Practicum: The Nuts & Bolts of Evidentiary Hearings

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CONSUMER CONNECT

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v.5

Introductions

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(cacb.uscourts.gov/judges/honorable-martin-r-barash)

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The focus

Common issues arising in consumer litigation.

Economics.

Before, during, after

- Pretrial opportunities
- Trial tactics and strategy
- Post-trial actions

Pretrial consideration No. 1

You want something.

Does your client have a claim for relief?

Each cause of action has elements.

You must establish the elements with evidence.

Elements, evidence, and burden of proof are everything.

For example…

Elements 11 U.S.C. §523(a)(2)(B)

4-523 Collier on Bankruptcy ¶523.08 (16th):

…a creditor must prove that the debt was obtained by the use of a statement

(1) in writing;
(2) that is materially false;
(3) respecting the debtor's or an insider's financial condition;
(4) on which the creditor to whom the debtor is liable for money, property, services or credit reasonably relied;
(5) that the debtor caused to be made or published with intent to deceive.

Burden of proof

Grogan v. Garner, 498 U.S. 279, 291, 111 S. Ct. 654 (1991) ("… we hold that the standard of proof for the dischargeability exceptions in 11 U.S.C. §523(a) is the ordinary preponderance-of-the-evidence standard.").

"In writing"

Vangelisti v. Kerbaugh (In re Kerbaugh), 159 B.R. 862, 871 (Bankr. D.N.D. 1993) ("In order for a statement made by the debtor to render a debt nondischargeable under §523(a)(2)(B), the statement, to be in writing, must have been either signed by the debtor, written or produced by the debtor, or have been adopted and used by the debtor. … A written statement does not have to be physically prepared by a debtor in order to satisfy the in writing requirement of § 523(a)(2)(B). … The in writing requirement is satisfied if existence of the written statement was either signed, adopted and used, or caused to be prepared by the debtor. Id. An objecting creditor that relies on a debtor's oral misrepresentations of his or her financial wherewithal will not be entitled to a nondischargeability determination under §523(a)(2)(B).

"respecting the debtor's or an insider's financial condition"

Schneiderman v. Bogdanovich (In re Bogdanovich), 292 F.3d 104, 112 (2d Cir. 2002) ("In determining whether a statement relates to a debtor's financial condition, courts agree the term is not limited to formal financial statements. … Two views have emerged over how to interpret the scope of § 523(a)(2)(A)'s exception. A broad interpretation would include any statement that reflects the financial condition of the debtor. … On the other hand, a narrow interpretation would find that a statement relates to financial condition only when it provides information 'as to [a debtor's] overall financial health.' …").

"materially false"

In re Bogstad, 779 F.2d 370, 375 (7th Cir. 1985) ("Material falsity has been defined as 'an important or substantial untruth.' … A recurring guidepost used by courts has been to examine whether the lender would have made the loan had he known of the debtor's true financial condition. … cf. 1 D. Cowans, Bankruptcy Law and Practice 343 (1978) ('The materiality of the omission [of a debt] is often attempted to be shown by the testimony of the lending officer that if he or she had known of the existence of the omitted debt, he would have refused to make the loan.')).").

"reasonable reliance"

Coston v. Bank of Malvern (In re Coston), 991 F.2d 257, 261 (5th Cir. 1993) ("The reasonableness of a creditor's reliance, in our view, should be judged in light of the totality of the circumstances. The bankruptcy court may consider, among other things: whether there had been previous business dealings with the debtor that gave rise to a relationship of trust; whether there were any 'red flags' that would have alerted an ordinarily prudent lender to the possibility that the representations relied upon were not accurate; and whether even minimal investigation would have revealed the inaccuracy of the debtor's representations. … the inquiry into the reasonableness of the creditor's reliance ultimately rests on the particular circumstances of each case…").

"published"

4-523 Collier on Bankruptcy P 523.08 (16th) ("The word 'published' in paragraph (B)(iv) is used in the same sense that it is used in defamation cases, that is, to make it known to any person other than the person defamed. The statement need not be made directly to the creditor or the creditor's representative in order for the debt to fall within the exception to discharge. It is sufficient if the creditor learns of the false statement indirectly, as long as there is reliance on it. Hence, a false statement made to a credit reporting agency for general use is unquestionably a basis for excepting the debt from discharge.").

"intent to deceive"

Morrison v. W. Builders of Amarillo, Inc. (In re Morrison), 555 F.3d 473, 482 (5th Cir. 2009) ("…'intent to deceive may be inferred from use of a false financial statement.' In re Young, 995 F.2d 547, 549 (5th Cir. 1993). A judge may look at the totality of the circumstances and infer an intent to deceive when '[r]eckless disregard for the truth or falsity of a statement combined with the sheer magnitude of the resultant misrepresentation may combine' to produce such an inference. …The bankruptcy court found that 'the totality of the facts taken together indicate that Morrison knew of the error on February 22.'").

Then again, evidence is not *always* about elements

Not always as helpful as you think.

Impeachment?

You can't just smear the opponent because you have juicy evidence. It might be irrelevant or resented by the court as a waste of time.

Be analytic about your evidence; passion should not control the selection of material.

Pretrial consideration No. 2

Local rules, forms and chambers rules are beloved by the judges.

You are not beloved if you overlook them.

Take an hour to look for them and to read all that apply to your case.

These are a Great Equalizer for out of town counsel, because if you observe the rules, you look like a pro and show diligence. See http://www.urbandictionary.com/define.php?term=The%20Great%20Equalizer&defid=4826622, definition of "Great Equalizer" ("A phrase used to describe when the other person gets [the guy or gal] on a regular basis or is generally considered to be good-looking. This serves as 'the great equalizer' when other bad things happen in their life, and they shouldn't be able to complain about the other things as a result.")

What is evidence?

Argument is not evidence

Barcamerica Int'l USA Trust v. Tyfield Imps., Inc., 289 F.3d 589, 593, n. 4 (9th Cir. Cal. 2002) ("...Barcamerica cannot prevail on this appeal from a grant of summary judgment by replacing unfavorable deposition testimony with the arguments of its lawyer; the arguments and statements of counsel 'are not evidence and do not create issues of material fact capable of defeating an otherwise valid motion for summary judgment.' Smith v. Mack Trucks, 505 F.2d 1248, 1249 (9th Cir. 1974) (per curiam).").

Admissions

If it is admitted somewhere, maybe you don't have to prove it yourself.

A great resource is Russell's Bankruptcy Evidence Manual. It collects bankruptcy applications of the Federal Rules of Evidence and discusses hundreds of cases.

See Section 801.12 of the Manual for a discussion of admissions.

You do not have to bill your client to create admissions.

Where are admissions found?

Schedules.

341(a) testimony.

The trustee's questionnaire and answers.

The debtor's tax return. 11 USC §521(e)(2)(A)(ii); a creditor can ask for it.

FRBP 2004 examination.

Sworn testimony in earlier cases.

Public records (e.g., California Secretary of State).

On-line: Facebook, Linked In, websites.

Attorney can make "judicial admissions" against her client

In re Sanglier, 124 B.R. 511, f.n. 3 (Bankr. E.D. Mich. 1991) ("A concession or a stipulation of fact made by counsel in open court is considered a judicial admission. ... We therefore conclude that the Debtors are precluded from taking a contrary position....").

Armstrong v. JPMorgan Chase Bank Nat'l Ass'n, 633 Fed. Appx. 909, 912 (10th Cir. Colo. 2015) ("...we affirm its conclusions as to the judicial-admission doctrine. 'A judicial admission is a formal, deliberate declaration which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute.' ... **If unequivocal, '[j]udicial admissions are binding on the party who makes them, are evidence against such party, and may furnish the basis for a verdict.'** ").

Admissions in debtor's schedules FRE 801(d)(2)

American Exp. Travel Related Servs. v. Vinhnee (In re Vinhnee), 336 B.R. 437, 449 (B.A.P. 9th Cir. 2005) ("The court's refusal to admit the monthly billing statements in evidence left American Express with only evidence of the debtor's statement in entries on Schedule F (Creditors Holding Unsecured Nonpriority Claims) that showed amounts owed that were not designated as disputed. These entries on the **debtor's verified schedules constitute statements by (or adopted by) a debtor that qualify, when offered against the debtor, as admissions by a party opponent that are not hearsay. Fed. R. Evid. 801(d)**....").

Requests for admission

Serve **requests for admission** about the authenticity of documents. FRBP 7036; FRCP 36(a)(1)(B) ("A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 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**. . . . A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.").

Authenticate the documents, prepare for hearsay objections, and consider the original writing (best evidence) rule. FRE 901, 902.

If appropriate, stipulate to authentication.

Requests for admission

Mayer v. Angelica, 790 F.2d 1315 (7th Cir. Ill. 1986) ("**Rule 36 provides for service 'upon any other party' of a 'written request' for admissions**. Rule 36 further provides that the matter is admitted unless a written answer or objection is made within 30 days after the request. There is no provision in Rule 36 for a 'Response' to a Request for Admissions but doubtless such a document has been at times employed. In the case at bar, there was never any written request for an admission served for plaintiff Mayer on the Kimballs. Instead, in connection with the negotiation of a settlement with the Kimballs, counsel for plaintiff and counsel for the Kimballs in collusion worked out a combined Request and Response, as earlier described, which was designed to be used to authenticate the Kimball letters at the trial after the Kimballs had been dismissed from the action by reason of their settlement and could thereby evade cross-examination about the letters. ... This response makes plain that the **trial judge mistakenly believed that a written statement purporting to be that of a co-conspirator is admissible without authentication under some exception to the 'requirement of authentication' contained in Rule 901(a) of the Federal Rules of Evidence**...").

Trial

You are in court to prove elements of a claim for relief.

Your pretrial statement identifies those elements that were not established before trial.

Your judge wants you to be focused and efficient.

Opening statement

Your elements guide the opening statement.

What do you need to prove? Tell the judge how you will.

This can be short.

Appreciate that many consumer cases involve common themes or claims for relief.

The court wants to hear your evidence more than the law.

Judicial notice (court files, hearsay)

In re Harmony Holdings, LLC, 393 B.R. 409, 412-413 (Bankr. D.S.C. 2008):

The Fifth Circuit in Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 347-48 (5th Cir.1982) stated the proposition as follows: 'Judicial notice applies to self-evident truths that no reasonable person could question, truisms that approach platitudes or banalities. . . .' Barry Russell, Bankr. Evid. Manual § 201.2 (2007 ed.). Judge Russell further explains the subtleties of taking judicial notice regarding documents filed with the Court. . . . There exists a mistaken notion that it means taking judicial notice of the truth of facts asserted in every document in a court file, including pleadings and affidavits. However, **a court may not take judicial notice of hearsay allegations as being true merely because they are part of a court record or file**.

The taking of judicial notice is often merely a way of simplifying the process of authenticating documents which would generally require certification under FRE 901 and 902, and overcoming FRE 1002 best evidence problems (i.e. the concept that because they are in the Court's own files they are accepted as genuine). It is clear however, that authenticating a document does not automatically insure its introduction into evidence in the face of other objections, such as hearsay.

"While a bankruptcy judge may take judicial notice of a bankruptcy court's records, see Fed.R.Evid. 201(c), … we may not infer the truth of the facts contained in documents, unfettered by rules of evidence or logic, simply because such documents were filed with the court. See Barry Russell Bankruptcy Evidence Manual § 201.5 at 201 (West 1995)." In re Scarpinito, 196 B.R. 257 (Bkrtcy.E.D.N.Y.1996).

Judicial notice (court files, appeal)

Bullock v. Telluride Income Growth LP (In re Telluride Income Growth LP), 364 B.R. 407, 414-415 (B.A.P. 10th Cir. 2007):

The doctrine of judicial notice is broadly construed in the Tenth Circuit. "The scope and reach of the doctrine of judicial notice has been enlarged over the years until today it includes those matters that are verifiable with certainty." In the context of an appeal to the district court from contempt citations entered by the bankruptcy court, the foregoing statement was cited as authority for the proposition that when exercising review, the court may "take judicial notice of the bankruptcy court's records and files, as well as those of this court resulting from the many appeals the debtors have taken from the bankruptcy... ."

No judicial notice (timing of mail)

Mora v. Vasquez (In re Mora), 199 F.3d 1024, 1026 footnote 3 (9th Cir. 1999) ("BancBoston had directed debtors to make all mortgage payments to a post office box in Van Nuys, California. On appeal, the **debtors ask this court to take judicial notice, under Fed. R. Evid. 201, of the fact that first class mail is generally delivered overnight to locally designated cities**. Although it may be true that the Post Office advertises its attempt to deliver locally designated mail overnight, this court does not take judicial notice that the Post Office delivered the check in question overnight or that the check was probably delivered overnight. Both propositions are disputable and **not appropriately admitted** as facts under Rule 201. See In re Blumer, 95 B.R. 143, 147 (BAP 9th Cir. 1988) (explaining when judicial notice is appropriate).").

No judicial notice (deposition transcript)

In re Blumer, 95 B.R. 143, 146-147 (B.A.P. 9th Cir. Wash. 1988) ("Credit Alliance also contends that the trial court erred in refusing to take judicial notice of the Robin Blumer deposition. ... Rule 201 allows a court to take judicial notice of facts that are not subject to reasonable dispute in that they are either '(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' Rule 201. The **facts set forth in the Robin Blumer deposition are not 'generally known within the territorial jurisdiction of the trial court' or 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'** Therefore, the bankruptcy court properly refused to take judicial notice of those facts.").

Exclusion of witnesses FRE 615

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(d) a person authorized by statute to be present.

When may FRE 615 be invoked?

Wood v. Southwestern Bell Tel. Co., 637 F.2d 1188, 1193-1194 (8th Cir. Mo. 1981):

Appellant . . . argues that the district court erred in failing to exclude witnesses from the courtroom, pursuant to Fed.R.Evid. 615, after appellant had moved for such exclusion. The motion for exclusion of the witnesses came on the second day of trial, after some of appellant's witnesses had testified. The district court denied appellant's motion on the ground that it was not timely made. . . .

It is clear from the wording of Rule 615 . . . the exclusion of witnesses so they cannot hear the testimony of other witnesses is required when requested by a party. . . . Rule 615 does not specifically require that the exclusionary request be made at any particular stage of the trial.

Barred testimony FRE 615

In re Martin, 963 F.2d 809, 814-815 (5th Cir. Tex. 1992):

FNBL attempted to call Irwin as a rebuttal witness to show both that Martin committed perjury and that Martin acted fraudulently in not revealing this financial liability to FNBL. Martin objected to FNBL calling Irwin to testify because the court had invoked "the Rule" requiring witnesses to remain out of the courtroom when not testifying. . . . Irwin had been seated in the courtroom throughout the trial. The bankruptcy judge agreed with Martin and refused to allow Irwin to testify. FNBL argues it could not have anticipated that Martin would lie on the stand. FNBL wanted to call Irwin only to rebut Martin's claims, and Irwin's presence in the courtroom would not have influenced his testimony. . . . We hold that the bankruptcy judge did not abuse her discretion in refusing to allow Irwin to testify.

Expert not excluded FRE 615(c)

Mayo v. Tri-Bell Industries, Inc., 787 F.2d 1007, 1013 (5th Cir. Tex. 1986) :

We conclude that the trial court properly allowed the defense's expert witnesses to testify. Fed. R. Evid. 703 provides that an expert may base his opinion on facts or data obtained "at or before the hearing." As experts they would be testifying solely as to their opinion based on the facts or data in the case, and, accordingly, were properly exempted from the exclusion of witness order. . . . Because the experts were not witnesses whose recollections might have been colored by accounts of prior witnesses, there was no prejudice. See, e.g., Trans World Metals, Inc. v. Southwire Co., 769 F.2d 902, 910-11 (2d Cir. 1985).

Care and feeding of witnesses

Live direct testimony.

Direct testimony by declaration.

Redirect and recross

What is the purpose of these?

What does the objection “outside the scope of direct exam” mean?

Be a sniper: hit specific targets of weakness, namely the enemy’s elements that are not well established.

Don’t revisit the strengths of the opponent.

This can feed into your closing by highlighting what was not proven by the opponent.

Redirect

Use this to clarify the facts if the cross examination weakened your element presentation.

It can be useful to eliminate confusion created by the opponent in the cross examination.

You usually can’t go into new areas not visited in the direct exam, but why not try? The judge may allow it anyway.

Recross

Again, focus tightly.

May repeat questions on critical points that favor you but you cannot replay the entire cross examination.

Good opportunity to show inconsistency by the witness.

You need really good notes taken during the opponent's exam. Listen.

How to make an evidentiary objection during testimony

Refreshing recollection (generally)

First Card v. Carolan (In re Carolan), 204 B.R. 980, 986-987 (B.A.P. 9th Cir. Cal. 1996):

First Card asserts in its opening brief that**, "It is axiomatic that a witness can be shown anything to attempt to refresh recollection - anything."** . . . First Card offers no specific facts to support its contention that the bankruptcy court abused its discretion in sustaining the objection. Although a witness can generally be shown anything to refresh his or her recollection under Federal Rule of Evidence 612, in this case, there was no showing of how or why showing the debtor an unauthenticated TRW report that he had never seen before would refresh his recollection. . . . Even if the bankruptcy court's ruling on this matter were mistaken, an erroneous evidentiary ruling is subject to harmless error review. 28 U.S.C. § 2111.

Writing used to refresh FRE 612

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:
(1) while testifying; or **(2)** before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. ...an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

Writing used by deponent

N. Natural Gas Co. v. Approximately 9117.53 Acres, 289 F.R.D. 644, 650 (D. Kan. 2013):

Rule 612 . . . is "to promote the search of credibility and memory." ... Courts have held that the rule is applicable to depositions pursuant to Fed. R. Civ. P. 30(c). . . . In order to obtain disclosure of a writing used by a witness prior to testifying, a party must meet three conditions: (1) the witness must use the writing to refresh his or her memory; (2) the witness must use the writing for the purpose of testifying; and (3) the court must determine that production is necessary in the interests of justice. Id. at 254. The party must also show that the documents "actually influenced the witness' testimony." Id. …

Recorded recollection FRE 803(5)

Federal Rule of Evidence 803:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness...

(5) ***Recorded Recollection.*** A record that:
(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

News reporter's transcript (admitted)

Savage & Assocs. v. Mandl (In re Teligent Inc.), 380 B.R. 324, 330, 333-334 (Bankr. S.D.N.Y. 2008):

Mandl [gave]. . . an interview with a Washington reporter, Jeremy M. Brosowsky. . . . Brosowsky did not specifically recall the details of the Interview. He testified, however, that his practice was to record an entire interview, and then have the recorded interview transcribed. If he edited the interviewee's statements in the published interview, he indicated changes with ellipses or brackets. Brosowsky identified the Interview as the one he wrote. . . . The Court is satisfied that the Interview reflected an accurate transcription of Mandl's remarks [to Brosowsky]. . . . The net effect is that Brosowsky testified about what Mandl said, and Mandl's statements during the Interview are admissible either as a non-hearsay admission, FED. R. EVID. 801(d)(2), or as a recorded recollection. FED. R. EVID. 803(5).

Meeting notes (not admitted)

Schnelling v. Thomas (In re Agribiotech, Inc.), 2005 U.S. Dist. LEXIS 6465, *17-18 (D. Nev. Mar. 2, 2005):

If a record falls within this exception, it may be read into evidence, but it is not admissible as an exhibit unless offered by an adverse party. Fed. R. Evid. 803(5). The Court concludes, in its discretion, that exhibit 33 does not fall within the past recollection recorded exception. No evidence in the record establishes that Ingalls' notes accurately reflect his knowledge at the time. At his deposition, Ingalls stated he could not recall the document or the alleged meeting the document describes. Ingalls does not indicate his notes accurately reflected his knowledge at the time he made them. [Footnote 1. . . . Ingalls never stated he authored the document, but he stated it looked vaguely familiar, and he talked about the notes as if he had written them.] Accordingly, exhibit 33 does not fall within the past recollection recorded exception.

Police statement (not admitted)

Schmeckpeper v. Lewis (In re Lewis), 528 B.R. 885, 889-890 (Bankr. E.D. Wis. 2015):

...given Ms. Grabowski's present inability to remember the incident, her statements arguably could be admissible as a past-recorded recollection. ... Importantly, Rule 803(5) requires that the memorandum or record must have been "made or adopted by the witness." ... Here, Ms. Grabowski did not sign, swear to or otherwise adopt the statement. The police report was prepared by Officer Dubis, and it was not a verbatim recollection of Ms. Grabowski's interview. ... The hearsay exception of past-recorded recollection under Fed. R. Evid. 803(5) applies only when the record is made or adopted by the witness. Where the documents were not reported verbatim and were unsigned and unsworn by declarant, they constituted inadmissible hearsay. ... Thus, Ms. Grabowski's statements in the police report do not satisfy the hearsay exception under Rule 803(5).

Writings used before and during testimony

Thomas v. Euro RSCG Life, 264 F.R.D. 120, 122 (S.D.N.Y. 2010):

Here, plaintiff admitted to reviewing the notes for approximately fifteen minutes immediately prior to her deposition. ... Fed. R. Evid. 612(2) indicates that if a witness reviews privileged documents prior to the deposition instead of using them to refresh her memory during the deposition itself, disclosure is only required where "the court in its discretion determines it is necessary in the interests of justice." Fed. R. Evid. 612(2). . . But just such a finding is compelled here. The notes are simply a factual recitation, arranged chronologically, and evince no work-product concerns. They relate to conversations about which the witness knew she would be questioned . . . since the subject matter of these conversations, and the conversations themselves, are likely to play a substantial role in plaintiff's case, it is in the interests of justice for defendants to be able to adequately cross-examine plaintiff by having access to notes…

Use of deposition transcripts FRCP 32

FRCP 32(a)(1): At 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

FRCP32(a)(2): Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness…

FRCP32(a)(3): An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee…

FRCP 32(a)(4): A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;

(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;

(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or

(E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.

Admit those documents

Documents have to be admitted.

Keep track of what you brought and used and be sure before you wrap up that your documents are admitted into evidence.

The court has lots of discretion to allow the documents.

Requirement of original -- FRE 1002

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

Testimony about a writing (not admitted)

Anderson v. Architectural Glass Constr., Inc. (In re Pfister), 749 F.3d 294, 300, n. 4 (4th Cir. S.C. 2014):

AGC has suggested that . . . the initial mortgage was "in the individual names" of Mr. and Mrs. Pfister . . . But as AGC acknowledged at oral argument, it never sought to admit the note into evidence. Accordingly, neither we nor the bankruptcy court could examine the note. Nor does Mr. Pfister's testimony regarding the company's obligation under the note suffice . . . In addition to being self-serving, the testimony violates Federal Rule of Evidence 1002, which recognizes the inherent unreliability of oral testimony about the contents of a document and so requires a party to introduce an "original writing" to establish the document's contents.

Testimony about a writing (GPS screen) not admitted

United States v. Bennett, 363 F.3d 947 (9th Cir. Cal. 2004) ("That is the nature of Chandler's GPS testimony here and why his testimony violated the best evidence rule. First, **the GPS display Chandler saw was a writing or recording because, according to Chandler, he saw a graphical representation of data that the GPS had compiled about the path of Bennett's boat**. See Fed. R. Evid. 1001(1). Second, Chandler never actually observed Bennett's boat travel the path depicted by the GPS. Thus, **Chandler's testimony concerned the 'content' of the GPS**, which, in turn, was evidence of Bennett's travels. Fed. R. Evid. 1002. At oral argument, the government admitted that the **GPS testimony was offered solely to show that Bennett had come from Mexico**. Proffering testimony about Bennett's border-crossing instead of introducing the GPS data, therefore, was analogous to proffering testimony describing security camera footage of an event to prove the facts of the event instead of introducing the footage itself. “).

Admission of duplicates FRE 1003

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Admission of duplicates (lost)

Yoppolo v. Household Realty Corp. (In re Winland), 276 B.R. 773, 779-780 (Bankr. N.D. Ohio 2001):

Under the Federal Rules of Evidence, a party seeking to prove the content of a writing, such as a mortgage, must normally produce the original writing. . . . This Rule, however, is qualified by other rules of evidence which permit a duplicate or other secondary evidence to be introduced to prove the content of a writing. *See, e.g.*, FED. R. EVID. 1003 (exception for duplicates); 1005 (exception for public records); 1006 (exception for summaries); 1007 (exception for party admissions). In this respect, the Defendant has asserted that its copy of the mortgage executed by the Debtors is admissible, on the basis that it was . . . certified by the county recorder's office. . . . Under Federal Rule of Evidence 1004, the production of an original document may be excused if two requirements are met: (1) the original writing was lost or destroyed; and
(2) the proponent of the secondary evidence has not acted in bad faith.

Hearsay defined -- FRE 801

The following definitions apply under this article:

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Hearsay excluded -- FRE 802

Hearsay is not admissible unless any of the following provides otherwise:

a federal statute;

these rules; or

other rules prescribed by the Supreme Court.

Not hearsay -- FRE 801(d)

(d) **Statements That Are Not Hearsay**. A statement that meets the following conditions is not hearsay:
(1) **A Declarant-Witness's Prior Statement**. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding [e.g., 341(a) examination] or in a deposition;

(B) is consistent with the declarant's testimony and is offered:
(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

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

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

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

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

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

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

Business records exception FRE 803(6)

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
(6) **Records of a regularly conducted activity**. A record of an act, event, condition, opinion, or diagnosis if:

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

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

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

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

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Custodian certification FRE 902(11)

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

(11) *Certified Domestic Records of a Regularly Conducted Activity*. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court.

Before the trial or hearing, the proponent must **give an adverse party reasonable written notice** of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

Interplay
FRE 803(6) and FRE 902(11)

Rambus, Inc. v. Infineon Techs. AG, 348 F. Supp. 2d 698, 699-701 (E.D. Va. 2004) ("Rambus claims that the documents fall within the business records exception to the hearsay rule, Rule 803(6), and has offered purportedly authenticating declarations under Rule 902(11) in an effort to have them admitted. … **Rule 803(6) . . .** was amended in 2000 to add that, in lieu of live testimony, the foundation for admissibility of a business record may be established by a certification that complies with Rule 902(11). . . . Rules 803(6) and 902(11) go hand in hand. Making reference to Rule 803(6), the Advisory Committee Notes explain that Rule 902(11) '**sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness**.' . . . Rule 902(11) 'provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. . . . The final requirement of Rule 902(11) is that it must have been a regular practice of a 'regularly conducted activity' to make and keep the record at issue. . . . A 'regularly conducted activity' is a business activity, whether conventional or unconventional, or even illegal…").

Unqualified declarant -- FRE 902(11)

American Exp. Travel Related Servs. v. Vinhnee (**In re Vinhnee**), 336 B.R. 437, 447-448 (B.A.P. 9th Cir. 2005) ("Indeed, **Federal Rules of Evidence 803(6) and 902(11) were amended in 2000 expressly to authorize self-authentication of a business record by 'written declaration of its custodian or other qualified person' in certain circumstances**. Fed. R. Evid. 803(6) ('qualified witness') & 902(11) ('qualified person'). . . . While a 'qualified' witness or person under Rules 803(6) and 902(11) need not be an expert, there needs to be enough information presented to demonstrate that the person is sufficiently knowledgeable about the subject of the testimony. . . . Here, the declarant merely asserted that he is employed by American Express and is personally familiar with the hardware and software and computer record-keeping systems in use in the credit card industry. He did not indicate his job title or anything about his training and experience that would import an aura of verisimilitude to his assertions. . . .").

Custodian, bankruptcy, Central District of California form

I am one of the custodians of the books, records and files of Movant as to those books, records and files that pertain to loans and extensions of credit given to Debtor concerning the Property. I have personally worked on books, records and files, and as to the following facts, I know them to be true of my own knowledge or I have gained knowledge of them from the business records of Movant on behalf of Movant, which were made at or about the time of the events recorded, and which are maintained in the ordinary course of Movant's business at or near the time of the acts, conditions or events to which they relate. Any such document was prepared in the ordinary course of business of Movant by a person who had personal knowledge of the event being recorded and had or has a business duty to record accurately such event. The business records are available for inspection and copies can be submitted to the court if required. [F 4001-1.RFS.CUST.MOTION]

Electronic records FRE 901(b)(1)

American Exp. Travel Related Servs. v. Vinhnee (In re Vinhnee), 336 B.R. 437, 444 (B.A.P. 9th Cir. 2005 -- opinion by Judge Klein) ("**Authenticating a paperless electronic record**, in principle, **poses the same issue as for a paper record**, the only difference being the format in which the record is maintained: **one must demonstrate that the record that has been retrieved from the file, be it paper or electronic, is the same as the record that was originally placed into the file**. Fed. R. Evid. 901(a).

Hence, the **focus is** not on the circumstances of the creation of the record, but rather on the **circumstances of the preservation of the record** during the time it is in the file so as to assure that the document being proffered is the same as the document that originally was created. In the case of a paper record, the inquiry is into the procedures under which the file is maintained, including custody, access, and procedures for assuring that the records in the files are not tampered with. The foundation is well understood and usually is easily established. . . . Ultimately, however, it all boils down to the same **question of assurance that the record is what it purports to be**.").

Business records

American Exp. Travel Related Servs. v. Vinhnee (In re Vinhnee), 336 B.R. 437, 446-447 (B.A.P. 9th Cir. 2005) ("Professor Imwinkelried perceives electronic records as a form of scientific evidence and discerns an eleven-step foundation for computer records: 1. The business uses a computer. 2. The computer is reliable. 3. The business has developed a procedure for inserting data into the computer. 4. The procedure has built-in safeguards to ensure accuracy and identify errors. 5. The business keeps the computer in a good state of repair. 6. The witness had the computer readout certain data. 7. The witness used the proper procedures to obtain the readout. 8. The computer was in working order at the time the witness obtained the readout. 9. The witness recognizes the exhibit as the readout. 10. The witness explains how he or she recognizes the readout. 11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact….").

Dressel (the trustee's dilemma)

Professor Dan Schechter, Loyola Law School, Los Angeles, ***Insolvency e-Bulletin***, Oct. 23, 2015 ("A district court in Pennsylvania has held that because a bankruptcy trustee was unable to verify the accuracy of the corporate debtor's books and records in order to prove the entity's insolvency, his fraudulent transfer action against the debtor's affiliated corporations failed for lack of proof. [***In re Dressel Associates, Inc.***, 2015 Westlaw 4956098 (W.D. Pa.).] A bankruptcy trustee brought a fraudulent transfer action, claiming that the corporate debtor had made payments to its affiliates while it was insolvent, without receiving reasonably equivalent value. The trustee relied on the testimony of his predecessor trustee, who had taken over the debtor's affairs upon its bankruptcy filing. After trial, judgment was entered for the defendants on the ground that the trustee had failed to prove the debtor's insolvency at the time the payments were made. The district court affirmed, holding that the testimony of the predecessor bankruptcy trustee had been insufficient to establish the accuracy of the financial statements that purportedly proved effective insolvency: [The predecessor trustee's] statement that Debtor's financial schedules were 'as accurate as they can reasonably be' . . . is not an affirmative statement of actual accuracy.").

Bankruptcy trustee (not custodian)

Smith v. Litchford & Christopher, P.A. (In re Bay Vista of Va., Inc.), 428 B.R. 197, 212, 214-215 (Bankr. E.D. Va. 2010):

The Trustee initially relies upon the so-called "business records" exception to the hearsay exclusion, contending that both the First Account and the Wilson Letter are business records of Bay Vista because he found copies of them among the records of Bay Vista. The "business records" hearsay exception, found in Federal Rule of Evidence 803(6), provides for the admissibility of a record that would otherwise be inadmissible as hearsay under Federal Rule of Evidence 802... The Trustee cannot meet his burden under Federal Rule of Evidence 602, as he lacks personal knowledge as to the authenticity of both the First Account and the Wilson Letter. The Trustee testified that he found the documents among Bay Vista's records…

…but . . . discovery of these documents among the debtor's papers does not suffice to allow the Trustee to lay an adequate foundation for his testimony regarding the contents of the document and the truth thereof. Without authentication of these documents, the Court cannot admit them...

Additional bases exist to exclude these documents as well. The Trustee here is not "the custodian or other qualified witness," whose testimony is required by Federal Rule of Evidence 803(6), of either the First Account or the Wilson Letter, both of which were apparently prepared by individuals or entities other than Bay Vista, its principal or employees, or by the Trustee.

Further, the Trustee failed to show that both documents were "kept in the course of a regularly conducted business activity" by Bay Vista and that "it was the regular practice of [Bay Vista in the course of its] business activity to make" these records. Accordingly, the Court correctly sustained the objection of Litchford as to the admissibility of these documents under the "business records" exception to the hearsay rule.

E-mail

Lehman v. Byrne, 2004 Cal. App. Unpub. LEXIS 5089 (2004) (not published) ("Employer argues that the trial court properly exercised its discretion in making its evidentiary ruling regarding the proffered e-mails and correspondence in that they were not properly authenticated and were inadmissible hearsay. ... Pursuant to Evidence Code section 250, a 'writing,' includes 'transmitting by electronic mail. . . .' **All writings must be authenticated. (Evid. Code, § 1401.) . . .** Circumstantial evidence, content and location are all valid means of authentication.' . . . Our review of the record reveals adequate authentication of the e-mails bearing 'gallabyrne' in the screen name. …

Plaintiff's explanation of how he obtained the e-mails, combined with Galla Byrne's deposition testimony, convinces a reasonable person that the e-mails are written versions of electronic messages she generated. The screen name is her proper name. All the e-mails from the Byrne law firm were on hotmail accounts, as was this one. She begrudgingly acknowledged in her deposition that only she and her husband had her password for her account and that some of the messages sounded like what she would have written. And the content of many of the e-mails was clearly within her knowledge and expressed her views. The e-mails in the initial opposition to the MSJ should have been considered.").

Zillow valuation

In re Barajas, 2006 Bankr. LEXIS 3095 (Bankr. E.D. Cal. Nov. 8, 2006) ("The Debtors estimate the value of their residence at $170,000 based on information they obtained from Zillow.com, with an adjustment for 'necessary repairs.' . . . As owners of their home, the **Debtors may state their opinion of its value under Fed.R.Ev.701. The source of that opinion is not material to its admissibility**. …

…As a non-expert third party, Mr. Friesen's contention regarding the property's value must be supported by competent and admissible evidence. . . . if Mr. Friesen is offering [a Zillow valuation] as evidence to impeach the Debtors' opinion regarding the value of their home, he fails to establish (1) a foundation to show that his inquiry of Zillow.com is based on the same information, and (2) that the date on which he based his inquiry of Zillow.com corresponds with the date of the petition. . . . **if Mr. Friesen is offering the results of his search with Zillow.com to prove that the house is actually worth $224,147, then such evidence is inadmissible as both hearsay (Fed.R.Ev. 802) and lacking any foundation to establish its authenticity and accuracy. (Fed.R.Ev. 901(a)).** The court cannot properly consider it.").

Newspaper articles

Horta v. Sullivan, 4 F.3d 2, 8 (1st Cir. Mass. 1993) ("The significant exhibit is a **photocopy of a newspaper article** indicating that Officer Sadeck's cruiser had arrived on the scene before the crash and was so positioned with Officer Sullivan's cruiser as to form a 'staggered roadblock.' This account is contrary to all the other reports before the court. . . . This article should have been stricken on appellees' motion and cannot be considered in deciding whether Horta has raised a genuine issue of material fact. . . . The **account is hearsay, inadmissible at trial to establish the truth of the reported facts**. In fact, the **newspaper account is hearsay within hearsay**. See Fed. R. Evid. 805. Even were appellee Chief Mello the sole source of the article's information, so that his statements could be regarded as the nonhearsay admissions of a party opponent, see Fed. R. Evid. 801(d)(2), the article itself constitutes inadmissible out-of-court statements, by unidentified persons, offered to prove the truth of the matter asserted. See Fed. R. Evid. 801(c)…").

Are we there yet?

You may not need all your evidence on a particular element to persuade the court.

How can you tell if the court is persuaded? Should you just ask?

Naturally, if the court tells you to move on, you are out of time on that particular subject.

If the judge says a point is minor or inconsequential, consider that she might be right and that you might waste credibility and judicial capital continuing to hammer the point.

Can a party skip trial?

Does it make a bad impression if a party skips a trial?

When does one have to attend?

Can this be used to advantage?

Can you make an out of town party show up for trial? What are those strategy angles?

Closing statement

Post trial work

Findings of fact and conclusions of law.

The judgment.

Thinking about an appeal…

Drafting findings

You need to have the court consider your evidence and say that you have met your elements.

There is always some ambiguity about what happened at trial. You will desire one interpretation because it is favorable.

Do you float a trial balloon and see what happens?

Judges hate to be misquoted

The winner has a lot of leeway in drafting findings and conclusions.

But the court does not appreciate overreaching.

A judge and your opponent will look carefully at the findings and conclusions. Draft carefully.

Retrieve your exhibits

The court is not a library; it does not want your trial materials.

Go get them.

Final tips and traps