AMERICAN BANKRUPTCY INSTITUTE

Alexander L. Paskay Memorial Bankruptcy Seminar

Adversary Proceedings and Evidence

Mariane L. Dorris, Moderator
Shuker & Dorris, P.A. | Orlando, Fla.

Hon. Scott M. Grossman
U.S. Bankruptcy Court (S.D. Fla.) | Fort Lauderdale

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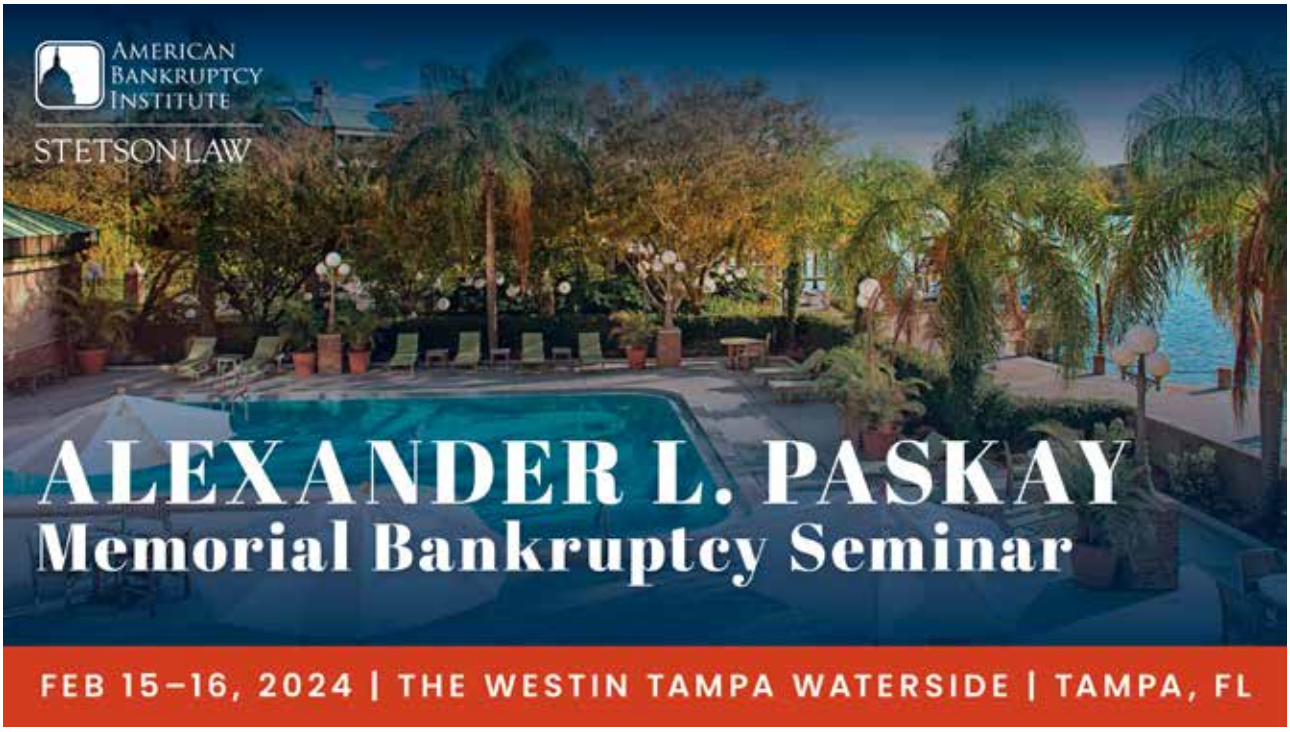
Maria M. Yip
Yip Associates | Miami

2024



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Summary Background of Facts

Groovy, LLC

- Owned by Jose Pirate
- 3-D printing business of customized Gasparilla Beads
- $40MM Loan secured by all assets with a ballon payment due in late 2022
- 2022 - $50MM in Gross Revenue
- Secured Lender obtains judgment after default
- Groovy files a Chapter 7

Groovy II, LLC

- Owned 49% by Jaime Pirate and 51% by Jose Pirate as "silent partner"
- Jose Pirate started printing in his garage
- 3-D Printer was Jose's personal equipment
- Took out some MCA Loans

Authentication of Social Media / Website

Authentication of Social Media / Website

- Fed. R. Evid. 901
- Fed. R. Evid. 601
- Fed. R. Evid. 602

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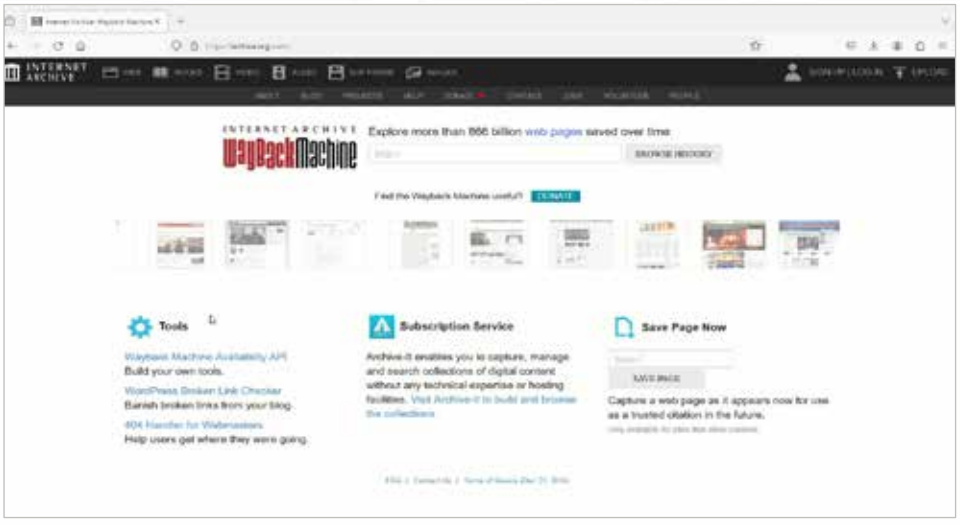

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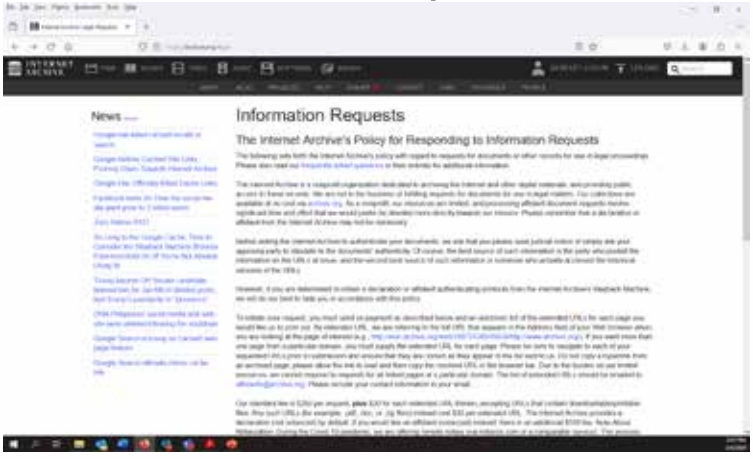


https://archive.org/legal

The Way Back Machine

Standard Affidavit

1. I am a Records Request Processor at the Internet Archive. I make this declaration of my own personal knowledge.

2. The Internet Archive is a website that provides access to a digital library of Internet sites and other cultural artifacts in digital form. Like a paper library, we provide free access to researchers, historians, scholars, and the general public. The Internet Archive has partnered with and receives support from various well-known institutions and libraries, including the Library of Congress.

3. The Internet Archive has created a service known as the Wayback Machine. The Wayback Machine makes it possible to browse more than 450 billion pages stored in the Internet Archive's web archive. Visitors to the Wayback Machine can search archives by URL (i.e., a website address). If archived records for a URL are available, the visitor will be presented with a display of available dates. The visitor may select one of those dates, and begin browsing an archived version of the Web. Links on archived files in the Wayback Machine point to other archived files (whether HTML pages or other file types). If any are found for the URL indicated by a given link. For instance, the Wayback Machine is designed such that when a visitor clicks on a hyperlink on an archived page that points to another URL, the visitor will be served the archived file found for the hyperlink's URL with the closest available date to the initial file containing the hyperlink.

4. The archived data made viewable and browsable by the Wayback Machine is obtained by use of web archiving software that automatically stores copies of files available via the Internet, each file preserved as it existed at a particular point in time.

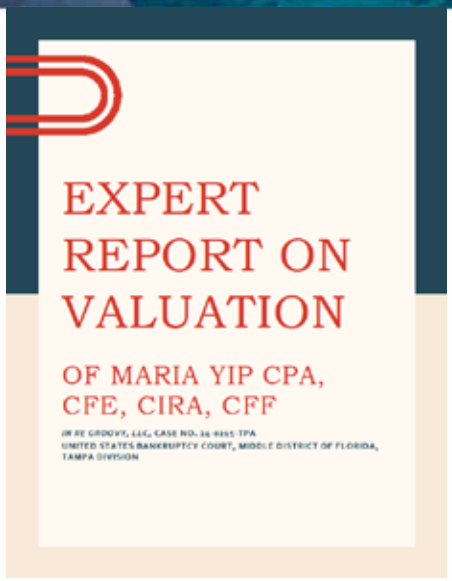
5. The Internet Archive assigns a URL on its site to the archived files in the format: http://web.archive.org/web/[Year in yyyy][Month in mm][Day in dd][Time code in hh:mm:ss][Archived URL] aka an "extended URL." Thus, the extended URL http://web.archive.org/web/19970126045828/http://www.archive.org/ would be the URL for the record of the Internet Archive home page HTML file (http://www.archive.org/) archived on January 26, 1997 at 4:58 a.m. and 28 seconds (19970126 at 04:58:28). A web browser may be set such that a printout from it will display the URL of a web page in the printout's footer. The date indicated by an extended URL applies to a preserved instance of a file for a given URL, but not necessarily to any other files linked therein. Thus, in the case of a page constituted by a primary HTML file and other separate files (e.g., files with images, audio, multimedia, design elements, or other embedded content) linked within that primary HTML file, the primary HTML file and the other files will each have their own respective extended URLs and may not have been archived on the same dates.

6. Attached hereto as Exhibit A are true and accurate copies of browser printouts of the Internet Archive's records of the archived files for the URLs and the dates specified in the footer of the printout or an attached coversheet in the case of records for which a browser does not provide a ready option to print a URL in the footer, e.g., in the case of a PDF file.

7. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Using a Rule 2004 Examination Transcript/ Fed. R. Civ. P. 32

2004 Examination



Expert Report

- **Fed. R. Evid. 801 – defines "hearsay"**
- **Fed. R. Evid. 802 – hearsay is inadmissible unless it satisfies an exception**

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"Perhaps you'd like to reconsider that last answer."

Impeaching a Witness

Fed. R. Evid. 404
Fed. R. Evid. 607
Fed. R. Evid. 608
Fed. R. Evid. 613

Impeaching a Witness

Q. What color was the traffic light when you approached the intersection?
A. It was green.
Q. I took your deposition on [date]?
A. Yes.
Q. At that deposition, you swore to tell the truth?
A. Yes.
Q. And you answered my questions under oath?
A. Yes.
Q. At that deposition, I asked you the following question, and you gave the following answer [give opposing counsel page and line number]: "Q. What color was the traffic light when you approached the intersection? A. Red." Was that the testimony you gave under oath at your deposition?
A. Yes.

THANK YOU!!

ADVERSARY PROCEEDINGS AND EVIDENCE

Groovy, LLC sells 3-D printers designed to print and mass produce customized Gasparilla beads. The beads are also biodegradable, adding to their attraction. Groovy LLC's printing system was a smashing success and last year nearly every float at Gasparilla, Macy's Thanksgiving Day Parade, Disney's Christmas parade, and Mardi Gras ordered custom beads, and Groovy LLC grossed over 50 million dollars in 2022, its first full year of business. Groovy LLC was aided by a very successful marketing campaign launched through advertisers who were able to reach corporate and individual customers through the internet and social media.

After the holidays and 2022 Mardi Gras, Groovy LLC ran into trouble. It's a $40 million Main Street Loan, secured by all assets and receivables of Groovy, LLC came due. Groovy, LLC could not make the giant balloon payment due to the current interest rate environment, and the Main Street Lender obtained a $40 million judgment. Groovy, LLC filed for chapter 7 bankruptcy.

On January 1, 2023 just before Gasparilla 2023, Mr. Jose Pirate, owner of Groovy LLC decided to try again. Mr. Pirate used his garage to start printing beads again for new customers and to avoid any confusion between Groovy LLC and Groovy II LLC, Jose appointed his brother, Jaime, as the 'owner' and '49% member' Groovy II LLC and designated himself as a secondary 'silent partner' and 51% member. He added "II" to the garage sign that now proudly displays Groovy II LLC Jose reached out to his former advertisers and asked them to start marketing his custom beads under Groovy II, LLC. Jose used his 3D printing equipment which he owned personally, free and clear from the Main Street debt. To obtain a little bit of capital, Jaime took out a loan with MCA Co, who purchased all Groovy II, LLC's accounts receivable.

When the revenue started coming into Groovy II, LLC in 2023 after the holiday parades, MCA Co. claimed the collections from receivables for itself. Trustee for Groovy LLC was certain Groovy II, LLC was a mere continuation of Groovy LLC, and filed a Complaint for fraudulent transfer of the assets of Groovy LLC to Groovy II, LLC under 11 U.S.C. 548.

Judge Grossman set a trial on the 548 Complaint, and the following evidentiary issues ensued during the trial.

I. Authentication of Social Media / Website

Rule 901 of the Federal Rules of Evidence

(a) In General. 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.

(b) Examples. The following are examples only—not a complete list—of evidence that satisfies the requirement:

(1) *Testimony of a Witness with Knowledge*. Testimony that an item is what it is claimed to be.

(2) *Nonexpert Opinion About Handwriting*. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) *Comparison by an Expert Witness or the Trier of Fact*. A comparison with an authenticated specimen by an expert witness or the trier of fact.
(4) *Distinctive Characteristics and the Like*. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
(5) *Opinion About a Voice*. An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.
(6) *Evidence About a Telephone Conversation*. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or
(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) *Evidence About Public Records*. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or
(B) a purported public record or statement is from the office where items of this kind are kept.

(8) *Evidence About Ancient Documents or Data Compilations*. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;
(B) was in a place where, if authentic, it would likely be; and
(C) is at least 20 years old when offered.

(9) *Evidence About a Process or System*. Evidence describing a process or system and showing that it produces an accurate result.
(10) *Methods Provided by a Statute or Rule*. Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

a. Laying the Foundation for Authentication/Burden

Under Rule 901(a) of the Federal Rules of Evidence, "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." *United States v. Quashun Demarcus Carr*, 607 Fed. Appx. 869 (11th Cir. Apr. 7, 2015) (citation omitted). "The [proponent]'s burden here was not an onerous one; "[t]he proponent need only present enough evidence to make out a prima facie case that the proffered evidence is what it purports to be." *Id*. (citations omitted). A trial court is given discretion to determine authenticity. *Id*.

b. Archived Webpage-

- "The Wayback Machine is an online digital archive of web pages. It is run by the Internet archive, a nonprofit library in San Francisco, California." *Mojave Desert Holdings, LLC v. Crocs, Inc.*, 844 F. App'x 343, 346 n.2 (Fed. Cir. 2021).
  - Can be found at https://web.archive.org
  - Policy for Responding to Information Requests and Affidavit for authentication: https://archive.org/legal

c. Social Media/Text Messages

- Types of evidence to support authentication: (i) control of account or device, (i) IP Addresses, (iii) motive, (iv) information contained in the messages; (v) witnesses who are familiar with the posting or messaging party and the manner in which the person posts to social media or communicates via text message. *See e.g., United States v. Encarnacion-Lafontaine*, 639 Fed. Appx. 710, 713 (2d. Cir. Feb. 16, 2016) (authentication of Facebook Messages from various accounts); *United States v. Recio*, 884 F.3d 230, 236-237 (4th Cir. 2018) (authenticating Facebook account); *United States v. Perez*, 61 F.4th 623, 626-627 (8th Cir. 2023) (authenticating MeWe records).

II. Using a Rule 2004 Examination Transcript/ Fed. R. Civ. P. 32

a. Fed. R. Bankr. P. 2004

> (b) Scope of examination. The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.

Fed. R. Bankr. P. 2004(b).

The scope has generally been held to be a "fishing expedition" although there are some limitations including not circumventing Fed. R. Bankr. P. 7026-7037. *See In re Kipp,* 86 B.R. 490, 491 (Bankr. S.D. Tex1988). *See also In re Gillespie*, Case No. 22-20855-DOB, 2023 Bankr. LEXIS 2136, 2023 WL 5598413 (Bankr. E.D. Mich. Aug. 29, 203)

b. Fed. R. Civ. P. 26(b) (Fed. R. Bankr. 7026)

> Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1).

c. Fed. R. Civ. P. 30 (Fed. R. Bankr. P. 7030)

"[T]he scope of the inquiry is guided only by the general discovery standard of Fed. R. Civ. P. 26(b)(1)." *Overseas Private Inv. Corp. v. Mandelbaum*, 185 F.R.D. 67, 68 (D.D.C. 1999) (citations omitted).

d. Fed. R. Civ. P. 32 (Fed. R. Bankr. P. 7032)

(a) Using Depositions.

(1) In General. 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;

(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 Rule 32(a)(2) through (8).

Application of Rule 32(a)(1) and Rule 2004 Examination

Different positions:

(i) ***Per se Inadmissibility*** **(minority)**

Roberts v. Oliver (In re Oliver), 414 B.R. 361, 371 (Bankr. E.D. Tenn. 2009) (In an adversary proceeding, discovery is governed by Rules 26 through 37 of the Federal Rules of Civil Procedure, incorporated into Rules 7026 through 7037 of the Federal Rules of Bankruptcy Procedure. More specifically, oral testimony is taken by deposition pursuant to Rule 30 of the Federal Rules of Civil Procedure and its admissibility is governed by Rule 32. Because a Rule 2004 examination is not a deposition, Mr. Householder's testimony will not be admitted into evidence for purposes of the Motion for Summary Judgment. Accordingly, no portion of that Rule 2004 transcript will be considered. (citation omitted)).

(ii) ***Balancing (Majority View)***

St. Clair v. Cadles of Grassy Meadows II, L.L.C., 550 B.R. 655 (E.D.N.Y. 2016)

[M]any courts have rejected a *per se* rule and have instead admitted Rule 2004 testimony in adversary proceedings if they find that "the examination[s] w[ere] conducted fairly and in compliance with the Federal Rules of Civil Procedure." *In re Symington*, 209 B.R. 678, 687 (Bankr. D. Md. 1997); *see also F.D.I.C. v. Fid. & Deposit Co. of Maryland*, 64 F. Supp. 3d 1225, 1235 (S.D. Ind. 2014) ("3F & D asserts that this testimony is inadmissible because the argument is based upon Rule 2004 examinations.

> The court disagrees. Pearlman testified in his deposition in this case that either Trans Continental Leasing or Trans Continental Airlines had some aircraft . . . . That testimony is clearly admissible as F & D had the opportunity to examine Pearlman regarding that statement."); In re McLaren, 158 B.R. at 658 ("Further, admission of appellant's Rule 2004 testimony was particularly appropriate in light of the circumstances under which this particular examination was conducted. At his Rule 2004 Examination, appellant was represented by counsel who participated actively. Also, as the bankruptcy court noted, appellant did not move to have the Rule 2004 Examination treated confidentially.").
>
> In the present case, **[the other]** Judge Grossman declined to adopt a *per se* rule precluding the admission of the transcript of the Appellants' Rule 2004 examinations. Instead, he found that the circumstances of the examinations justified their admission at trial because "[the] Debtors were represented at the Rule 2004 examinations by counsel, the examinations were done under oath, and transcribed by a court reporter." (App. Rec. at 2062.) In addition, he found that the Appellants suffered no prejudice from admitting the transcripts because "[a]t trial both Debtors were able to testify and their counsel was given ample opportunity and leeway to 'cross-examine' them about issues that were not raised or germane to the Rule 2004 examination." (Id. at 2073.)

Id. at 668-669

- Trustee Smith took a 2004 examination of Groovy II LLC's owner, Jaime (the brother). Jaime testified that he was only an owner in name only, but that his brother, Jose, the former owner of Groovy LLC, really did everything, from organizing the marketing, printing the beads, talking to customers, coordinating with bead vendors and working on new advertising campaigns.
- Since the 2004 exam, Jaime, the brother, has backed off such strong statements and suggested that he and his brother Jose both own the company and share in all the work to be done.
- Trustee Smith wants to get the 2004 testimony into evidence. Can she?

Yes.

Fed. Civ. P. 32(a) (3) Deposition of Party, Agent, or Designee. 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 under Rule 30(b)(6) or 31(a)(4).

- While not qualifying as a deposition under Fed. R. Civ. P. 30, the balancing test would still permit its use, especially where the opposing party is the deponent.

Fed. R. Evid. 801(d)(2) -statement of a party opponent is not hearsay if offered against the opposing party. Accordingly, regardless of whether the Rule 2004 examination is a deposition, the statements are admissible.

III. Expert relying on other expert reports - value of business of Groovy LLC

- Groovy II LLC tries to introduce its expert's report that shows the value to Groovy LLC was $0 because it was fully encumbered with debt (to mitigate fraudulent transfer damages)
- Trustee Smith opposes the expert's position.
- Try to admit Yip's report as evidence.

a. Expert's Report is Hearsay

(i) Applicable Rules

Fed. R. Evid. 801

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

(b) "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.

Fed. R. Evid. 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.

(ii) Case Law

See Reckley v. Cmty. Nursing, Inc., Case No. CV 19-119-M-KLD, 2021 U.S. Dist. LEXIS 163976 at *3-4, 2021 WL 3861270 (D. Mont. Aug. 30, 2021) (Expert report is inadmissible hearsay).
Accord Johnston v. Borders, Case No. 6:15-cv-936-Orl-40DCI, 2018 U.S. Dist. LEXIS 150014 at *9-4, 2018 WL 4215027 (M.D. Fla. Sept. 4, 2018).

b. Effective December 1 – Changes in Federal Rules of Evidence 702. See attached Blackline and committee notes.

- Clarifying amendments.

- Under Fed. R. Evid. 104(a) and 702, if a proponent cannot demonstrate that the expert opinion satisfy the requirement in Rule 702, then the opinion must be excluded. It is not a question of weight.

o Emphasize that the "expert's knowledge must 'help' the trier of fact, not appreciable help.'"

c. Reliance on another Expert

Sabal Trail Transmission, LLC v. 0.589 Acres of Land, 2018 U.S. Dist. LEXIS 129709, 107 Fed. R. Evid. Serv. (Callaghan) 39, 2018 WL 3655559 (M.D. Fla. Aug. 2, 2018)

> Federal Rules of Evidence, which require that an expert witness be "qualified as an expert by knowledge, skill, experience, training, or education." Rule 702. Moreover, Rules 702 and do not permit an expert to "simply repeat or adopt the findings of another expert without attempting to assess the validity of the opinions relied upon." *In re Polypropylene Carpet Antitrust Litigation*, 93 F. Supp. 2d 1348, 1357 (S.D. Fla. 2000); *In re TMI Litigation*, 193 F.3d 613, 715-16 (3d Cir. 1999) (blind reliance by one expert on another expert's opinions demonstrates flawed methodology under Daubert); *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 732-33 (10th Cir. 1993) (excluding expert opinion relying on another expert's report because witness failed to demonstrate a basis for concluding report was reliable and showed no familiarity with methods and reasons underlying the hearsay report). *See also Stancill v. McKenzie Tank Lines, Inc.*, 497 F.2d 529, 536 (5th Cir. 1974) (without deciding the issue, suggesting that it is improper for one expert to base his opinion entirely on another expert's opinion) (*citing, inter alia, 6816.5 Acres v. United States*, 411 F.2d 834, 840 (10th Cir. 1969); *Taylor v. B. Heller & Co.*, 364 F.2d 608, 613 (6th Cir. 1966)).9Link to the text of the note As the Seventh Circuit explained,
>
> > Hearsay is normally not permitted into evidence because the absence of an opportunity to cross-examine the source of the hearsay information renders it unreliable. Rule 703 permits experts to rely on hearsay, though, because the expert's "validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes." Rule 703, Advisory Committee Notes. That rationale is certainly not satisfied...where the expert failed to demonstrate any basis for concluding that another individual's opinion on a subjective financial prediction was reliable, other than the fact that it was the opinion of someone he believed to be an expert who had a financial interest in making an accurate prediction. Dr. Boswell's lack of familiarity with the methods and the reasons underlying Werber's projections virtually precluded any assessment of the validity of the projections through cross-examination of Dr. Boswell. *TK-7 Corp.*, 993 F.2d at 732 (footnote omitted).

2018 U.S. Dist. LEXIS 129709 at *23-25.

IV. Impeachment

- At trial, the corporate representative for Groovy II LLC, Jaime, was asked where it obtained the 3D printing equipment to print the beads.
- Jaime, the corporate representative, said he purchased the equipment with the funds obtained from MCA Co. They were part of start-up costs for the new company.
- Trustee Smith knew from testimony at the 341 meeting of Groovy LLC and the 2004 examination of Jose that the printing equipment was owned by Groovy LLC's owner, Jose. Jose, Groovy LLC's Corp rep said he simply transferred over the printing equipment for use at Groovy II LLC (another bad fact for a mere continuation theory).
- Trustee Smith's counsel attempts to impeach Groovy II LLC's / or Groovy LLC corporate rep (first the wrong way, then it is done right).

- Follow Judge Grossman's guide for a proper impeachment strategy.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

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

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

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

(d) the ~~expert has reliably applied~~ expert's opinion reflects a reliable application of the

[1] New material is underlined; matter to be omitted is lined through.

16 principles and methods to the facts of the

17 case.

Committee Note

Rule 702 has been amended in two respects:

(1) First, the rule has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule. *See* Rule 104(a). This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules. *See Bourjaily v. United States*, 483 U.S. 171 175 (1987) ("The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration."); *Huddleston v. United States*, 485 U.S. 681, 687 n.5 (1988) ("preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard"). But many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).

There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that

rule. Nor does the amendment require that the court make a finding of reliability in the absence of objection.

The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000—requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard. But it remains the case that other admissibility requirements in the rule (such as that the expert must be qualified and the expert's testimony must help the trier of fact) are governed by the Rule 104(a) standard as well.

Some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds it more likely than not that an expert has a sufficient basis to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis always go to weight and not admissibility. Rather it means that once the court has found it more likely than not that the admissibility requirement has been met, any attack by the opponent will go only to the weight of the evidence.

It will often occur that experts come to different conclusions based on contested sets of facts. Where that is so, the Rule 104(a) standard does not necessarily require exclusion of either side's experts. Rather, by deciding the disputed facts, the jury can decide which side's experts to credit. "[P]roponents 'do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of

reliability is lower than the merits standard of correctness.'" Advisory Committee Note to the 2000 amendment to Rule 702, quoting *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994).

Rule 702 requires that the expert's knowledge "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.

(2) Rule 702(d) has also been amended to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology. Judicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support.

The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error. In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of

features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.

Nothing in the amendment imposes any new, specific procedures. Rather, the amendment is simply intended to clarify that Rule 104(a)'s requirement applies to expert opinions under Rule 702. Similarly, nothing in the amendment requires the court to nitpick an expert's opinion in order to reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make claims that are unsupported by the expert's basis and methodology.

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FROM THE JUDGES' CHAMBERS

IMPEACHING A WITNESS WITH A PRIOR INCONSISTENT STATEMENT

By: Hon. Scott M. Grossman

Impeaching a witness with a prior inconsistent statement – particularly in bench trials – is quite simple, straightforward, and easy to do. Yet I have been surprised how few attorneys do it correctly.

In theory, impeachment should be done the same way we all learned it in law school, regardless of whether during a jury trial or a bench trial. But in practice, in bench trials lawyers typically do not need all of the dramatic flair and build-up you may have been taught in law school. In other words, you don't need to ask all the questions to establish the solemnity of the witness's deposition testimony: questions about going to a lawyer's office, sitting around a conference room table, all the lawyers there, the court reporter, raising your right hand, etc. Instead – since judges know full well what it means for a witness to testify under oath at a deposition – all you really need to do is establish that the witness previously testified under oath and that the witness gave a different answer.

So here is a short refresher on how to do it. The first step, of course, is to be prepared. When cross-examining a witness, a well-prepared lawyer will have at hand the page and line number from the witness's deposition transcript for any question the lawyer asks the witness. This way, when you ask, "what color was the traffic light as you approached the intersection?" you know that on page x, line y of her deposition transcript, the witness testified, "it was red." Then, when the witness answers at trial, "it was green," you know immediately where to go to impeach her testimony.

And it is quite simple – particularly in a bench trial – to impeach a witness with her prior inconsistent statement. All you have to do is:

1. Ask the witness if she had her deposition taken, was asked questions under oath, and swore to answer truthfully?
2. Then – as required by Federal Rule of Evidence 613(a) – tell (or show) opposing counsel the page and line number of the transcript from which you are about to read.
3. Next, ask the witness if you asked the following question and she gave the following answer?
4. Then read – verbatim – the question and answer from the transcript.
5. And, finally, confirm with the witness that was the testimony she gave.

That's it. You have now successfully impeached the witness with her prior inconsistent statement. You do not need to argue with her or ask the argumentative (and objectionable) question, "were you lying then, or are you lying now?"

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FROM THE JUDGES' CHAMBERS

IMPEACHING A WITNESS WITH A PRIOR INCONSISTENT STATEMENT (continued from page 6)

Notwithstanding the simplicity of this process, I have too often seen attorneys do it wrong. Again, suppose you ask the witness what color the traffic light was, she answers "green," and you know she testified at her deposition that it was red. Here are some examples (many variations of which I have seen) of how **not** to impeach a witness:

Q. Well, that's not what you said at your deposition, was it?

Q. Didn't you tell me it was red during your deposition? Were you lying then, or are you lying now?

Q. Why are you saying it is green when you previously said it was red?

Q. Judge, I have a deposition transcript where she said it was red!

Q. Your Honor, I'd like to offer into evidence the transcript of the witness's deposition, where she said it was red.

As discussed above, none of these questions is proper, appropriate, or effective to impeach a witness's testimony. Rather, here is an example of how to do it properly:

Q. What color was the traffic light when you approached the intersection?

A. It was green.

Q. I took your deposition on [date]?

A. Yes.

Q. At that deposition, you swore to tell the truth?

A. Yes.

Q. And you answered my questions under oath?

A. Yes.

Q. At that deposition, I asked you the following question, and you gave the following answer [give opposing counsel page and line number]: "Q. What color was the traffic light when you approached the intersection? A. Red." Was that the testimony you gave under oath at your deposition?

A. Yes.

That's it. You are done. You have successfully impeached the witness with a prior inconsistent statement, and you can move on to your next question.

Faculty

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Hon. Scott M. Grossman is a U.S. Bankruptcy Judge for the Southern District of Florida in Fort Lauderdale, sworn in on Oct. 2, 2019. He previously was a shareholder with a large international law firm in its global restructuring and bankruptcy practice, and he represented distressed companies, debtors, secured and unsecured creditors, official committees, trustees, landlords and purchasers of distressed assets, and worked on bankruptcy cases across various industries, including real estate, hospitality, health care, entertainment, banking, technology, energy and financial fraud. While primarily involved in chapter 11 reorganizations, he also represented clients in out-of-court workouts and restructurings, chapter 7 liquidations, receiverships, assignments for the benefit of creditors and insolvency-related litigation. Judge Grossman was active in local bar activities, including having served as president of the Bankruptcy Bar Association of the Southern District of Florida. When in private practice, he was listed in *Chambers USA*, *The Best Lawyers in America* and *Super Lawyers* magazine, and was a member of the winning teams for the Global M&A Network's Turnaround Atlas Awards for both "Cross Border Special Situation M&A Deal (Small-Mid Markets)" in 2019, as well as "Turnaround of the Year — Small Markets" in 2015. Judge Grossman began his legal career in the Attorney General's Honors Program at the U.S. Department of Justice, where he was a trial attorney in the Tax Division, Civil Trial Southern Section, from 1999-2004. He received his B.S. in 1996 from the University of Florida and his J.D. in 1999 from George Washington University Law School.

Megan W. Murray is a founding shareholder of Underwood Murray PA in Tampa, Fla., and has nearly 20 years of reorganization and workout experience advising business owners, debtors, trustees, creditors' committees, secured and unsecured creditors, and asset-purchasers and sellers. She has experience both on the legal side and business side in a global financial institution, and she counsels businesses and owners in a wide variety of industries, including but not limited to real estate, health care, hospitality, pharmaceutical, medical services, construction, insurance, transportation, logistics, aviation and financial services. Ms. Murray also has experience representing a variety of fiduciaries, from chapter 7 and 11 trustees to assignees in assignments for the benefit of creditors and receivers in proceedings across the state. In addition to her broad range of representations in core bankruptcy matters, she counsels her clients in making critical business decisions, while prosecuting and defending complex business disputes. She has experience in director and officer liability litigation, bondholder

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Mark J. Wolfson is a partner with Foley & Lardner LLP in Tampa, Fla., and has been a practicing commercial litigation and bankruptcy lawyer for more than 37 years. He has experience in out-of-court loan workout and restructuring matters, as well as broad experience in all types of insolvency and bankruptcy cases, representing secured creditors, indenture trustees, creditors' committees, buyers of assets in chapter 11, equityholders, bondholders, and parties to contracts such as landlords and franchisors. His experience includes health care, hotel, golf course, manufacturing, telecommunication, technology, automotive and agriculture insolvency cases. Mr. Wolfson is rated AV-Preeminent by Martindale-Hubbell and has been recognized by *Chambers USA: America's Leading Business Lawyers* since 2003. He also was selected for inclusion in the 2006-17 *Florida Super Lawyers* lists and in *The Best Lawyers in America* since 2007 for Bankruptcy and Creditor/Debtor Rights Law. Mr. Wolfson regularly lectures on lender liability, fraudulent transfer, and complex bankruptcy matters. He also is co-author of the chapter titled "The Impact of Bankruptcy" for the Florida Bar manual *Florida Construction Law and Practice*, recently edited in 2018. Mr. Wolfson has been an active participant in Hillsborough County's *Pro Bono* Legal Aid Programs. He was awarded the 2017 "Thirteenth Judicial Circuit Outstanding *Pro Bono* Service by a Lawyer Award" in the Tampa Bay Area. As chair of the Tampa office's *Pro Bono* efforts, he accepted the Outstanding Law Firm Commendation for *Pro Bono* Service from the Chief Judge of the Florida Supreme Court in February 2019. Mr. Wolfson was the 2005-06 chair of the Florida Bar Business Law Section and is a member of the Section's Executive Council. He also has served as the chair of the Business Law Section's Bankruptcy/UCC Committee and as the lead representative to the Florida Legislature for the Business Law Section in connection with the enactment of Revised Article 9 in Florida in 2001. In addition, he was the primary draftsman of the Florida non-uniform default and remedies provisions. Mr. Wolfson was a member of the advisory board for ABI's Caribbean Insolvency Symposium for more than eight years and has been a member of the advisory board for ABI's Alexander L Paskay Bankruptcy Conference

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