AMERICAN BANKRUPTCY INSTITUTE

2022 Winter Leadership Conference

Evidentiary Issues in Bankruptcy: Making Your Case

Hon. Christopher M. Lopez
U.S. Bankruptcy Court (S.D. Tex.); Houston

Jennifer B. Lyday
Waldrep Wall Babcock & Bailey PLLC; Winston-Salem, N.C.

Adine S. Momoh
Stinson LLP; Minneapolis

Jason N. Zakia
White & Case LLP; Chicago

CONCURRENT SESSION

2022

Presenters

Hon. Christopher Lopez (Moderator)
U.S. Bankruptcy Court Judge, Southern District of Texas

Jennifer Lyday, Waldrep Wall

Adine S. Momoh, Stinson LLP

Jason Zakia, White & Case

Presentation Agenda

- Use of Depositions at Trial
- Declarations
- Authenticating ESI for Trial
- Judicial Notice (in materials)

Use of Depositions at Trial

Use of Depositions at Trial

Overview

Under FED. R. CIV. P. 32 (made applicable by FED. R. BANKR. P. 7032), a party generally may use a deposition against another party to the same extent the testimony would otherwise be admitted as live testimony, provided:

(1) the opposing party was present or represented at the deposition and had reasonable notice of the deposition, and

Use of Depositions at Trial

Overview (*cont'd*)

(2) one of the following apply:

  (a) the deposition is used for impeachment,

  (b) the deposition is used in lieu of live testimony of a witness that is unavailable, or

  (c) the deposition is offered against the party and is the deposition of the party or the party's officer, director, managing agent, or designee under FED. R. CIV. P. 30(b)(6) or FED. R. CIV. P. 31(a)(4).

Use of Depositions at Trial: Impeachment

Applicable Rules

- FED. R. BANKR. P. 7032
- FED. R. CIV. 32(a)(2)
- FED. R. EVID. 801(d)(1)(A): Provides that the deposition of a trial witness, if it is inconsistent with the witness's trial testimony, is not hearsay.
- FED. R. EVID. 613

Use of Depositions at Trial: Impeachment

- At trial, any deposition may be used by any party against any party present during the deposition or who had reasonable notice of the deposition for the purpose of contradicting or impeaching the deponent (witness at trial). FED. R. CIV. P. 32(a)(2); 8 NORTON BANKR. L. & PRAC. 3d § 163:21.

Use of Depositions at Trial: Impeachment

Mechanics

- When using deposition testimony to contradict or impeach a witness, the proper practice is:
  - Refer back to the testimony given earlier.
  - Establish the date the prior testimony was given, that it was under oath, the witness was accompanied by a lawyer, the witness intended to tell the truth, and related foundational questions.

Use of Depositions at Trial: Impeachment

Mechanics (*cont'd*)

  - Read aloud the deposition question and the answer that was given.
  - You can also request to present or publish a visual of the testimony so the judge (or the judge and jury, if applicable) can read it and hear it (**but consider first whether the document has been admitted as an exhibit**).
- Give consideration to the different mechanics when the trial is a bench trial as opposed to a jury trial, as well as to the judge's preferences.

Use of Depositions at Trial: Deposition Designation Testimony

Where Witness Is "Unavailable"

Applicable Rules

- Bankruptcy Rule 7032
- FED. R. CIV. P. 30(b), (c), (e)
- FED. R. CIV. P. 32(a)(4)
- FED. R. CIV. P. 26(a)(3)
- FED. R. EVID. 106
- FED. R. EVID. 804(a)

Use of Depositions at Trial: Deposition Designation Testimony

Where Witness Is "Unavailable"

General

- The deposition of any witness, whether or not a party, may be used at trial if the witness is unavailable for one of the five reasons listed in FED. R. CIV. P. 32(a)(4):
  - Death

Use of Depositions at Trial: Deposition Designation Testimony

Where Witness Is "Unavailable"

General (*cont'd*)

- Absence of the witness:
  - If the witness:
    - is at a greater distance than 100 miles from the place of trial, OR
    - is out of the United States,
  - Unless it appears that the absence of the witness was procured by the party offering the deposition.

Use of Depositions at Trial: Deposition Designation Testimony

Where Witness Is "Unavailable"

General (*cont'd*)

- Inability to Testify:
  - It is shown that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment.
  - Such a showing should be supported by proof in the form of an affidavit or sworn testimony.

Use of Depositions at Trial: Deposition Designation Testimony

Where Witness Is "Unavailable"

General (*cont'd*)

- Inability to procure the attendance of the witness by subpoena:
  - *E.g.*, the witness is a physician or a member of the legislature and is, by statute, exempt from subpoena to trial.
- Exceptional circumstances:
  - If exceptional circumstances exist as to make it desirable, in the interest of justice, to allow the deposition to be used.

Source: FED. R. CIV. P. 32(a)(4); Bankr. Proc. Manual § 7032:5, Deposition of unavailable witness (2022 ed.)

Use of Depositions at Trial: Deposition Designation Testimony

Where Witness Is "Unavailable"

What if the witness could otherwise testify remotely? Is the witness still **"unavailable"**?

Use of Depositions at Trial: Deposition Designation Testimony

Where Witness Is "Unavailable"

Mechanics

- Pretrial disclosures
- Video depositions and submission of transcript
- Deposition transcript reading or video play during trial

Use of Depositions at Trial: Common Objections

- Improper impeachment
- Waived objections due to not being raised during the deposition
- Exception for objections that can be raised for the first time at trial
- FED. R. EVID. 106: "Rule of Completeness"

Use of Depositions at Trial: Practice Tips

- Review any pretrial notices and pretrial agenda, especially with respect to deposition designations, counter-designations, handling of objections, and use of video deposition designations as opposed to written.
- Review judge practice pointers or standing orders.
- Contact court clerk staff, where acceptable, to discuss courtroom technology.
- Consider exhibits, errata sheets, and treatment of objections made during deposition (whether to exhibits or questions asked).
- Consider that opportunities for redirect may be limited or eliminated.

Declarations

Are Declarations Hearsay?

- Hearsay is defined as "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. 801.

Are Declarations Hearsay?

- Declarations are out of court statements that are offered for truth of matter asserted.
- Declarations are prepared specifically for litigation and were not subject to cross examination.
- They are not business records, are not prior sworn statements and not even a type of document that would have high indicia of reliability. FED. R. EVID. 803(6)(b), 804(b)(1).

Declarations in Practice: Case Law

- Declarations are often used in place of direct testimony.
- Despite appearing to be hearsay, it is standard practice in many courts to use declarations in place of live testimony.

Declarations in Practice: Case Law

- Courts have held that allowing the use of declarations is within the discretion of the trial judge.
    - *In re Adair*, 965 F.2d 777, 779 (9th Cir. 1992) (Allowing for written testimony to be used in lieu of live testimony as it is "consistent with FED. R. EVID. 611 (a)"); *Ball v. Interoceanica Corp.*, 71 F.3d 73, 77 (2d Cir. 1995) (written submissions were allowed in lieu of live testimony as "such a procedure falls within the district court's ample authority to manage proceedings before it").

Declarations in Practice: Case Law

- But the declarant must be available for cross-examination or redirect in order to for a Judge to allow this practice. *See In re Geller*, 170 B.R. 183, (S.D. Fl. 1994) ("The Court finds that calling a witness to the stand, swearing the witness, having the witness swear or affirm the written declaration is his or her testimony and then turning over the witness for cross examination with right to redirect is the taking of the testimony in open court"); *In re Adair*, 965 F.2d 777, 779 (9th Cir. 1992) ("The bankruptcy court's procedure permits oral cross-examination and redirect examination in open court and thereby preserves an opportunity for the judge to evaluate the declarant's demeanor and credibility").

Declarations in Practice: Judges' Rules

- Different courts take different approaches
- Some Judges mandate use of declarations
  - Judge Beckerman, Southern District of New York
  - Judge Bentley, Southern District of New York
  - Judge Jones, Southern District of New York
  - Judge Mastando, Southern District of New York

Declarations in Practice: Judges' Rules

- Some Judges prohibit use of Declarations
  - Judge Garrity, Southern District of New York
- Some courts have rules that provide for use of declarations on case by case basis
  - Judge Glenn, Southern District of New York
  - Judge Lane, Southern District of New York
  - Judge Morris, Southern District of New York

Declarations in Practice: Judges' Rules

- Some Judges let the parties decide
  - Judge Owens, District of Delaware
  - Judge Shannon, District of Delaware
  - Judge Stickles, District of Delaware

Declarations in Practice: Judges' Rules

- Even in courts that do not have written rules on the subject, be prepared to address the matter.
  - Most bankruptcy courts will allow use of declarations if parties agree.
  - Even when Judges have no written rules, some may have strong views. For example, the Southern District of Texas does not have written rules on this subject.

Declarations in Practice: Pros

- Streamline the process and save time. Increases efficiency.
- You can ensure in advance that you make your record. Decreases uncertainty.
- Allows the court to see evidence in advance of hearing.
- Is an excellent way to establish factual basis for uncontested or uncontroversial points.

Declarations in Practice: Cons

- Written document can be less compelling than live testimony, less opportunity for witness to engage with court.
- No opportunity to warm up your witness, she will start her live testimony facing hostile questions.
- Allows your adversary to highlight the issues that they want to focus on.
- Redirect is limited to issues raised on cross.

Declarations in Practice: Considerations

- Is the issue contested?
  - Declarations for uncontested issued will almost always be better.
- Is the witness ready?
  - Will your witness hold up to immediate cross examination or is there a need to make them more comfortable by starting with friendly questions?

Declarations in Practice: Considerations

- How important is the story?
  - Is the factual issue one that will benefit from witness connecting with court and telling story.
- Works both ways
  - Presumably both sides will present testimony in the same way.
  - Benefits and costs will apply to both sides. Does balance weigh in your favor?

Authenticating ESI for Trial

Use of ESI at Trial

- Overview
  - Pursuant to Federal Rule of Evidence 901, electronically stored information ("ESI") must be authenticated before it can be admitted into evidence.
  - Specifically, FRE 901(a) states that "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."
  - But how do you authenticate a text message, a copy of an Instagram post, or a webpage?
  - Thankfully, the Federal Rules of Evidence set forth at least four methods to authenticate ESI even before you arrive at the courtroom.

Source: Haideyn DiLorenzo and Kathryn Honecker, Four Ways to Authenticate Copies of Webpages and Other ESI Before Trial, American Bar Association Practice Points (https://www.americanbar.org/groups/litigation/committees/consumer/practice/2019/four-ways-to-authenticate-copies-of-webpages-and-other-esi-before-trial/) (July 31, 2019)

Authentication Method #1: "Self-Authenticate" by Certifying

- The Federal Rules Advisory Committee amended FRE 902(13)-(14) to allow self-authentication for (a) "record[s] generated by an electronic process or system that produces an accurate result" and (b) forensic copies of ESI such as webpages, social media posts and profiles, emails, and text messages.
- To "self-authenticate" under FRE 902(13) or (14), the proponent must do three things:
  - acquire a forensic or technical expert's certification that the copy to be introduced into evidence is the same as the original;
  - give other parties reasonable notice of their intent to offer the evidence; and
  - permit other parties to inspect the evidence and certification.

Authentication Method #2: Authenticate with Admissions

- Before incurring the expense of hiring a forensic or technical expert to certify ESI, a proponent should first try to authenticate ESI by asking the opposing party to admit authentication through one of the following methods:
  - requests for admissions pursuant to FRCP 36(a)(2);
  - deposition testimony; or
  - stipulations.
- No trial testimony or expert certification is necessary to authenticate ESI if an opposing party admits that the offered ESI copy is a true and correct copy of the original ESI.

Authentication Method #3: Request the Document from an Opposing Party

- *See Am. Fed'n of Musicians of United States & Canada v. Paramount Pictures Corp.*, 903 F.3d 968, 976 (9th Cir. 2018) ("Paramount contends that AFM's failure to elicit deposition testimony about the email is fatal to its authenticity. However, Paramount itself produced the email, which includes Toth's Paramount email signature and Paramount email address. Given the 'contents, substance ... [and] other distinctive characteristics of the item,' Fed. R. Evid. 901(b)(4), plus the fact that it was produced by Paramount in discovery, a reasonable juror could find that the email is what AFM claims it is.").
- Using the logic of the above-cited case, a proponent seeking to admit ESI should also request that the opposing party produce the document in question in discovery.

Authentication Method #4: Authenticate ESI as an Ancient Document

- The final authentication method works if you are offering ESI that originates from an older document.
  - *See* FRE 901(b)(8).deposition testimony; or
    - A document or data compilation is self-authenticating if 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.

Judicial Notice

Judicial Notice

- "Judicial notice is premised on the concept that certain facts . . . exist which a court may accept as true . . . without requiring additional proof . . . It is an adjudicative device that substitutes the acceptance of universal truth for the conventional method of introducing evidence." *Gen. Elec. Cap. Corp. v. Lease Resol. Corp*., 128 F.3d 1074, 1081 (7th Cir. 1997) (citations omitted).

Judicial Notice

- When a matter is judicially noticed, it is accepted as true without formal evidentiary proof.
- What is the legal significance of taking judicial notice?
  - "[T]he effect of taking judicial notice under [FRE] 201 is to preclude a party from introducing contrary evidence and in effect, directing a verdict against him as to the fact noticed . . . ." *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (citation omitted).

Judicial Notice

- **FRE 201(a)**: The rule governs judicial notice of an adjudicative fact only, not a legislative fact.
- **FRE 201(b)**: The court may judicially notice a fact that is not subject to reasonable dispute because it:
  - (1) is generally known within the trial court's territorial jurisdiction; or
  - (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Judicial Notice

- **FRE 201(c)**: The court:
  - (1) may take judicial notice on its own; or
  - (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
- **FRE 201(d)**: The court may take judicial notice at any stage of the proceeding.
- **FRE 201(e)**: On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

Judicial Notice – 201(a)

- A court may only take judicial notice of "adjudicative facts." Fed. R. Evid. 201(a).
    - Adjudicative facts are the facts of the particular case.
    - Adjudicative facts are the "who did what, where, when, how and with what motive or intent."

Judicial Notice – 201(a)

- FED. R. EVID. 201 advisory committee's notes.
    - Judicial notice of legislative facts is not permitted (i.e. facts to assist a court interpret a statute or about policy issues relating to a statute). *See* FED. R. EVID. 201(a).
- *See also* Michael H. Graham, 2 HANDBOOK OF FEDERAL EVIDENCE § 201:1 (9th ed. 2021).

Judicial Notice: Two-Part Test

- FED. R. EVID. 201(b)
- "Not subject to reasonable dispute"
- Fact is either
  - Generally known within the territorial jurisdiction of the trial court; or
  - Capable of accurate and ready determination by reference to sources whose accuracy can't be reasonably questioned

Judicial Notice

- A court may take judicial notice of:
  - Local bankruptcy rules and case management procedures. *See Phillips v. LaBarge* (*In re Phillips*), 317 B.R. 518, 524 (B.A.P. 8th Cir. 2004).
  - Public stock price quotes. *See In re AlphaStar Ins. Group Ltd.*, 383 B.R. 231, 260 n.6 (Bankr. S.D.N.Y. 2008).
  - Geographic locations. *See United States v. Bello*, 194 F.3d 18, 23 (1st Cir. 1999).

Judicial Notice

- A court may take judicial notice of:
  - Prevailing published interest rates. *See Transorient Navigators Co., S.A. v. M/S SOUTHWIND*, 788 F.2d 288, 293 (5th Cir. 1986).
  - Government agency determinations likes tax liens and recorded deeds. *See Haye v. United States*, 461 F. Supp. 1168, 1174 (C.D. Cal. 1978).

BUT REMEMBER JUDICIAL NOTICE IS
<u>NOT</u> A SUBSTITUTE FOR EVIDENCE

Judicial Notice

- "Caution must . . . be taken to avoid admitting evidence, through the use of judicial notice, in contravention of the relevancy, foundation, and hearsay rules." *Am. Prairie Constr. Co. v. Hoich*, 560 F.3d 780, 797 (8th Cir. 2009) (citation omitted).

Judicial Notice

- Adjudicative facts must be admissible for the purpose offered:
  - *See, e.g., Johnson v. Spencer*, 950 F.3d 680, 705 (10th Cir. 2020) ("The overarching concern with taking notice of judicial records for 'the truth of the matter asserted' is the improper admission of *hearsay*.") (emphasis added) (citation omitted).
  - A court that "judicially notices facts that otherwise contravene the bedrock admissibility rules for evidence risks reversal even under the abuse of discretion standard." *RightCHOICE Managed Care, Inc. v. Hosp. Partners, Inc.*, No. 5:18-cv-06037-DGK, 2021 WL 4258753, at *1 (W.D. Mo. Sept. 17, 2021) (citation omitted).

Judicial Notice of Court Records

- A bankruptcy court may take judicial notice of the bankruptcy court's records, including a debtor's bankruptcy schedules. *See In re Ranieri*, 598 B.R. 450, 453 n.1 (Bankr. N.D. Ill. 2019).
- A "court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'" *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (citations omitted); *see also Taylor v. Charter Med. Corp.*, 162 F.3d 827, 829-832 (5th Cir. 1998) (same).

Judicial Notice of Court Records

- "While a bankruptcy judge may take judicial notice of a bankruptcy court's records, *see* FED. R. EVID. 201(c), . . . we may not infer the truth of the facts contained in documents, unfettered by rules of evidence of logic, simply because such documents were filed with the court. See Barry Russell, Bankruptcy Evidence Manual § 201.5 at 201 (West 1995)." *In re Harmony Holdings, LLC*, 393 B.R. 409, 413 (Bankr. D.S.C. 2008) (*quoting In re Scarpinito*, 196 B.R. 257, 267 (Bankr. E.D.N.Y 1996)).

SO WHAT IS THE LEGAL EFECT OF A COURT TAKING JUDICIAL NOTICE OF A CERTIFICATE OF SERVICE?

Judicial Notice: Practice Tips

- Only seek judicial notice of adjudicative facts that are not in reasonable dispute.
- Seek admission of disputable facts through evidence, including requests for admission and interrogatories.
- If seeking judicial notice of records from another court, obtain certified court copies.
- Even when a court takes judicial notice of the record in a case, remember: the court is not required to search the record to make a party's case for it.

Any Questions?

Thank You

Moderator
Hon. Christopher Lopez
U.S. Bankruptcy Court Judge
Southern District of Texas

Jennifer Lyday
Waldrep Wall
jlyday@waldrepwall.com

Adine S. Momoh
Stinson LLP
adine.momoh@stinson.com

Jason Zakia
White & Case
jzakia@whitecase.com

Faculty

Hon. Christopher M. Lopez is a U.S. Bankruptcy Judge for the Southern District of Texas in Houston, appointed on Aug. 14, 2019. He previously was in private practice in Houston from 2003-19. Judge Lopez received his B.A. in psychlogy in 1996 from the University of Houston, his M.A. in theology in 1999 from Yale University and his J.D. from the University of Texas School of Law in 2003.

Jennifer B. Lyday is a partner at Waldrep Wall Babcock & Bailey PLLC in Winston-Salem, N.C. Prior to joining the firm, she was an associate at Womble Carlyle Sandridge & Rice, LLP, where she focused on corporate chapter 11 representations and related state court debtor/creditor representations. Ms. Lyday has represented secured creditors, distressed businesses, unsecured creditors' committees, and trustees in business bankruptcy cases. She has also represented buyers and sellers of assets in bankruptcy, and has counseled clients in complex civil litigation. Her civil litigation experience includes officers and directors' liability, personal injury, premises liability, wrongful death and professional negligence defense. In addition, Ms. Lyday has significant *pro bono* experience working with Legal Aid of North Carolina, particularly in helping domestic violence victims obtain 50-B protection orders. She also regularly represents parents of children abducted and taken into the U.S. in Hague Convention cases, and she helped a victim of religious persecution in Burma obtain asylum in the U.S. Ms. Lyday received her B.A. in 2006 from Wake Forest University and her J.D. in 2009 from the William & Mary School of Law, where she was lead articles editor of the *William & Mary Law Journal* from 2008-09.

Adine S. Momoh is a partner with Stinson LLP in Minneapolis and is a dedicated trial attorney who defends complex business and commercial litigation matters for securities, banking, estates and trust clients, and resolves creditors' rights and bankruptcy cases in state and federal courts nationwide. She also handles complex business and regulatory disputes and investigations for businesses ranging from Fortune 500 companies to emerging entrepreneurs, as well as individuals in diverse industries, such as financial services and wealth management, health care, natural gas, medical gas, nonprofits and foundations, telecommunications and government contracts. Ms. Momoh co-chairs the firm's Estates and Trusts Litigation Practice Group. In her bankruptcy and creditors' rights practice, she regularly represents clients (including insurers, regional and national banks and financial institutions) in matters involving claim and administrative expense resolution and defense, fraudulent conveyance, preferential transfers and other avoidance actions, breaches of fiduciary duty and Ponzi schemes. She also has represented clients in § 363 sales, cash collateral, DIP financing and plan confirmation. In her estates and trusts litigation practice, she regularly represents fiduciaries (individuals and corporate entities), beneficiaries or devisees, and other interested persons in will or trust contests and probate or trust administration. Ms. Momoh was the first Black woman and youngest attorney to serve as president of the 8,000-member Hennepin County Bar Association. In 2016, the National Conference of Bankruptcy Judges selected her as a Blackshear Presidential Fellow, and in 2014, she received the Minnesota State Bar Association's first-ever Outstanding New Lawyer of the Year Award. In 2013, she was named a Fellow of the Leadership Council on Legal Diversity. Ms. Momoh was recognized with Stinson's 2013 *Pro Bono* Service to the Indigent Award. She also provides *pro bono* work through the firm's Legal Clinic, the Federal Bar Association's *Pro Se* Project, the Minnesota Appellate Public Defender and the Office of the Federal Defender for the

District of Minnesota. Before joining the firm as an associate, Ms. Momoh worked at Stinson as a summer associate. She also served as a federal judicial law clerk to Hon. Jeanne J. Graham (ret.) of the U.S. District Court for the District of Minnesota. Ms. Momoh received her B.A. *summa cum laude* in business administration-legal studies from the University of St. Thomas, her J.D. *magna cum laude* from the William Mitchell College of Law and her LL.M. in Taxation with distinction from Georgetown University Law Center.

Jason N. Zakia is a partner in the Chicago office of White & Case LLP in the firm's Commercial Litigation practice. An experienced trial lawyer, he has represented clients in state courts, federal courts, and before arbitration panels across the country. Mr. Zakia's practice focuses on high-stakes, complex business disputes for corporations and their shareholders, officers and directors. He was recognized in *The Best Lawyers in America* for Litigation – Bankruptcy in 2020 and and as a Florida Legal Elite (Commercial Litigation) in *Florida Trend* in 2017. Mr. Zakia is admitted to practice in Illinois and Florida, and before the U.S. District Courts for the Northern District of Illinois and the Northern and Southern Districts of Florida, and the U.S. Courts of Appeals for the First, Second, Third, Fourth and Eleventh Circuits. He received his B.A. from the State University of New York at Albany and his J.D. from New York University School of Law.