AMERICAN BANKRUPTCY INSTITUTE

2019 Southwest Bankruptcy Conference

# Evidence, Part I: Overview of the Underbrush


**Robert M. Charles, Jr.**
*Lewis Roca Rothgerber Christie LLP; Tucson, Ariz.*

**Dawn M. Cica**
*Carlyon Cica Chtd.; Las Vegas*

**Hon. Bruce A. Harwood**
*U.S. Bankruptcy Court (D. N.H.); Concord*

**Samuel A. Schwartz**
*Brownstein Hyatt Farber Schreck, LLP; Las Vegas*


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# Evidence in Bankruptcy Cases 101

**Dawn M. Cica**
Carlyon Cica Chtd.

**Robert Charles**
Lewis Roca Rothgerber Christie LLP

**Samuel A. Schwartz**
Brownstein Hyatt Farber Schreck, LLP

**Hon. Bruce Harwood**
U.S. Bankruptcy Court – District of New Hampshire

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# SOUTHWEST BANKRUPTCY CONFERENCE

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**Panelists:**

***Dawn M. Cica***
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***Samuel A. Schwartz***
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***Hon. Bruce Harwood***
*U.S. Bankruptcy Court – District of New Hampshire*

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Las Vegas, Nevada
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# Evidence in Bankruptcy Cases 101

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## I. The Basics.

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

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

1. **Relevance**. The evidence must be relevant. That is, under Federal Rule of Evidence ("FRE") 402 the evidence must have "any tendency to make the existence of any fact that is of consequence more or less probable."

2. **Personal Knowledge**. The witness must have personal knowledge about the matters about which the witness is testifying. Under FRE 602 a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter (with the exception of experts who may rely on inadmissible evidence in forming opinions). Statements "on information and belief" that are not based on personal knowledge are inadmissible. *In re Scott*, 588 B.R. 122, 129 (Bankr. D. Idaho 2018).

3. **Not Subject to the Rule of Exclusion**. Finally, evidence must not be subject to a rule of exclusion. If the evidence is subject to a rule of exclusion, e.g., the hearsay rule, it must fall within an exception to the rule of exclusion, e.g., the business records exception.

C. Applicable Federal Rules of Evidence.

1. FRE 103—Rulings on Evidence

a) Effect of erroneous ruling—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, an

(1) Objection—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context;

(2) Offer of proof—In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

b) Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

2. FRE 402—Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

3. FRE 401 – Evidence is relevant if it tends to make a fact more or less provable and the fact matters.

4. FRE 602—Lack of Personal Knowledge.

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.
>
> This rule is subject to the provisions of FRE 703, relating to opinion testimony by expert witnesses.

5. FRE 802—Hearsay Rule.

> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.
>
> Testimony offered in court that reflects an out of court statement offered for the truth of the matter asserted is hearsay. FRE 801(c).

6. Prior Bad Acts

> Counsel in distress concerning damaging evidence has several alternatives for lifelines. One is FRE 404(b), which excludes evidence of prior bad acts offered to prove other actions.
>
> a) For example, a trial court properly excluded evidence that was offered to prove a loan service mishandled other customers' loans. *May v. Nationstar Mortg., LLC*, 852 F.3d 806, 819 (8th Cir. 2017).
>
> b) That rule does not apply to bad acts that are the gravamen of the matter at issue. *United States v. Ellison*, 704 F. App'x 616, 627 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2675, 201 L. Ed. 2d 1072 (2018), and *cert.*

*denied sub nom*. *Swenson v. United States*, 138 S. Ct. 2676, 201 L. Ed. 2d 1072 (2018).

c) Prior misconduct may also be admissible to show a pattern of continuing concealment. *In re Hart*, 563 B.R. 15, 44 (Bankr. D. Idaho 2016) (evidence of transfers more than a year before bankruptcy admissible to prove continuing concealment during the year before bankruptcy in § 727 action).

d) Prior misconduct may be admissible to demonstrate a motive for bankruptcy fraud, *United States v. Addario*, 662 F. App'x 61, 63 (2d Cir. 2016); *United States v. Patela*, 578 F. App'x 139, 142 (3d Cir. 2014). or knowledge or intent of criminal activity. *United States v. Ledee*, 772 F.3d 21, 37 (1st Cir. 2014).

7. FRE 901—Requirement of Authentication or Identification.

a) General provision—The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

b) Illustrations—By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

c) Evidence may be presumptively authentic, for example, certified copies of public records, FRE 902(4); or commercial paper and related documents. FRE 902(9). A party opposing authenticity of such documents must provide "significant probative evidence" of the lack of authenticity. *In re Connelly*, 487 B.R. 230, 244 (Bankr. D. Ariz. 2013).

D. Other Sources of Evidence Law

1. Privileges

a) Federal common law

b) State law, including state statutes

While in federal court the Federal Rules of Evidence apply, those rules may point the court to state law evidence rules where the underlying claim is based on state law. FRE 501 provides:

> The common law--as interpreted by United States courts in the light of reason and experience--governs a claim of privilege unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.

2. Substantive law

a) E.g. parol evidence rule. See *In re Mortgages Ltd.*, 559 B.R. 508, 517 (Bankr. D. Ariz. 2016); *In re Resler*, 551 B.R. 835, 843 (Bankr. D. Idaho 2016); *In re Premier Golf Properties, LP*, 564 B.R. 660, 680 (Bankr. S.D. Cal. 2016).

## II. The Do's and Don'ts of Effective Witness Examination.

A. Direct Examination.

1. FRE 611—Mode and Order of Interrogation and Presentation.

(c) Leading Questions. Leading question should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. . . . When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

2. A leading question is one that suggests the answer to the person being questioned. If a question can be answered by a mere "yes" or "no" it is generally considered leading. As a general proposition, questions containing the words, "Who, What, When, Where, Why, or How," are not leading questions.

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

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

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

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

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

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

B. Cross-Examination.

1. FRE 611—Mode and Order of Interrogation and Presentation.

a) Scope of Cross-Examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

b) Leading Questions. ... Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

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

## III. The Basics of Documentary Evidence.

A. Discoverable versus Admissible.

1. Admissible Evidence. Admissible evidence is any testimonial, documentary, or tangible data that may be introduced to the Court to establish or bolster an argument made by a party in the case. For evidence to be admissible, it must be relevant and "not

excluded by the rules of evidence" - which generally means that it must not be unfairly prejudicial, and it must have some indicia of reliability. The general rule is that all relevant evidence is admissible and all irrelevant evidence is inadmissible. There are exceptions, including the exclusionary rule, which prohibits the use of evidence that was obtained illegally.

2. Discoverable Evidence. The scope of discoverable evidence is much broader that admissible evidence. Under Fed. R. Civ. P. 26(b)(1), unless limited by a court order, parties may obtain discovery relating to any nonprivileged matter that is relevant to a party's claim or defense and is proportional to the needs of the case, including the parties' access to information, the burden or expense of the proposed discovery, and the issues at stake in the case. Generally, parties may obtain discovery of any nonprivileged matter that may lead to admissible evidence.

B. Basic Evidence Requirements.

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

C. Authentication of Documents.

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

D. Records of Regularly Conducted Activity a/k/a the "Business Records Exception to the Hearsay Rule."

1. FRE 803(6).

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with FRE 902(11), FRE 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

2. Qualified Witness. FRE 803(6) requires that the elements necessary to establish the document is a record of a regularly conducted activity be established by "the testimony of the custodian or other qualified witness." What constitutes a "qualified witness" other than a custodian is not defined by FRE 803(6). Generally this requirement is met by establishing that the witness is familiar with the practices of the business in question at the time.

3. Elements:

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

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

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

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

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

f) It was the regular practice of that business activity to make the record.

*Compare In re Hudson*, 504 B.R. 569, 575 (B.A.P. 9th Cir. 2014) ("document kept in the regular course of business, but not made by the business, can still qualify as a business record of the enterprise if there is testimony that the document was kept in the regular course of business and the business regularly relied on the document."). Failure to prove that a record is kept and relief upon in the regular course of business is a bar to admissibility. *In re Hudson*, 504 B.R. at 576 (bankruptcy court's admission of evidence reversed for abuse of discretion).

4. Pre-Trial Declaration Pursuant to FRE 803(6) and 902(11) as Alternative to Witness.

a) FRE 803(6) was amended effective December 1, 2000, to provide, as an alternative to introducing the evidence at trial through a "qualified witness," the filing and serving of a certification that complies with FRE 902(11).

b) FRE 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

> (11) Certified domestic records of regularly conducted activity—The original or a duplicate of a domestic record of regularly

conducted activity that would be admissible under FRE 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

5. Financial statements

Financial statements, such as balance sheets, are in essence statements of financial condition. If not prepared by the opposing party, balance sheets may be inadmissible hearsay. *In re Blanchard*, 547 B.R. 347, 360 (Bankr. C.D. Cal. 2016).

E. Public Records

A different exception to the hearsay rule provides for admission of certain public records. FRE 803(8). The exception does not extend to what would otherwise be hearsay statements in the public records. Nor does the fact of a government investigation, proven through public records, proof that the investigation has found misconduct. *F.D.I.C. v. Arciero*, 741 F.3d 1111, 1118 (10th Cir. 2013).

F. Residual Exception

When faced with a hearsay challenge to financial records, a proponent will last point to the federal residual exception to the hearsay rule, FRE 807.

a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in FRE 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it. FRE 807.

This residual exception should be narrowly applied. "The residual exception is to "be used very rarely, and only in exceptional circumstances." Wright & Miller, Federal Practice and Procedure § 7095 (2000)." *In re Blanchard*, 547 B.R. 347, 360 (Bankr. C.D. Cal. 2016).

G. Proofs of Claim

Bankruptcy law may provide another exception to the rule against hearsay. A proof of claim is prima facie evidence of the validity of the claim. 11 U.S.C. § 502; Bankr. R. 3001(f). A claim based solely upon hearsay, but which is not rebutted by admissible evidence, is allowable. *In re Walston*, 606 F. App'x 543, 547 (11th Cir. 2015) (affirming overruling of debtor's objection to creditor's claim on "prove you own the debt" grounds).

## IV. Use of Depositions at Trial.

A. FED. R. CIV. P. 32.—Text of Rule:

(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).

(2) *Impeachment and Other Uses*. Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(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).

(4) *Unavailable Witness*. 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.

(5) *Limitations on Use*.

(A) *Deposition Taken on Short Notice*. A deposition must not be used against a party who, having received less than 11 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place — and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney*. A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) *Using Part of a Deposition.* If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other

parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) *Substituting a Party*. Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) *Deposition Taken in an Earlier Action.* A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) OBJECTIONS TO ADMISSIBILITY. Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

B. FRE 804—Text of Rule:

Rule 804. Hearsay Exceptions; Declarant Unavailable

1. Hearsay exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(a) Definition of unavailability.

"Unavailability as a witness" includes situations in which the declarant—

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

C. FRE 801(d) -- Text of Rule:

d) Statements which are not hearsay. A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition; or

(2) Admission by party-opponent. The statement is offered against a party and is:

(A) the party's own statement, in either an individual or a representative capacity or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . .

D. General Rule.

1. FED. R. CIV. P. 43, which applies to all proceedings in bankruptcy courts pursuant to FED. R. BANKR. P. 9017, provides that in every trial (which would include an evidentiary hearing under FED. R. BANKR. P. 9014), testimony of witnesses shall be taken in open court unless a federal law, other provisions of the Federal Rules of Civil Procedure or Federal Rules of Evidence provides differently.

2. With respect to depositions, the exceptions to the requirement of live testimony that apply to depositions are contained in FED. R. CIV. P. 32 and FRE 801(d)(1)-(2) and 804(b)(1).

E. FED. R. CIV. P. 32. In Application:

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

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

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

c) One of the following circumstances must be present:

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

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

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

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

a) Dead;

b) Located outside the subpoena range of the court;

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

d) Exceptional circumstances exist.

F. FRE 801(d). In Application:

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

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

b) An admission by a party opponent under FRE 801(d)(1)(A). This can either be the party's own statement or a statement made by the party's agent concerning a matter within the scope of the agency or employment made during the existence of the relationship.

G. FRE 804(b)(1). In Application:

1. This rule creates an exception to the hearsay rule with respect to former testimony given by a witness in a deposition if the party against whom the testimony is offered

had an opportunity and similar motive to develop the testimony by direct or cross examination if the party offering the deposition testimony can show that the witness is "unavailable."

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

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

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

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

## V. Judicial Notice.

A. Defined.

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

BLACK'S LAW DICTIONARY 863-64 (8th ed. 2004) (also termed "judicial cognizance" or "judicial knowledge").

B. FRE 201—Judicial Notice of Adjudicative Facts.

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is 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.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

C. Procedure.

1. Judicial notice may be taken at any stage of a proceeding, FRE 201(f), including appeal. *Nantucket Investors II v. California Federal Bank (In re Indian Palms Associates)*, 61 F.3d 197, 204 (3rd Cir. 1995).

2. A party is entitled to be heard, however, with respect to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. FRE 201(e). Thus, for example, if a bankruptcy court implicitly took judicial notice, *sua sponte*, in considering the debtor's schedules in arriving at a ruling, on appeal, the matter may be remanded to allow the disadvantaged party to be afforded notice and opportunity to respond. *Annis v. First State Bank of Joplin*, 96 B.R. 917, 920 (W.D. Mo. 1988).

3. Where judicial notice is taken without prior notice, the burden is on the disadvantaged party to make a request for a hearing to challenge the propriety of taking judicial notice. *Calder v. Job (In re Calder)*, 907 F. 2d 953, 955 n.2. (10th Cir. 1990).

D. Scope—Adjudicative Facts.

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

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

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

E. Examples of Requests for Judicial Notice.

1. Court Records. Requests for judicial notice of court records typically fall into one of three categories:

a) Establishing the genuineness of the documents without going through the steps normally needed to authenticate documents. This is the equivalent of a certificate regarding custody by a judge of a court of record of the district in which the record is kept. *In re Bestway Products, Inc.*, 151 B.R. 530, 540 (Bankr. E.D. Cal. 1993). The fact the document is genuine does not mean that the court can automatically accept as true the facts contained in such documents. Statements in the documents must be otherwise admissible under the Federal Rules of Evidence, for example, as an evidential admission offered against a party. *Id.*; FRE 801(d)(2).

b) Taking as true the recording of the judicial acts contained in the record. Commentators suggest that the better practice is to admit the record under the official records exception to the hearsay rule so that evidence of any inaccuracy in the record may be established. *In re Bestway Products, Inc.*, 151 B.R. at 540 n.33 (citing 21 WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5106 (1992 Supp.)).

c) The third, "and widely criticized," use of judicial notice of court records is to take as conclusively established the facts that are set forth in the records. *In re Bestway Products, Inc.*, 151 B.R. at 540 n.33. A previously filed court document will generally not be competent evidence of the truth of the matters asserted therein solely because the court has taken judicial notice of its existence. *Nantucket Investors II v. California Federal Bank (In re Indian Palms Associates)*, 61 F.3d 197, 204 (3d Cir. 1995).

d) That is, there is a crucial distinction between taking judicial notice of the fact that an entity has filed a document in the case, or in a related case, on a given date, i.e., the existence thereof, and the taking of judicial notice of the truth or falsity of contents of any such document for the purposes of making a finding of fact. *In re Earl*, 140 B.R. 728, 731 fn. 2 (Bankr. N.D. Ind. 1992). Accordingly, while a bankruptcy court may take judicial notice of its own records, it may not "infer the truth of facts contained in documents, unfettered by rules of evidence or logic, simply because such documents were filed with the court." *Staten Island Savings Bank v. Scarpinito (In re Scarpinito)*, 196 B.R. 257, 267 (Bankr. E.D. N.Y. 1996) (citing BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 201.5 (1995)).

2. Plan Votes. To establish whether the plan has received the votes needed to confirm the court may take judicial notice of the proofs of claim and the presence in the schedules of amounts due to other claimants who have not filed proofs of claim. *In re American Solar King Corp.*, 90 B.R. 808, 829 n.41 (Bankr. W.D. Tex. 1988) (citing BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL, § 201. 5 (2007) ("Whether the information contained in the schedules is true is immaterial to this inquiry.").

3. Omissions from Schedules. The court may take judicial notice of the debtor's statement of affairs and schedules as not listing certain assets alleged not to be disclosed in an action under Bankruptcy Code § 727(a)(4). *Calder v. Job (In re Calder)*, 907 F.2d 953, 955 n.2 (10th Cir. 1990) ("In this case, the bankruptcy court, consistent with Rule 201(b)(2), simply took judicial notice of the contents of ...[the debtor's] Statement of Affairs and Schedule B-1 and not the truthfulness of the assertions therein.").

4. Absence of Pending Adversary. The court may take judicial notice of the failure of a Chapter 7 trustee to have filed an action to set aside a fraudulent conveyance. *Pruit v. Gramatan Investors Corp. (In re Pruitt)*, 72 B.R. 436, 440 (Bankr. E.D.N.Y. 1987).

5. Docket Sheets. The court may take judicial notice of the docket sheets in an adversary proceeding and the debtor's main case. *Muzquiz v. Weissfisch*, 122 B.R. 56, 58 (Bankr. S.D. Tex. 1990).

6. Debtor's Insolvency. Several opinions have held that a court may take judicial notice of the debtor's schedules in order to determine if the debtor was insolvent on the date of an alleged preferential transfer. *See, e.g.*, *In re Trans Air, Inc.*, 103 B.R. 322, 325 (Bankr. S.D. Fla. 1988); *Matter of Claxton*, 32 B.R. 219, 222 (Bankr. E.D. Va. 1983); *In re Blue Point Carpet, Inc.*, 102 B.R. 311, 320 (Bankr. E.D.N.Y. 1989). The better view, however, is that the schedules may not be used for that purpose since the schedules are reflective of the debtor's financial condition on the date of the petition and not on the date of the transfers. *In re Strickland*, 230 B.R. 276, 282 (Bankr. E.D. Va. 1999) (citing BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 201.8 (1988).

## VI. Judicial Admissions.

A. Defined.

> A formal waiver of proof that relieves an opposing party from having to prove the admitted fact and bars the party who made the admission from disputing it.
>
> BLACK'S LAW DICTIONARY 51 (8th ed. 2004) (also termed "solemn admission"; "admission injudicio"; "true admission").

B. Evidentiary Admissions Distinguished.

1. FRE 801(d)(2).

> (d) Statements which are not hearsay. A statement is not hearsay if—
>
> (2) Admission by party-opponent—The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

2. Even if a prior statement by a party is determined not to be a judicial admission and, therefore, not conclusive, it may still operate as an "adverse evidentiary admission..." properly before the court in its resolution of the factual issue. *White v. Arco/Polymers, Inc.*, 728 F.2d 1391, 1396 (5th Cir. 1983).

3. As evidentiary admissions, however, they may be controverted or explained by the party against whom they are being offered. BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 801.22 (2007).

C. Effect.

1. A judicial admission is an admission made by a party in pleadings, stipulations, and the like and do not have to be proven in the litigation in which they are made. *Gianne v. United States Steel Corp.*, 238 F.2d 544, 547 (3rd Cir. 1956).

2. It is conclusively binding upon the party making the admission for purposes of the case in which made, provided that the admission is unequivocal. *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir. 1972).

D. Scope.

1. Judicial admissions are restricted in scope to matters of fact which otherwise would require evidentiary proof. *Id*.

2. Conclusions of law—e.g., that a party was negligent or caused an injury, do not lie within the scope of the doctrine of judicial admission. *Gianne*, 238 F.2d at 547. For example, the admission that an agreement is a "true lease" is a conclusion of law and cannot constitute a judicial admission. *In re Pittsburgh Sports Associates Holding Co.*, 239 B.R. 75, 81 (Bankr. W.D. Penn. 1999).

E. Examples of Assertions That Are Judicial Admissions.

1. Factual assertions in pleadings. *Myers v. Manchester Insurance & Indemnity Co.*, 572 F.2d 134 (5th Cir. 1978). Contents of court orders. *In re Camp*, 170 B.R. 610, 612 (Bankr. N.D. Ohio 1994).

2. Statements in proofs of claim and in an objection to a proof of claim in a contested matter objecting to the claim are judicial admissions. *Jenkins v. Tomlinson (In re Basin Resources Corporation)*, 182 B.R. 489, 493 (N.D. Tex. 1995).

3. Matters set out in the debtor's schedules may constitute judicial admissions. If a debtor fails to qualify the schedule's description to include the term "disputed," the debtor may waive the right to contest a debt's existence. *Morgan v. Musgrove (In re Musgrove)*, 187 B.R. 808, 812 (N.D. Ga. 1995). On the other hand, because schedules are filed in the "main" case as opposed to a particular adversary proceeding or contested matter, they may simply be considered evidentiary admissions rather than judicial admissions. *In re Cobb*, 56 B.R. 440, 442 n. 3 (Bankr. N.D. Ill. 1985). As evidential admissions, they would not be conclusive. *Id*.; *contra Larson v. Groos Banks*, 204 B.R. 500, 502 (W.D. Tex. 1996) (court granted summary judgment against the former Chapter 7 debtor in an action against a bank for violating the Fair Credit Reporting Act on the basis that the debtor's listing as "None" in response to the schedule category under which the debtor was required to list "Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims..." constituted a judicial admission that he had suffered no damages in the case). Where a debtor identifies property in a schedule and assigns a value, that value may be admissible as an admission by the debtor (and debtor's insiders) in a later dispute over valuation. *In re Ingrim Family LLC*, 592 B.R. 368, 373 (Bankr. W.D. Wash. 2018), *aff'd sub nom*. *In re Ingrim Family,*

*LLC*, No. 3:15-BK-43036-MJH, 2019 WL 2524246 (B.A.P. 9th Cir. June 18, 2019) (schedules are judicial admissions admissible against the debtor).

4. Statements of counsel, although not evidence, may be judicial admissions. BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 801.20 (2007); *In re Stephenson*, 205 B.R. 52 (Bankr. E.D. Pa. 1997).

5. Concessions made by counsel in open court are binding as judicial admissions. I*n re Menell*, 160 B.R. 524, 525 n. 3 (Bankr. D.N.J. 1993); BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 801.22 (2007).

6. Contents of requests for admissions where no response is filed by the opposing party. *In re Tabar*, 220 B.R. 701, 703 (Bankr. M.D. Fla. 1998).

F. Examples of Assertions That Are Not Judicial Admissions.

1. Admissions made in another proceeding are not conclusive and binding judicial admissions. *Universal American Barge Corp. v. J. Chen., Inc.*, 946 F.2d 1131, 1142 (5th Cir. 1991). This includes admissions made in other motions or adversary proceedings, which were conducted in the same bankruptcy case. While these may be admissible as an admission of a party-opponent, they are not judicial admissions with conclusive effect because they were not made in the same proceeding. *Jenkins v. Tomlinson*, 182 B.R. at 491; *see also In re Cobb*, 56 B.R. at 442 n. 3 (schedules are filed in the "main" case as opposed to a particular adversary proceeding or contested matter and, accordingly, are evidential admissions as opposed to judicial admissions).

2. Admissions made in superseded pleadings are as a general rule considered to lose their binding force, and to have value only as evidentiary admissions. *Borel v. United States Casualty Co.*, 233 F.2d 385 (5th Cir. 1956). However, where the amendment only adds allegations, deleting nothing stated in prior pleadings, admissions made in the prior pleadings continue to have conclusive effect. *Dussour v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 601 (5th Cir. 1981).

3. Statements of value in schedules relate to value and are matters of opinion as opposed to fact. Thus, they do not constitute judicial admissions but only evidential admissions. *In re Cobb*, 56 B.R. at 442 n. 3 (citing *Fairbanks v. Yellow Cab. Co.*, 346 F.2d 256 (7th Cir. 1965).

## VII. Expert Opinion Testimony.

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

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

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

2. *Daubert* rejected the notion that the Federal Rules of Evidence placed "no limits on the admissibility of purportedly scientific evidence." *Id*. at 589. It established the trial judge as the "gatekeeper" in determining whether the expert is proposing to testify about scientific knowledge that will assist the trier of fact to understand the issue. As a gatekeeper, the trial court's inquiry must be "solely on principles and methodology, not on the conclusions they generate." *Id.* at 595. The court should not, however, deny admission of expert testimony "simply because it finds the testimony unpersuasive or because the opponent has offered cogent criticisms of that testimony." *In re EPD Inv. Co., LLC*, 587 B.R. 711, 718-19 (C.D. Cal.), *reconsideration denied*, 595 B.R. 910 (C.D. Cal. 2018).

B. Rules.

1. FRE 701—Opinion Testimony by Lay Witnesses.

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

2. FRE 702—Testimony by Experts.

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

3. FRE 705—Disclosure of Facts or Data Underlying Expert Opinion.

> The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

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

> . . . a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under FRE 702, 703, or 705.

> . . . this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness.

C. Application of FRE 702.

1. If expert opinion testimony is to be introduced, then the reliability requirements of FRE 702 apply. These requirements are found in FRE 702 which includes the requirements that:

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

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

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

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

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

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

c) Finally, the witness must have applied the principles and methods reliably to the facts of the case. This is also a qualitative analysis. That is, the principles must not only be reliable, but also they

d) must have been reliably applied to the particular facts relied upon by the expert. For example, just because the witness has reviewed numerous other sales in determining the value does not mean the principle has been reliably applied. For example, are the other sales really comparable? What were the dates of the other sales? Is the condition of the subject automobile similar to the comparables? What market changes have occurred post-petition that make recent comparables invalid as predictors of value as of the date of the petition?

D. Qualification of the Expert Witness Is Not the Focus of *Daubert.*

1. While only qualified witnesses may give expert opinion testimony under FRE 702, the focus of *Daubert* is on the judge's role as a gatekeeper for the admission of the opinion rather than on the judge's role in passing on the qualification of the expert. As aptly put by the Seventh Circuit in *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir. 1996), "[u]nder the regime of *Daubert* . . . a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist." *Id.* at 318. Put another way, "[j]udges should not be buffaloed by unreasoned expert opinions," even from the most qualified of experts. *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1340 (7th Cir. 1989) (citing Paul Meier, *Damned Liars and Expert Witnesses*, 81 J. Am. Statistical Ass'n 269 (1986)).

2. In fact, the qualification of the experts in *Daubert* and *Kumho Tire Company v. Carmichael*, was not at issue. *Kumho*, 526. U.S. at 583. In *Daubert*, the Supreme Court noted that all the experts "possessed impressive credentials." *Daubert*, 509 U.S. at 583. In *Kumho*, the Supreme Court noted that the district court, which excluded the expert's testimony, "did not doubt [the expert's] qualifications . . . ." *Kumho*, 526 U.S. at 153.

3. Expert Testimony Regarding Solvency. The court in *In re Valley-Vulcan Mold Co.*, held that expert on solvency qualified under *Daubert* and *Kumho* to testify in an action on fraudulent transfer. 237 B.R. 322, 335-336 (B.A.P. 6th Cir. 1999).

4. Expert Testimony on Rehabilitation Costs. The court in *In re Syed*, held that the experts on the rehabilitation costs on debtor's property met the *Daubert*/*Kumho* test even though the court did not hold a full *Daubert* hearing. 238 B.R. 133, 141-143 (Bankr. N.D. Ill. 1999).

E. Lay Opinion Testimony.

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

2. Traditional Lay Opinions. The FRE 701 amendment was not intended to change the law concerning the traditional types of testimony properly offered as lay opinion. Most often this would be an owner testifying as to value. *See Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995).

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

4. In bankruptcy court, oftentimes, it is the owner that gives the opinion of value. It is generally accepted that an owner is competent to give opinion testimony about the value of the owner's property. *In re Brown*, 244 B.R. 603, 611 (Bankr. W.D. Va. 2000); BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 701.2 (2007).

5. FRE 701 provides:

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

6. The advisory committee note to FRE 702 references that the types of witnesses who may provide expert testimony under FRE 702 are not limited to experts in the "strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values." *Brown*, 244 B.R. at 611; BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 701.2 (2007).

7. Alternatively, an owner may testify as to value as a lay witness under FRE 701. If testifying under FRE 701, the owner "may merely give his opinion based on his personal familiarity of the property, often based to a great extent on what he paid for the property." BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL § 701.2 (2007). Such testimony will be given little, if any, weight. *Id*. On the other hand, if the owner truly has "knowledge, skill, experience, training or education" that would qualify the owner as an expert, then it is appropriate to require that the owner's testimony otherwise comply with FRE 702 and be based on reliable principles applied to sufficient data. As noted in the *Brown* case regarding such testimony, "Even though [the debtor's] testimony as to valuation is admissible, it should be subject to the same type of critical analysis as would the testimony of an independent 'expert.'" *Brown*, 244 B.R. at 612.

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

## VIII. Charts

A. FRE 1006 simply explains:

> The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

B. The material summarized in charts must be admissible, made available to the other side, and the preparer of the chart available for cross-examination. *United States v. Spalding*, 894 F.3d 173, 185 (5th Cir. 2018).

C. Conversely, inadmissible material, including opinions, should not be allowed on charts offered in court. *United States v. Spalding*, 894 F.3d at 185.

## IX. Attorney-Client Privilege.

A. Defined.

> "The client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney."
>
> BLACK'S LAW DICTIONARY 1235 (8th ed. 2004) ("privilege—*attorney-client privilege*")
>
> Wigmore's Essential Elements:
>
> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the privilege be waived.
>
> *Id*. (citing 8 JOHN HENRY WIGMORE, EVIDENCE § 2292 (1961)).

B. Purpose of the Privilege

1. "The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

2. "The attorney client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

C. Characteristics.

1. Ownership. "[T]he privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets." *Hunt v. Blackburn*, 128 U.S. at 470.

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

3. Termination. The privilege survives the death of the client. *Swindler & Berlin v. United States*, 524 U.S. 399 (1998) (there is generally an exception in the area of testamentary disclosures based on a theory of implied waiver).

4. Burden. "The party invoking the attorney client privilege has the burden of proving that an attorney client relationship existed and that the particular communications were confidential." *Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003).

D. What does the Privilege Cover?

1. Confidential Communications by Client.

"The attorney-client privilege applies to 'confidential communications between an attorney and his client . . . .'" *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1262 (11th Cir. 2008) (internal citation omitted).

a) "The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney: [T]he protection of the privilege extent only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981) (internal citation omitted).

2. Relating to Legal Advice.

a) "relating to a legal matter for which the client has sought professional advice." *Miccosukee Tribe of Indians*, 516 F.3d at 1262.

b) "The attorney-client privilege attaches only to communications made in confidence to an attorney by that attorney's client for the purposes of securing legal advice or assistance. . . . Courts generally have held that the preparation of tax returns does not constitute legal advice within the scope of that privilege. . . . Admittedly, the preparation of a tax return requires some knowledge of the law . . . [but a] taxpayer should not be able to invoke a privilege simply because he hires an attorney to prepare his tax returns." *In re Grand Jury Investigation*, 842 F.2d 1223 (11th Cir. 1987).

c) "The attorney-client privilege is limited to confidential communications between the lawyer and the client made for the purpose of securing legal advice, not for the purpose of committing a crime or a tort." *In re Grand Jury Proceedings*, 689 F.2d 1352, 1352 (11th Cir. 1982) (commonly referred to as the "crime-fraud exception").

## X. "Work Product" Rule.

A. "Work Product" Defined.

> Tangible material or its intangible equivalent—in unwritten or oral form—that was either prepared by or for a lawyer or prepared for litigation, either planned or in progress. . . . The term is also used to describe the products of a party's investigation or communications concerning the subject matter of a lawsuit if made (1) to assist in the prosecution or defense of a pending suit, or (2) in reasonable anticipation of litigation.
>
> BLACK'S LAW DICTIONARY 1638 (8th ed. 2004).

B. FED. R. CIV. PROC. 26(b)(3).

> (3) Trial Preparation: Materials. [A] party may obtain discovery of documents and tangible . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

C. Historical Basis—*Hickman v. Taylor*

1. When the Federal Rules of Civil Procedure originally took effect in 1938, Rule 26 did not contain the Work Product Exception now found in FED. R. CIV. PROC. 26(b)(3). Whether the work product of an attorney was discoverable under the new rules engendered a great deal of divergence among the lower federal courts dealing with the issue. In light of this, the Supreme Court granted certiorari to deal with the issue in the case of *Hickman v. Taylor*, 329 U.S. 495 (U.S. 1947).

2. The "basic question" before the court at stake was whether any of new discovery devices could be used to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation. *Id*. at 505.

3. The type of information dealt with in *Hickman v. Taylor* were the memoranda, statements and mental impressions of counsel that fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. That is, the "protective cloak" of the attorney client privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories. *Id*. at 508.

4. Notwithstanding the non-privileged and relevant nature of the information sought, the Supreme Court was concerned about "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." *Id*. at 509-510.

5. This work is reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals as the 'Work product of the lawyer.'" *Id*. at 511(citing 153 F.2d 212, 223 (3d Cir. 1945)).

6. Accordingly, *Hickman v. Taylor* established that although absent from the literal terms of the Federal Rules as initially implemented, the general policy against invading the privacy of an attorney's course of preparation was "so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted." *Id*. at 512.

D. Practical Application—Protecting Your Work Product

1. Information compiled by an agent of the attorney in preparation for trial as well as the material prepared by the attorney falls within the Work Product Rule. *United States v. Nobles*, 422 U.S. 225 (1975); *In re Southwest Florida Telecommunications*, 195 B.R. 504 (Bankr. M.D. Fla. 1996) (Paskay, C.B.J.) (documents prepared by investigator in anticipation of bankruptcy court litigation are protected).

2. The Work Product Rule applies only to documents created primarily to prepare for and assist in the defense or prosecution of identifiable, specific lawsuit which is either pending or threatened. *In re Hillsborough Holdings Corp.*, 132 B.R. 479, 481 (Bankr. M.D. Fla. 1991) ("Hillsborough Holdings ") (citing *In re Hillsborough Holdings Corp.*, 118 B.R. at 870; *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296-97 (Temp.Emer.Ct.App.1985); *Southern Film Extruders, Inc. v. Coca-Cola*, 117 F.R.D. 559 (M.D.N.C. 1987)).

3. Accordingly, in Hillsborough Holdings, though some of the requested documents were listed with a description that indicated preparation of litigation, because it was apparent from the dates listed on the documents that there was no litigation existing or impending at the time of their preparation, they were not considered within the Work Product Rule. *Id*.

4. The Attorney-Client Privilege or Work Product Rule can also attach to reports of third parties made at the request of the attorney or the client where the purpose of the report was to put into usable form as part of legal advice by attorney to the client. *United States v. Kovel*, 296 F.2d 918 (2nd Cir.1961). Where the information is turned over to the third party for reasons unrelated to seeking or rendering legal advice, however, the Attorney-Client Privilege is waived. *Eglin Federal Credit Union v. Cantor*, 91 F.R.D. 414, 418 (N.D. Ga.1981).

## XI. Settlement/Mediation Privilege

A. Evidence may be inadmissible due to the fact that it reflects settlement or mediation communications. FRE 408(a).

B. State law may also make mediation proceedings inadmissible. *Doe v. Archdiocese of Milwaukee*, 772 F.3d 437 (7th Cir. 2014) (Wisconsin mediation privilege).

C. Not all settlement discussions are inadmissible. FRE 408(b).

1. And some actions occurring in a mediation or settlement may be admissible notwithstanding the general prohibition against admission of mediation proceedings. For example, in a California mediation, one side obtained the arrest of the other at the court-ordered mediation, leading the bankruptcy court to deny that party all relief in the case under the doctrine of unclean hands due to sabotage of the mediation. *In re Halvorson*, 581 B.R. 610 (Bankr. C.D. Cal. 2018), *vacated for lack of jurisdiction*, No. 8:15-AP-01454 MW, 2018 WL 6728484 (C.D. Cal. Dec. 21, 2018).

2. Nor can a person exclude evidence of conversations with codefendants in a money laundering trial by claiming the discussions were settlement negotiations. *United States v. Zinnel*, 725 F. App'x 453, 459 (9th Cir. 2018), *cert. denied sub nom*. *Eidson v. United States*, 139 S. Ct. 1205, 203 L. Ed. 2d 230 (2019), and *cert. denied*, 139 S. Ct. 2650 (2019).

3. Settlement negotiations may bear on the reasonableness of a party's claim for reimbursement of legal expenses. *In re Carson*, 510 B.R. 627, 637 (Bankr. E.D. Cal. 2014).

## XII. Inferences and Presumptions

A. Evidence may also be offered via inferences and presumptions.

B. Inferences may include adverse inferences drawn from a witness' invocation of the Fifth Amendment privilege against self-incrimination.

1. In civil cases, however, the Supreme Court has said that "the Fifth Amendment does not forbid adverse inferences against parties ... when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976). "Th[is] rule allowing invocation of the privilege [by civil litigants], though at the risk of suffering an adverse inference or even a default, accommodates the right not to be a witness against oneself while still permitting civil litigation to proceed." *Mitchell v. United States*, 526 U.S. 314, 328, 119 S.Ct. 1307, 1315, 143 L.Ed.2d 424 (1999).

2. *Coquina Investments v. TD Bank, N.A.*, 760 F.3d 1300, 1310 (11th Cir. 2014). The adverse inference may be drawn against a party or a nonparty witness. *Coquina Investments v. TD Bank, N.A.*, 760 F.3d at 1310.

C. Presumptions include those in the Bankruptcy Code, such as insolvency in the preference claim within 90 days of the petition, 11 U.S.C. § 547(f). or that certain purchases of luxury goods or services are nondischargeable. 11 U.S.C. § 523(a)(2)(C).

## XIII. Trial Advocacy Tips.

A. Witness Preparation.

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

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

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

C. Try Your Case.