



AMERICAN
BANKRUPTCY
INSTITUTE

2017 Annual Spring Meeting

How and When to Make Evidentiary Objections

Joseph P. Davis III, Moderator

Greenberg Traurig, LLP; Boston

Hon. Pamela Pepper

U.S. District Court (E.D. Wis.); Milwaukee

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Jones Day; New York



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1

WHAT’S MY OBJECTION?

2

DEBTOR COUNSEL: Ms. Smith, when were you appointed CRO for BigCo?

SMITH: **December 4, 2016.**

Q: So you've been in that position for about four months?

A: **Yes.**

Q: In that period, have you become familiar with the day-to-day operations of the company?

A: **Yes, given that I'm pretty much running it at this point, along with some of the lower-level management team.**

Q: Have you reviewed the debtor's proposed plan of reorganization?

A: **Yes.**

Q: So you are aware that it calls for BigCo to sell off its widget manufacturing facilities in California and Nevada, and to concentrate its focus on service and consulting?

A: **Yes.**

Q: Has the profitability of the consulting division improved over historical performance since you've been the CRO?

COUNSEL: **Objection.**

3

LACK OF FOUNDATION

SUSTAINED

NO PERSONAL KNOWLEDGE

4

Q: Are you aware that one of the concerns expressed by the creditors is that the machinery and equipment in the widget manufacturing facilities is outdated, and has not been properly serviced over time?

A: **Yes.**

Q: Have you visited the California widget manufacturing plant in the past four months?

A: **No.**

Q: Have you visited the plant in Nevada?

A: **Yes--I've toured that plant once, over the course of a couple of days. I plan to visit the California facility soon.**

Q: Did the machinery at the Nevada plant appear to you to be outdated?

COUNSEL: **Objection.**

5

LACK OF FOUNDATION

SUSTAINED

**NO FOUNDATION LAID FOR
FOR KNOWLEDGE OF
MACHINERY**

6

Q: After assuming the CRO position, did you talk with Jim Duffin, the CEO of NinthFourth Bank?

A: Yes.

Q: Did you talk with him about the creditor's concerns about the status of manufacturing equipment?

A: Yes.

Q: What did he tell you?

COUNSEL: Objection.

7

LACK OF FOUNDATION

HEARSAY

SUSTAINED

**IF OFFERED FOR THE TRUTH
OF THE MATTER ASSERTED**

8

Q: Ms. Smith, you have been appointed the chief restructuring officer for BigCo, correct?

COUNSEL: **Objection — Leading.**

9

LEADING
SUSTAINED
BUT WHY OBJECT?

10

Q: Ms. Smith, since your appointment as BigCo's CRO, have you had the opportunity to review and compare the revenue generated by the consulting division on a year-by-year basis for the past five years?

COUNSEL: **Objection — Leading.**

11

OVERRULED

**QUESTION DID NOT
TELL WITNESS WHAT
TO SAY**

12

Q: Ms. Smith, it was your idea to strip off the manufacturing facilities in order to streamline the debtor and reduce overhead, correct?

COUNSEL: **Objection — Leading.**

13

SUSTAINED

**QUESTION CONTAINS
THE ANSWER**

14

Q: Ms. Smith, you've testified that on December 14, 2016, you met with Jim Duffin, CEO of NinthFourth Bank, in BigCo's offices in Pittsburgh, Pennsylvania. You've testified that there were a number of people present during the meeting, including upper management of NinthFourth and some members of your interim management team, as well as a couple of the members of the unsecured creditors' committee. What, if anything, did Jim Duffin tell you about the creditor's concerns with the manufacturing operations of BigCo?

COUNSEL: **Objection.**

15

HEARSAY
OVERRULED

FRE 801(d)(2)
EXCEPTION FOR STATEMENT
MADE BY PARTY OPPONENT

16

What if:

NinthFourth is one of the objectors to the plan. NinthFourth is objecting to confirmation on the ground that it does not believe that BigCo can sell off the manufacturing division, due to the age and condition of the manufacturing equipment and some other issues about the plant facility. The Debtor believes that NinthFourth is simply trying to crush the Debtor, so that it cannot reorganize under any circumstances.

17

What if Duffin said:

"Look--you can market those facilities for a year and you won't get a buyer. It would cost less to purchase state-of-the-art machinery than to recondition what's in there now. We are not interested in a plan that relies, in part, on the sale of the manufacturing division."

18

Q: Ms. Smith, at the December 14, 2016 meeting, did you provide the NinthFourth team with any information that might assuage their concerns about the ability to sell the manufacturing equipment and plants?

A: **Yes--I came prepared.**

Q: What did you tell the NinthFourth team at that meeting about the likelihood of selling the California and Nevada facilities?

COUNSEL: **Objection.**

19

HEARSAY

SUSTAINED

**IF BEING OFFERED FOR THE
TRUTH OF THE MATTER ASSERTED**

20

Q: Your Honor, it's not hearsay--Ms. Smith is the one who said it, and she is here in court today.

WRONG

**STATEMENT WAS MADE
OUT OF COURT**

21

Q: Ms. Smith, after the December 14, 2016 meeting in Pittsburgh, did you have any conversations with either of the unsecured creditor reps who attended the meeting?

A: Yes--as soon as the meeting was over, I went to a coffee shop with Mike Turek, who's the rep for our parts supplier. He and I hashed over the meeting.

Q: Was anyone else present at that meeting?

A: No--just the two of us.

Q: And that meeting took place in Pittsburgh, in a coffee shop, immediately after the meeting with NinthFourth?

A: Yes--late afternoon that day.

Q: Ms. Smith, what, if anything, did Mike Turek say to you about your idea of proposing a plan that would strip off the manufacturing division?

COUNSEL: Objection.

22

HEARSAY

OVERRULED

**IF OFFERED TO SHOW STATE OF
MIND AND NOT FOR TRUTH
OF MATTER ASSERTED**

23

Q: Ms. Smith, you've testified that you've been working full-time, almost seven days a week, at BigCo since December 4, 2016, correct?

A: **Yes.**

Q: Have you become familiar with the company during that time?

A: **It depends on what you mean by "familiar," but I feel I know the company pretty well at this point. I've had a chance to see most of the physical facilities, I've met people in every division, I've pored over the financials, and I've had a chance to see how the company operates day-to-day.**

Q: Over that time, have you formed an opinion as to the value of BigCo in its current form?

COUNSEL: Objection.

24

LAY WITNESS EXPERT TESTIMONY

OVERRULED

RULE 701 - LAY WITNESS TESTIMONY
ADMISSIBLE IF RATIONALLY BASED ON
WITNESS' PERCEPTION AND
HELPFUL TO UNDERSTAND FACTS

25

Q: So let me repeat the question, Ms. Smith--have you formed an opinion as to the value of BigCo in its current form?

A: Yes, I have.

Q: What is that opinion?

A. Right now, I believe that the company--including the manufacturing divisions--is worth \$22.8 million.

Q: How did you reach that opinion?

A: I've had to study up on companies like this since being appointed CRO. I've gotten familiar with the market. Having read several industry reports, I have learned –

COUNSEL: Objection, Your Honor.

26

HEARSAY

SUSTAINED

**UNLESS WITNESS IS QUALIFIED
AS AN EXPERT**

27

Q: Ms. Smith, I'm showing you what has been marked as Debtor's Exhibit 37. Do you recognize this?

A: Yes.

Q: What is this?

A: This is the valuation report prepared for the debtor by ValuesRUs.

Q: Who asked ValuesRUs to prepare this report?

A: I did.

Q: When did you request the report?

A: Just after I came on board in December 2016.

Q: Your Honor, I move Exhibit 37 into evidence.

COUNSEL: Objection, Your Honor--hearsay.

28

HEARSAY

SUSTAINED

RULE 803(6)

**The valuation report does not
qualify for the business records
exception**

29

Q: Mr. Smith, just before you were locked out in February of 2002, did you make any effort to determine what was actually out there?

COUNSEL: Objection.

COURT: Sustained.

Q: What did you do—before you left in February 2002, what activities took place in terms of your company at the site?

COUNSEL: Objection.

COURT: Sustained.

30

ASSUMES FACTS NOT IN EVIDENCE

THERE WAS NO EVIDENCE HE WAS
LOCKED OUT IN FEBRUARY OF '02.

31

Q: Were you involved in any decisions as to what to do with the surplus materials at that point in time after Mr. Red left?

A: **No, sir.**

Q: Were you ever given any instructions or did you have any discussions with anyone as to what to do with those materials?

A: **Yes.**

Q: What discussions did you have and with whom?

COUNSEL: **Objection.**

32

HEARSAY

SUSTAINED

**IF BEING OFFERED FOR THE
TRUTH OF THE MATTER ASSERTED.**

33

Q: On a number of the items, especially in Section three that you looked at and appraised, specifically if you look on Page 10, Line 95, at the end of your valuation, it says the value presumes the NP is properly reattached. What does that mean?

A: **Okay. There were a number of vessels that did not have nameplates, which were so noted as nameplate missing. In some cases, Mike did come to me towards the end of the day and said, I have nameplates --**

COUNSEL: **Objection.**

34

HEARSAY

OVERRULED

RULE 703 - AN EXPERT MAY BASE AN OPINION ON FACTS OR DATA IN THE CASE THAT THE EXPERT HAS BEEN MADE AWARE OF OR PERSONALLY OBSERVED. SUCH FACTS OR DATA ARE ADMISSIBLE ONLY IF THE PROBATIVE VALUE SUBSTANTIALLY OUTWEIGHS PREJUDICIAL EFFECT.

35

Q: And what is this document?

A: It's – I sold it or got Tom Smith to – or Tom Smith from Northern Scrap to quote me a price per pound what he would pay for it.

Q: And what was that price?

COUNSEL: Objection.

36

HEARSAY

OVERRULED

IF THE QUESTIONER PROVIDES
FOUNDATION FOR THE BUSINESS
RECORDS EXCEPTION TO HEARSAY
UNDER RULE 803(6).

37

But I Need to Get It In, Judge!
Evidence for the Bankruptcy Lawyer

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Submitted in connection with the panel discussion:
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American Bankruptcy Institute
2017 Annual Spring Meeting
April 22, 2017

- I. Why Are the Rules of Evidence Important in Bankruptcy Court?
 - A. The law says they apply! (Fed. R. Evid. 101)
 - B. Consistency—parties know what to expect
 - C. Fairness
 - D. Record on appeal
- II. Getting Documents Admitted Into Evidence (“But Judge—I Need It!”)
 - A. *Foundation Issues*
 - 1. Relevance – Rules 401 to 403
 - 2. General foundation issues
 - a. Documents
 - b. Witness testimony
 - 3. “Judicial notice”
 - a. Governing rule – Rule 201
 - b. What it is and isn’t – Rule 201(b)
 - c. When you can take it – Rule 201(c)
 - d. When you have to take it – Rule 201(d)

2017 ANNUAL SPRING MEETING

e. Hearing – Rule 201(e)

B. *Hearsay Issues*

1. If it's hearsay, it is not admissible unless there's an exception – Rule 802

2. Question #1 – Is It Hearsay?

a. Hearsay is:

- i. A statement
- ii. Other than one made by the declarant while testifying at the trial or hearing
- iii. Offered in evidence
- iv. To prove the truth of the matter asserted

- b. Hearsay *is not*:
 - i. Admissions by party-opponent – Rule 801(d)(2)
 - A. Admissions *are not hearsay*, so if it’s an admission, it comes in unless it isn’t relevant.
 - B. Is it an admission?
 - 1. Offered against a party – Rule 801(d)(2); and
 - 2. Is (i) the party’s own statement OR (ii) a statement the party has adopted OR (iii) a statement by someone the party has authorized to make the statement OR (iv) a statement by the party’s agent concerning a matter within the scope of employment during the existence of the employment relationship.
 - 3. TIP: Many attorneys confuse “admissions”–which are not hearsay–with the Rule 804(b)(3) *exception* to the hearsay rule for statements that a declarant makes against interest. The Rule 804(b)(3) *exception* applies only to allow admission of *hearsay* in cases where the declarant is not available. A Rule 801(d)(2) *admission* has no requirement of declarant unavailability or that it be against the declarant’s interest.
 - C. In bankruptcy, are a party’s statements on schedules admissions? (Look at definition above–depends on who’s offering against whom and who made the statement.)
- c. It’s hearsay, but there’s an exception:
 - i. Recorded recollection – Rule 803(5)

A. Components

1. A memo or a record;
2. Which concerns a matter that this witness once had knowledge about, but cannot now recall sufficiently to enable the witness to testify accurately about it; and
3. Which the proponent can prove the witness made or adopted when the matter was fresh in the witnesses' memory and reflected the knowledge accurately.
4. No requirement that declarant be unavailable (this is not a requirement with any of the Rule 803 exceptions).

B. Limitations

1. Proponent can read it into evidence, but *cannot* offer it as an exhibit.
2. Only the *adverse party* can offer it as an exhibit.
3. The adverse party is entitled to inspect the document, to cross-examine on it, and to introduce evidence about it. Rule 612.

C. Practical use

1. Used to refresh a witnesses' recollection.
2. Be aware of the procedure—You can't refresh recollection until the witness has said she doesn't remember. Once she's said that, ask if there's anything that would refresh her recollection. If she identifies such an item, you can show the witness the item briefly, take it back, *then* ask, "Did that help to refresh your recollection?" Then ask the question again.

ii. Records of Regularly Conducted Activities
("Business Records") – Rule 803(6)

A. Components

1. Memo, report, record, or data compilation "in any form"
2. Of "acts, events, conditions, opinions, or diagnoses"
3. Made at or near the time
4. By, or from information transmitted by, a person with knowledge.
5. Document must be "kept in the course of a regularly conducted business activity"
6. It must have been the regular practice of that business activity to make such a record.
7. The witness must be a "custodian" of the record "or other qualified witness."
8. "Business" includes "business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

B. Limitations

1. Record must have been made "at or near" the time of the events it records—if the document records events a year prior, you've got a problem.
2. Record must be kept in the course of a regularly-conducted business activity—this doesn't help you with a one-off.
3. Record must have been made by the business whose record it is.
4. Usually, except in certain narrowly-specified circumstances, you need the records custodian to put the records in.

C. Practical use

1. Litigants in bankruptcy court often try to use this exception.
 2. Good for bank records, loan documents, and other commonly-occurring bankruptcy evidence, as long as the right records custodian is called as a witness.
 3. Appraisals—debtors or creditors often seek to admit property appraisals under this exception, without calling a custodian. Who is the custodian? For whom is it a business record? Who can introduce it?
- D. Similar exceptions that can confuse parties.
1. Absence of entry in records kept in accordance with the business records rule – Rule 803(7)
 2. Public records and reports – Rule 803(8)
 3. Absence of public record or entry – Rule 803(10)
 4. Records of documents affecting an interest in property – Rules 803(14) and (15)
- iii. Former testimony – Rule 804(b)(1)
- A. Components
1. Declarant must be unavailable to testify at hearing.
 2. Must have given testimony as a witness at another hearing, or at a deposition which complies with the law.
 3. Party against whom the testimony is being offered must have had the opportunity and motive to develop the testimony by direct, cross, or redirect examination.

B. Limitations

1. Can use this rule only if declarant is “unavailable”, a strictly-defined term under Rule 804(a)
2. Opposing party must have had opportunity to conduct thorough cross-examination at previous hearing.

C. Practical use

1. Parties often confuse this rule with using testimony from a previous hearing to refresh the recollection of a witness who is in the courtroom right now.
2. If the witness is here in the courtroom testifying, you cannot have admitted into evidence as an exhibit her testimony from a previous hearing.

iv. Lay witness opinion testimony – Rule 701

A. Components

1. Rationally based on the perception of the witness
2. Helpful to a clear understanding of the witness’ testimony or the determination of a fact in evidence
3. Not based on scientific, technical or other specialized knowledge.
4. TIP: The rule does NOT bar lay opinion testimony. It just puts limits on it.

B. Bankruptcy issues

1. Can a debtor testify as to her opinion of the value of her home?
2. Can a business owner testify as to his opinion of the value of his business?

v. Expert witness testimony – Rule 702

A. Components

1. Scientific, technical, “or other specialized knowledge”
2. Will assist the trier of fact to understand the evidence or to determine a fact at issue
3. Witness must be qualified as an expert “by knowledge, skill, experience, training or education”
4. Can testify to that knowledge “in the form of an opinion or otherwise” IF:
 - a. The testimony is based on 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.

B. Limitations

1. Bases for forming opinions limited – Rule 703
2. CAN “embrace[] an ultimate issue to be decided by the trier of fact” (common misconception is that it can’t, but that’s only as to whether a criminal defendant possessed requisite *mens rea*)
3. Questions arise around “reliable principles and methods,” and the application of those methods to the facts in the case.

C. Important cases (Daubert, Kumho), and “hybrid” witnesses

D. Practical Use

1. Are realtors “experts” in housing valuation/sale?
2. What about “valuation experts?”
3. Even if the proponent qualifies the witness as an expert, will the testimony assist the trier of fact–i.e., the bankruptcy judge?

III. Attacking the Evidence Once It Has Been Admitted (Impeachment)

- A. The rules allow a proponent to impeach her own witness – Rule 607.
- B. Prior statements – Rule 613
 1. Components
 - a. Can impeach with prior written or oral statements.
 - b. No requirement that proponent show the witness the prior statement, *unless* opposing counsel asks to see it.
 - c. Extrinsic evidence of the prior inconsistent statement is *not* admissible, unless:
 - i. The witness is given an opportunity to explain or deny the extrinsic evidence; and
 - ii. The opposing party is given the opportunity to interrogate the witness on the extrinsic evidence;
OR
 - iii. “The interests of justice otherwise require.”
 2. Practical Use–again, know the process. There’s a predictable script which you can use every time.
 3. TIP: Issues often arise around whether the prior statement really was inconsistent. If not, it doesn’t impeach anything.

IV. Controlling Presentation of Evidence (“Who Steers This Ship?”)

- A. Rule 611 – gives the court authority to control “mode and order of interrogation and presentation”

1. Components
 - a. Not unlimited control – rule says “reasonable” control
 - b. Court should exercise control to make interrogation of witnesses and presentation of evidence “effective for the ascertainment of truth”
 - c. Court should exercise control to “avoid needless consumption of time”
 - d. Court should exercise control to “protect witnesses from harassment or undue embarrassment”
2. Cross-examination – Rule 611(b)
 - a. Generally limited to the subject matter of the direct, or questions regarding the witnesses’ credibility.
 - b. Court has some discretion to allow some questions into matters outside the scope of direct.
3. Leading question – Rule 611(c)
 - a. Misconception—a leading question is NOT a question that is susceptible to a single-word, affirmative or negative answer. A leading question IS a question which contains, or strongly suggests, its own answer. (“Are you hungry?” is not a leading question. “You are hungry, aren’t you?” is a leading question.)
 - b. Leading questions usually not allowed on direct, except to develop the narrative. Are allowed on cross.