



AMERICAN
BANKRUPTCY
INSTITUTE

Mid-Atlantic Bankruptcy Workshop

Litigation Skills

Hon. John T. Dorsey

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ABI Mid-Atlantic Litigation Skills Panel

Deposition/Rule 2004 Examinations

- Depositions and 2004 examinations
 - F.R.C.P. 32(a), and application to Rule 2004 transcripts.
 - Other differences between depositions and Rule 2004 examinations
 - Scope: 2004 arguably broader and with fewer protections for the witness than FRCP 26 discovery - purpose of a 2004 exam is “designed for the purpose of discovering and unearthing frauds” and to assist the parties in “revealing the nature and extent of the estate.”
 - Fishing expedition in terms of estate and assets, etc.
 - Reverse: More narrow and targeted. Party and dispute-based discovery versus estate issues/extent thereof
 - Right to cross examination and/or participation of other parties may be limited
 - Deponent has no right to have issues defined beforehand
 - Parties not assumed to be directly adversarial
 - Confirming and correcting testimony
 - Opportunity to review, correct and sign 2004 transcript
 - Filing with Court
 - Hearsay Exception. Fed. R. Evid. 804(b)(1)
- Taking the Rule 2004 Examination

- Understand the scope of examination, limitations and opportunities
- Purpose of examination, and making sure to know what you really need
- Technical and related issues, if you don't have the full background, making sure that you have the additional support at the examination to make the most of the opportunity
- If the examination is on a highly technical subject, and you do not have the ability to bring a back-up observer, take the time to confirm the testimony, utilize the record, read back and confirm answers and require completeness
- Take your time, but be mindful of time. Unless it is videotaped, the record won't reflect how long it took you to complete a question, but remember that the witness (and its counsel) is keeping count
- Make a clear record. If you are referencing documents, make sure that the record of what you are asking is clear and not out of context.
- Think ahead in planning for what you need, but be in the moment to know the import (or not) of the actual testimony)
- Do not be intimidated by the witness, and be prepared to make best use of failure of memory and recollection
- Do not be derailed by opposing counsel, be prepared for these issues, and be prepared to contact chambers if needed.
- Do not let counsel interfere with your deposition. Counsel should not be answering your questions

Evidence/Exhibits

- Practical suggestions for how to organize evidence
 - Elements of the case; using a table, etc.
- Different burdens and applicable standards of proof for each element of a claim
 - Preponderance of the evidence v. clear and convincing evidence
 - Shifting burdens
 - Burden of production vs. burden of persuasion
- Evidence and the gates of admissibility
 - Competency – Fed. R. Evid. 601-602
 - Relevance – Fed. R. Evid. 401-402
 - Is it needed to prove the case?
 - Is it helpful? Or needlessly duplicative?
 - Does it help the opponent
 - Materiality – Fed. R. Evid. 401
- Hearsay. And its relevance/use in Bankruptcy Court.
- Business record exception–Fed. R. Evid. 803(6): A record of an act, event, condition, opinion or diagnosis is not hearsay if
 - a. made in the regular course of business;
 - b. made at or near the time of the act, condition, or event;
 - c. kept in the regular course of business;
 - d. Custodian or other qualified witness testifies to its identity and the mode of preparation; No indications of lack of trustworthiness
- Opposing party's statement against Interest. Fed. R. Evid. 804(b)(3)

- How to Present Exhibits -- Determine the means, mode and order of presentation of the evidence
 - Pretrial Conferences and Orders
 - When applicable.
 - Contested matters versus significant contested matters.
 - Practical and tactical considerations in connection with requiring PTO or PTC (or not)
 - Exhibit lists
 - Discovery, and discovering/knowing your trial exhibits
 - Not every document produced in discovery is a potential exhibit
 - Exhibit list is working tool during evidence presentation
 - If you can't find it, you can't use it. Cross-examination
 - Pretrial stipulations, considerations, utility, risks
 - Pre-trial order – many forms of PTOs require parties to stipulate as to authenticity and admissibility or provide objections under order
 - Pre-trial conference – resolves all issues of authenticity, admissibility and objections at the pre-trial conference in advance of trial
 - Understanding the effect of stipulated exhibits
 - Authenticity only? If the stipulation is only as to authenticity then it is NOT proof that all information in the document is true or relevant

- If only authenticity, then you still need a witness to establish the truth of its contents
- Marking Exhibits
 - Be familiar with local rules and court procedures
 - Mark in advance!
 - Marking in same location (if possible) provides quicker reference
 - Provides a clearer record
 - Some courts require exhibits in advance of hearing or trial
 - In speaking, reference the exhibit properly
 - Prior to admission – “marked for identification as Exhibit X”
 - After admission – “Exhibit X”
 - If evidence is being presented electronically, be prepared for the system to crash and prepare alternate presentation
- Copies – bankruptcy cases often have multiple parties (anticipate and kill a tree)
 - Sufficient for witness, Court, and each counsel/party
- Ethical issues with exhibits – Model Rules of Professional Conduct 3.3 – Candor Towards the Tribunal
- Demonstrative evidence either demonstrates or illustrates substantive evidence (exhibits or testimony).

- In addition to standard three gates of admissibility, three other requirements
 1. Authentication – Fed. R. Evid. 901
 2. Accurate Representation of the Substantive Evidence
 - a. i.e. some graphs, photos can be misleading
 3. Balancing Test, probative value outweigh prejudice, confusion, wasting time. Fed. R. Evid. 403.

Exhibit Dos and Don'ts

- Do
 - Share exhibits with opposing counsel in advance (springing exhibits is bad form)
 - Related timing and tactical considerations
- Don't
 - Forget about your case
 - Cross-Examination: Ask question unless you know how witness will answer and can hold the witness to that answer
 - Cite to unreported authorities
 - Bankruptcy Court generally disfavors
 - Try the other person's case
 - Make disparaging remarks about opposing counsel
 - Say "With all due respect," "We would argue..." or "To tell you the truth"
 - Overuse acronyms
 - Overuse pronouns

Witness Preparation

- Deposition Preparation
 - Focus on preparing witness for opposing counsel's questions
 - Review ground rules
 - Allow whole question to be asked
 - Respond verbally
 - Never guess or speculate
 - Never volunteer or try to be helpful
 - Instruct witness to stop and let you make the objection before answers
 - Avoid problematic deposition behavior
 - If video deposition, counsel witness on mannerisms (more similar to trial testimony)
- Trial Preparation – Non-expert
 - Direct
 - Rehearse, but not too much
 - Know the big picture and key evidence
 - Counsel witness to listen to each question (listen, ask, answer)
 - Audience is the judge – look at judge when responding (but not too much)
 - Anticipate and confront major points opposition will attempt to elicit on cross

- Objections – likely more selective in objections at trial (in comparison to deposition)
- Focus on the question, and answer just the question
- But when should a witness be open-ended and try to testify more broadly
- Warn witness that cross examination often includes attack on credibility – encourage grace under fire and avoiding defensiveness to establish credibility
- Virtual Hearings & Trial Strategy
 - Know the general order and your judge; make sure discussed with counsel
 - Prepare for virtual courtroom with witness
 - Ensure that witnesses look professional on camera
 - Ensure that witnesses can see and review exhibits
 - COVID restrictions may drive settlement
- Difference between proper witness preparation and improper witness coaching
 - Can
 - Discuss role of witness and effective courtroom demeanor
 - Discuss recollection and probable testimony
 - Reveal to witness other testimony or evidence that will be presented and reconsider recounting of events in that light
 - Discuss applicability of law

Expert Witness

- Trial Prep
 - Expert not required to know everything
 - But should know everything about expert's report
 - Review assumptions
 - Make sure prepared to answer what expert did not do
 - Be prepared for qualification questions (*Daubert* standards and how they apply)
 - Vulnerabilities of expert witness
 - Testimonial experience (or lack thereof)
 - Hubris
 - Consistency
 - Fed.R.Evid. 803(18) – subject to attack by learned treatises
 - If expert on other side has different opinion, expert may be defensive
 - Experts aren't clients
 - Know opposing expert's case
 - Be polite and respectful; should be receptive to clarifying questions
- Expert testimony generally governed by Fed.R.Evid. 702
- *Daubert* – factors bearing on expert reliability
 - Customary to raise objection to expert testimony in pre-trial Motions in Limine or *Daubert* motion (if focused on qualifications)
 - Pros

- If successful, favorable settlement or Summary Judgment is possible
 - If complex argument, factual details from expert testimony may be helpful
- Cons
 - May not be helpful, especially if court gives time to cure deficiencies
 - If fails, may alert opposition expert to weakness in their analysis
- Cross-Examining Expert Witness in Bankruptcy Court
 - Use
 - The expert report. Fed R. Bankr. P. 7026; Fed. R. Civ. P. 26(a)(2)(B). – make arrangements with opposing counsel or move in court so that entitled to report
 - Expert report provides notice
 - If bankruptcy court observes the rules, likely to help opposing side more than reporting expert
 - But oftentimes, bankruptcy judge wants to read the reports in advance
 - Expert report obtained by interrogatory (in contested matter)
 - Own expert's assessment of report's strengths and weakness
 - Internet and Pacer
 - Deposition

- Depose expert, but often useless for attorney
 - May be useful for witness
- At the hearing
 - No cross-examination versus bad cross-examination
 - Narrow points of contention
 - Try to make strong witness irrelevant
 - Indirectly attack credibility
 - Point out interest in the outcome
- Don't
 - Focus on credentials
 - Fight her strength
 - Directly assault credibility without powerful evidence

Motions in limine

- Relevance is usually primary reason in civil trial; common to request exclusion in bankruptcy context when evidence doesn't comply with Federal Rules of Evidence
- Discourage using it as a tool to obtain a ruling on substantive issues (can't replace motion for summary judgment)
 - Should use motion *in limine* for evidence that is clearly inadmissible
- Whether expert evidence is excludable depends on whether it aids jury

Faculty

Hon. John T. Dorsey is a U.S. Bankruptcy Judge for the District of Delaware in Wilmington, sworn in on June 11, 2019. Previously, he practiced complex commercial litigation in Wilmington for 28 years. For 16 of those years, Judge Dorsey was a partner at Young Conaway Stargatt & Taylor, LLC, where he represented debtors and creditors in chapter 11 litigation matters. He also served as general counsel to Young Conaway for five years. Prior to joining Young Conaway, Judge Dorsey practiced with Richards Layton & Finger, PC, and served as the state director for then-U.S. Senator Joseph R. Biden, Jr. Prior to practicing law, he served in both the U.S. Army as a Military Police Investigator and the U.S. Air Force as an ICBM launch officer. Judge Dorsey was a board member of Delaware Volunteer Legal Services for 25 years and was active as a volunteer for the Delaware Office of Child Advocate representing children in foster care. He received his B.A. from the University of New York at Binghamton and his J.D. *magna cum laude* from Wake Forest University School of Law.

William H. Henrich, CPA is co-chair of Getzler Henrich & Associates LLC in New York and has nearly 40 years of experience in turnaround and crisis management, loan workouts and bankruptcy consulting, with over 400 engagements. He is experienced in helping debtors restructure their businesses, improve operations, boost cash flow and profitability, and maximize recovery for stakeholders, serving in such positions as financial advisor, CRO, interim CEO and independent board director. He also has advised secured and unsecured creditors during chapter 11 bankruptcy proceedings, including developing plans of reorganization and providing bankruptcy forensic analysis to support litigation, and served as plan administrator and liquidating trustee. Prior to joining the firm, Mr. Henrich was managing director of the New York practice of a prominent middle-market corporate restructuring firm. He also served in Arthur Andersen's corporate recovery services group, starting its New York bankruptcy and restructuring practice. Mr. Henrich is a former president and current advisory board member of the Turnaround Management Association's New York chapter, an executive board member of TMA Global, ABI's Treasurer, a former editorial advisory board member of the *ABF Journal* and a member of the Association of Corporate Growth. He frequently lectures and writes on turnaround and bankruptcy issues. In 2018, Mr. Henrich was inducted into the Turnaround Management Association's Hall of Fame. He received his B.B.A. from Baruch College, City University of New York, and his M.B.A. from Harvard Business School.

Laura Davis Jones is a named partner and management committee member of Pachulski Stang Ziehl & Jones LLP in Wilmington, Del., and is the managing partner of the firm's Delaware office. She gained national recognition as debtor's counsel in the *Continental Airlines* bankruptcy case and has represented numerous debtors, creditors' committees, bank groups, acquirers and other significant constituencies in national chapter 11 cases and workout proceedings. Ms. Jones participates as a speaker at national bankruptcy and litigation seminars, and she has authored numerous articles. She was named "Deal Maker of the Year" by *The American Lawyer* in 2002, which also has profiled her. Ms. Jones has been named continuously by her peers as one of the *The Best Lawyers in America* and as one of the "Best Lawyers in Delaware," and was selected as one of the top 10 lawyers in Delaware by *Delaware Super Lawyers*. She is a Fellow of the American College of Bankruptcy and a *Chambers USA* "Star Individual," the highest honor a lawyer can receive. Ms. Jones has been recognized in the *K&A Restructuring Register* and the *Lawdragon 500* since their inception, has been

named repeatedly to the *International Who's Who of Insolvency and Restructuring Lawyers*, and is AV-rated by Martindale-Hubbell. In 2018, she received the prestigious “Women Leadership” award at Global M&A Network’s Turnaround Atlas Awards, which honors the achievement of influential women leaders in the restructuring and turnaround communities. She started her career as a judicial law clerk in the U.S. Bankruptcy Court for the District of Delaware. Ms. Jones is admitted to practice in Delaware and the District of Columbia. She received her undergraduate degree from the University of Delaware and her J.D. from Dickinson School of Law, where she was on the board of editors and business manager for the *Dickinson Law Review* and served on the Appellate Moot Court Board.

Erika L. Morabito is a partner, litigator, trial attorney and restructuring lawyer at Quinn Emanuel Urquhart & Sullivan, LLP in Washington, D.C., and concentrates her practice in bankruptcy, creditors’ rights, debtor reorganizations and out-of-court restructurings. She regularly represents chapter 11 debtors, creditors’ committees, chapter 7 and chapter 11 trustees, shareholders, individuals, businesses, and ad hoc and special committees, as well as federal court-appointed receivers. Ms. Morabito also frequently advises and represents clients in creditors’ rights litigation, avoidance actions, claims disputes, out-of-court restructurings, and the purchase and sale of assets under the Bankruptcy Code. She has experience representing individuals, officers and directors, businesses, financial institutions, corporations, partnerships, and other entities involved in commercial transactions, as well as large bankruptcy and litigation matters, including retail, airline, automotive, coal, health, fraud and Ponzi scheme matters. Her practice includes restructuring work and complex commercial litigation cases in state and federal courts throughout the U.S. and internationally. Ms. Morabito was elected as a Fellow of the American College of Bankruptcy and she also serves as a member of ABI’s Board of Directors. In addition, she is an adjunct professor at Georgetown Law, where she teaches a class on chapter 15 and international bankruptcies. Ms. Morabito is repeatedly recognized in *The Best Lawyers in America* in the fields of Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law, as well as in *Chambers USA: America’s Leading Business Lawyers* for bankruptcy/restructuring. In 2020 and 2022, *Lawdragon* named her as one of “500 Leading U.S. Bankruptcy and Restructuring Lawyers,” and in 2021 she was selected by *Global Law Experts* as the Global Debtor and Creditor Law Expert of the Year in Washington, D.C. Most recently, Ms. Morabito represented clients in large bankruptcy proceedings, including Shiloh Industries, Pier 1, Toys “R” Us, Sears, LeClairRyan PLLC, GST Autoleather, Brooks Brothers and Intelsat, S.A. Ms. Morabito regularly lectures for ABI and serves on various boards that help to provide continuing education and updates on current bankruptcy topics. She received her B.A. *magna cum laude* from Oswego State University in 1995, where she was also an NCAA scholar athlete, and her J.D. *cum laude* from Syracuse University College of Law in 1999.

Marcos A. Ramos is a director and assistant general counsel with Richards Layton & Finger, P.A. in Wilmington, Del. He is a litigator and bankruptcy professional who focuses his practice on proceedings in the Delaware bankruptcy and other courts. He also provides counsel to U.S. and non-U.S. clients in other matters arising under or related to Delaware law, practice, procedure and courts. Mr. Ramos is active in the American Bar Association, Delaware Hispanic Bar Association and Hispanic National Bar Association. He formerly chaired the New Castle County Diversity Commission by appointment of the New Castle County Executive, and he is a Life Fellow of the American Bar Foundation. Mr. Ramos has written numerous articles for the American Bar Association and is admitted to practice in Delaware, New York, California and Maryland. He received his B.A. from Brown University and his J.D. from the University of Michigan Law School, where he worked on the *Michigan Law Review*.