtor in contempt. The court holds a hearing on the Motion, the debtor does not appear, and the court finds the debtor in civil contempt and states the information the debtor must provide in order to cure the contempt, and that if he does not cure the contempt the court may impose monetary sanctions and/or incarceration. The debtor does not cure the contempt. The court sets a follow-up hearing on its order of contempt. The debtor does not appear. Assume service on the debtor of the above motion and orders was good. At this point, the court can:

a. Issue a judgment of monetary sanctions against the debtor without further action or notice.
b. Issue an Order and Writ of Body Attachment directing the U.S. Marshals to bring the debtor from Georgia to Arkansas, incarcerate him to secure his attendance at a continued hearing on the order of contempt, and take all necessary actions, including, but not limited to, the use of reasonable force for the stated purpose and to arrest and/or evict any and all persons who obstruct, attempt to obstruct, interfere, or attempt to interfere, in any way with the execution of this order.
c. Just continue the hearing on its order of contempt to another day—maybe he will appear next time, who knows.
d. Any of the above.

Question 7:

You are defending the debtor in a nondischargeability action. The plaintiff has alleged 523(a)(6) only (willful and malicious injury by the debtor to another entity or to the property of another entity) and you are confident he won't be able to prove his case. During opening, counsel for the plaintiff states that the evidence will also show that the debtor committed fraud or defalcation while acting in a fiduciary capacity, a 523(a)(4) action. You should:

a. Object during the opening statement because the 523(a)(4) action was clearly not in the complaint;

b. Wait until your opening statement and point out to the court that the complaint did not include a 523(a)(4) cause of action and ask that no evidence be allowed on 523(a)(4);

c. Ignore it; it doesn't matter what plaintiff's counsel says in the opening statement anyway.

d. Mention in your opening that 523(a)(4) was not in the complaint and vow to object to the introduction of any evidence dealing with 523(a)(4).