AMERICAN BANKRUPTCY INSTITUTE

Northeast Bankruptcy Conference and Consumer Forum

Trial Preparation and Evidence

CONCURRENT SESSION

Hon. Heather Zubke Cooper
U.S. Bankruptcy Court (D. Vt.) | Rutland

Jonathan M. Horne
Murtha Cullina LLP | Boston

Hon. Elizabeth D. Katz
U.S. Bankruptcy Court (D. Mass.) | Springfield

Kate E. Nicholson
Nicholson, P.C. | Cambridge, Mass.

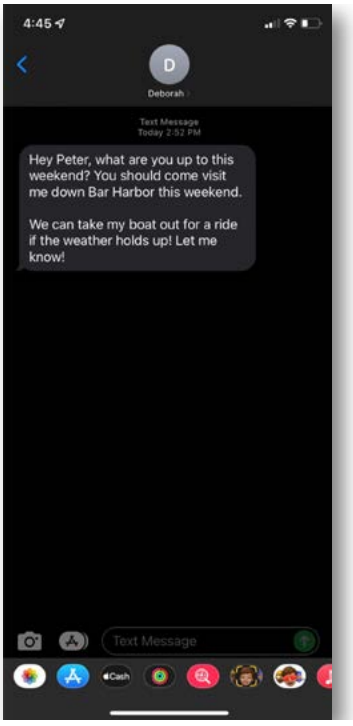
2022

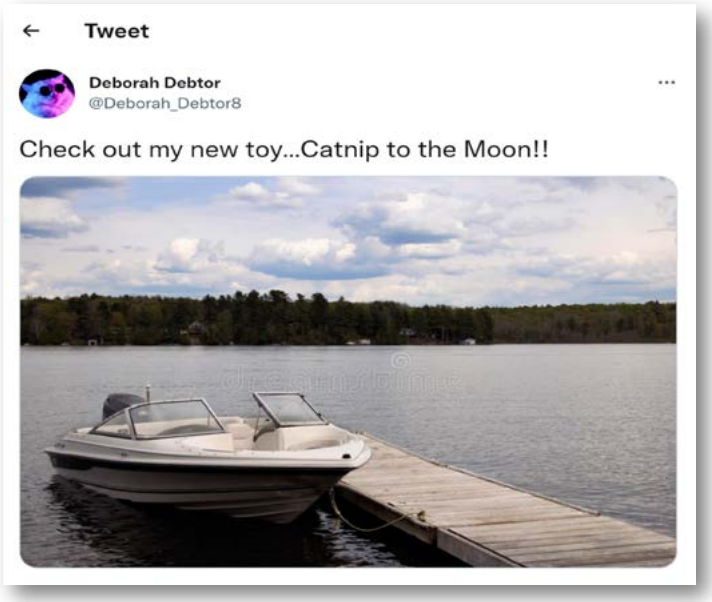
Trial Preparation and Evidence Exhibits

American Bankruptcy Institute

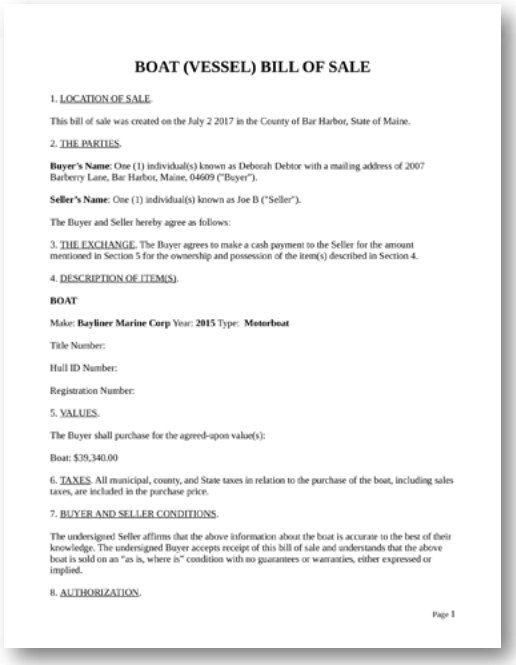
Northeast Bankruptcy Conference and Consumer Forum

Saturday, July 16, 2022, 9:30AM – 10:45AM




Tweet
Deborah Debtor
@Deborah_Debtor8
Check out my new toy...Catnip to the Moon!!


Tweet
Deborah Debtor
@Deborah_Debtor8
With the way the market is going these days, I should have been renting out the house years ago!



BOAT (VESSEL) BILL OF SALE

1. LOCATION OF SALE.

This bill of sale was created on the July 2 2017 in the County of Bar Harbor, State of Maine.

2. THE PARTIES.

Buyer's Name: One (1) individual(s) known as Deborah Debtor with a mailing address of 2007 Barberry Lane, Bar Harbor, Maine, 04609 ("Buyer").

Seller's Name: One (1) individual(s) known as Joe B ("Seller").

The Buyer and Seller hereby agree as follows:

3. THE EXCHANGE. The Buyer agrees to make a cash payment to the Seller for the amount mentioned in Section 5 for the ownership and possession of the item(s) described in Section 4.

4. DESCRIPTION OF ITEM(S).

BOAT

Make: **Bayliner Marine Corp** Year: **2015** Type: **Motorboat**

Title Number:

Hull ID Number:

Registration Number:

5. VALUES.

The Buyer shall purchase for the agreed-upon value(s):

Boat: $39,340.00

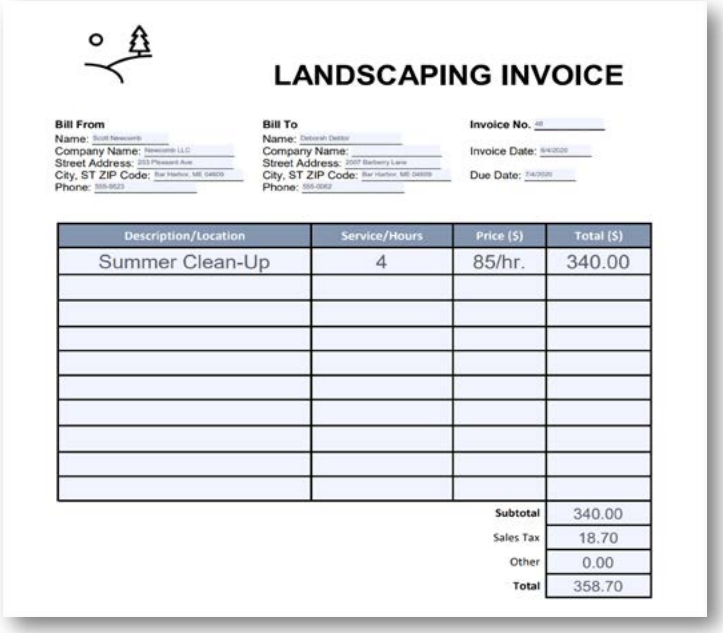
6. TAXES. All municipal, county, and State taxes in relation to the purchase of the boat, including sales taxes, are included in the purchase price.

7. BUYER AND SELLER CONDITIONS.

The undersigned Seller affirms that the above information about the boat is accurate to the best of their knowledge. The undersigned Buyer accepts receipt of this bill of sale and understands that the above boat is sold on an "as is, where is" condition with no guarantees or warranties, either expressed or implied.

8. AUTHORIZATION.

Page 1



LANDSCAPING INVOICE

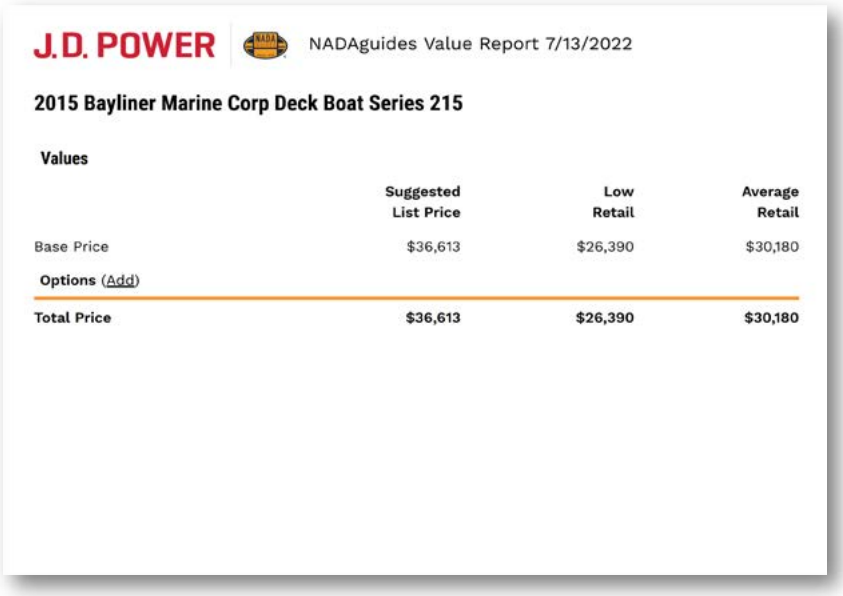
Bill From
Name: Scott Newcomb
Company Name: Newcomb LLC
Street Address: 233 Pleasant Ave
City, ST ZIP Code: Bar Harbor, ME 04609
Phone: 555-9523

Bill To
Name: Deborah Debtor
Company Name:
Street Address: 2007 Barberry Lane
City, ST ZIP Code: Bar Harbor, ME 04609
Phone: 555-0062

Invoice No. 48
Invoice Date: 6/4/2020
Due Date: 7/4/2020

Description/Location	Service/Hours	Price ($)	Total ($)
Summer Clean-Up	4	85/hr.	340.00

Subtotal	340.00
Sales Tax	18.70
Other	0.00
Total	358.70



J.D. POWER NADAguides Value Report 7/13/2022

2015 Bayliner Marine Corp Deck Boat Series 215

Values

	Suggested List Price	Low Retail	Average Retail
Base Price	$36,613	$26,390	$30,180
Options (Add)			
Total Price	**$36,613**	**$26,390**	**$30,180**

I. When electronically stored information (ESI) is offered as evidence, the following five steps must be met:

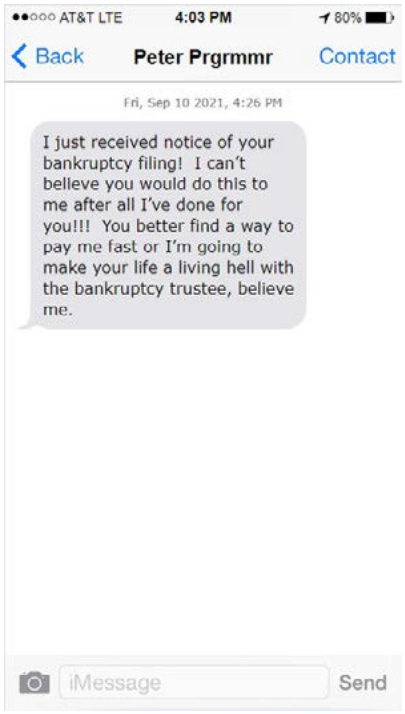
1) Is the ESI **relevant** as determined by **FRE 401** (hereinafter "**Rule 401**")?

2) If relevant under Rule 401, is it **authentic** as required by **Rule 901(a)**?

3) If the ESI is offered for its substantive truth, is it **hearsay** as defined by **Rule 801**, and if so, is it covered by an applicable exception (**Rules 803, 804 and 807**)?

4) Is the form of the ESI that is being offered as evidence an **original** or **duplicate** under the original writing rule, of if not, is there admissible secondary evidence to prove the content of the ESI (**Rules 1001–1008**)?

5) Is the probative value of the ESI substantially outweighed by the **danger of unfair prejudice** *or* one of the other factors identified by **Rule 403**, such that it should be excluded despite its relevance?



CATNIP TRUST 2017

This indenture of trust made this 15th day of June 2017, by and between Deborah Debtor, of Boston, Massachusetts, hereinafter called the donor, and Deborah Debtor of Boston, Massachusetts together hereinafter with any successor in trust called the trustee;

Witnesseth that:

Whereas, the donor desires to establish certain trusts of the property described in **Schedule A** annexed hereto and made a part hereof, which property the donor has simultaneously with the execution and delivery hereof transferred and paid over to the trustee; and

Whereas, the donor may from time to time hereafter convey, assign, transfer or pay over other property, real or personal, or both, to the trustee.

Now, therefore, the trustee hereby declares and covenants with the donors that she has received the property described in Schedule A annexed hereto in trust and that they will hold, manage, invest and reinvest the same, together with proceeds all other property, if any, hereafter conveyed, assigned, transferred or paid over to her as trustee hereunder or added to any of the trusts hereunder by gifts or by will and accepted by the trustees hereunder (all hereinafter referred to as the "trust property"), and, after paying or making provision for all proper expenses of administration, including reasonable compensation for her own service, will dispose of the income and principal upon the trusts and subject to the terms, provisions and conditions hereinafter set forth.

FIRST: Name. This trust is irrevocable in accordance with the provisions of Article SIXTH and shall be known as the Catnip Trust - 2017.

SECOND: Dispositions to Beneficiaries. The trustee may pay as much of the income of the trust as she shall determine in her sole and nonreviewable discretion to be necessary for the maintenance and well-being of the beneficiaries listed on the schedule of beneficiaries attached hereto as **Schedule B**. Any income not so paid may be accumulated and added to the principal. The principal shall be held until the termination of this trust. If the trust consists of real estate, then the trustee shall allow the beneficiaries to live in the premises for so long as they desire.

THIRD: Spendthrift Provisions. No principal or income payable or distributable or to become payable or distributable to any beneficiary, and no right or interest of any beneficiary under any trust established by this instrun1ent shall be subject to anticipation or assignment by any beneficiary thereof or to the interference or control of any creditor of any such beneficiary or be taken or reached by any legal or equitable process in satisfaction of any debt or other liability of any such beneficiary prior to its actual receipt by the beneficiary, and any money or other property payable or distributable to a married person shall be to his or her separate use, free from the interference or control of any spouse.

FOURTH: Powers of Trustee. The trustees of each trust hereunder shall have and may exercise at any time and from time to time the following powers, in addition to and not in

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This trust shall be interpreted in accordance with the laws of the Commonwealth of Massachusetts, and its validity and administration shall be governed by said laws except with respect to such assets as are required by law to be governed by the laws of some other jurisdiction.

In this indenture or any amendment hereto the masculine and neuter genders shall each be deemed to include the feminine, masculine and neuter gender and the singular the plural and vice versa as to both, where the context so indicates. The terms "trustee" and "trustees" mean the one or more trustees for the time being in office of the appropriate trust or trusts hereunder, whether original or successor; the terms "child," and "children" mean the one or more lawful descendants of the person designated in the first degree only; the term "issue" means the one or more lawful descendants of the ancestor designated in any degree (including the first degree). The terms "child", "children" and "issue" are intended to include not only blood descendants but also persons who have been adopted according to law or who have been born to a couple who openly lived together as husband and wife after the performance of a marriage ceremony between them.

In witness whereof, the parties hereto and to two counterparts hereof set their hands and seals, the day and year first above written.

Deborah Debtor, Donor

Deborah Debtor, Trustee

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Debtor, Deborah
December 17, 2021

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blah blah blah blah. Moreover, this and that and the other thing, that's all going to help my case. And don't forget about how terrible the mean trustee is and how much Peter Programmer hates me and would do anything to hurt me.

Q. Why did you establish the Catnip Trust 2017?

A. The only reason I set up that silly trust was because my accountant told me I could avoid taxes that way. Do you know how much you have to pay in taxes when you're a millionaire?!

Q. Do you personally use the property in Bar Harbor often?

A. Of course I do. I use the house whenever I want; I bought it!

Q. So you treat the property as your own?

A. Uh, wait a second. Can I talk to my attorney?

Q. Yes, after you answer the question.

A. I have to go to the bathroom.

Q. First you have to answer the question.

YourCase Court Reporting - Your Town, USA

Sources

- Twitter Profile Picture:
  - Credit : Photo by Kristina Kokhanova via istockphoto.com
- Twitter Picture of Boat
  - Credit: ID 75603600 © Karen Sauter | Dreamstime.com
- Twitter Picture of Summer Home
  - Credit: Great Duck Island House - https://greatduckislandhouse.com/

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Nicholson P.C.; Cambridge, MA

The panelists gratefully acknowledge the assistance of Darren Boykin, rising 2L at New England Law | Boston, in the preparation of these materials.

The Joint Pre-Trial Memorandum

Participants will learn best practices in preparing pre-trial statements and/or memorandum for the court.

Fed. R. Civ. P. 16(e) (Fed. R. Bankr. P. 7016)

The final pre-trial order controls the course of the trial and **supersedes all prior pleadings**. It can only be modified "to prevent manifest injustice."

The Joint Pre-Trial Memorandum

The pre-trial order often requires the parties to submit a joint pre-trial statement/memorandum. A typical joint pre-trial memorandum (JPTM) will contain:

- Statement of the case
- Statement of the law
- Statement of undisputed facts
- Statement of disputed facts
- Statement of the legal issues
- Lists of witnesses and exhibits
- Objections to any witnesses and exhibits

The final pre-trial order and the joint pre-trial memorandum supersede all prior pleadings, set the course of trial, and bind the parties.

Tips for an Effective JPTM

The joint pre-trial memo requires a party to envision the trial and to have their trial strategy in place. Make the most of your pre-trial memorandum.

Statement of the case – This is an opportunity to provide a brief, written opening statement. Set the table for the judge by identifying the relevant facts, explaining how the evidence will prove them, and discussing how the law applies to the facts so that your client prevails. How much legal analysis you include will depend on whether your JPTM also includes a statement of the law and/or whether you intend to file a trial brief.

Statement of the law – Identify the statutes at issue and any controlling case law on point. Also identify persuasive authority that supports your client's position. Be sure to articulate who has the burden of proof and the burden of production, what the burden of proof is (i.e. clear and

convincing, preponderance of the evidence, etc.) and whether there is any shifting of these burdens.

Statement of undisputed facts – Determine the facts you are willing to stipulate to. Ask yourself:

> Is the fact material?
>
> How will the opposing party go about proving it?
>
> Is it easily proven?
>
> Will the process of proving it detract from my own presentation or otherwise harm my client?
>
> Will it waste party and court time and resources and perhaps annoy the judge?
>
> Will agreeing to the fact give the opposing party an unfair advantage?

Statement of disputed facts – This should be a list of everything that you need to prove at trial and everything that your opponent needs to prove at trial. In preparing the JPTM, cross-reference this list to a list of the elements of the claims you are prosecuting or defending against, and to your exhibits and witnesses to be sure that you will have the evidence you need to prove your case.

Statement of the legal issues – Identify the legal questions to be answered. These will usually be mixed questions of law and fact, e.g. did the debtor possess the requisite good faith, was a creditor's reliance reasonable, did the debtor intend to cause harm, etc., but may also be pure questions of law.

List of witnesses and exhibits – Identify all the witnesses and exhibits you may present at trial (except those purely for the purposes of impeachment). If you want to present it at trial (and it's not solely for impeachment) it must be included in the list of exhibits and exchanged with the opposing party. Thus, you should be overinclusive. You can always decide not to introduce evidence that was included in the JPTM.

Objections to witnesses and exhibits – Any objections to the admissibility of evidence, except for objections under FRE 402 (relevance) and 403 (unfair prejudice, duplicative, wasteful, confusing, misleading), must be raised in the JPTM. **Any objections not raised are waived.**

Cautionary Tales: Selected Cases Illustrating the Importance of the JPTM

Tingling v. United States Dep't of Educ., 611 B.R. 710 (E.D.N.Y. 2020), aff'd by *Tingling v. Educ. Credit Mgmt. Corp. (In re Tingling)*, 990 F.3d 304 (2d Cir. 2021).

> A pro se debtor in a student loan discharge case agreed to certain facts during a court-ordered recess and later tried to retract some of those agreements. The bankruptcy court rejected the retraction and enforced the joint pre-trial memorandum that came from the parties' discussion during the recess. The district court and the Second Circuit affirmed. The district court noted that "Pursuant to Federal Rule of Civil Procedure 16(d), made applicable to the Bankruptcy Court by Federal Rule of Bankruptcy Procedure 7016, a pretrial order "supersede[s] all prior pleadings and control[s] the subsequent course of the action." Rockwell Int'l Corp. v. United States, 549 U.S. 457, 474, 127 S.Ct. 1397, 167 L. Ed. 2d 190 (2007) (internal quotation marks and citations omitted). "A bankruptcy court has broad discretion to preserve the integrity of a pretrial order, and . . . an appellate court generally should not interfere with a trial court's decision to admit or exclude evidence based on its interpretation of its own pretrial order." Old Republic Nat'l Title Ins. Co. v. Levasseur (In re Levasseur), 737 F.3d 814, 819 (1st Cir. 2013) (internal quotation marks and citation omitted); see also Santrayll v. Burrell, No. 91-CV-3166, 1998 U.S. Dist. LEXIS 586, 1998 WL 24375, at *7-8 (S.D.N.Y. Jan. 22, 1998) ("'Motions to reopen or to modify a pretrial order are addressed to the sound discretion of the trial judge.'") (quoting Bradford Trust Co. v. Merrill Lynch Fierce, Fenner, and Smith, Inc., 805 F.2d 49, 52 (2d Cir. 1986))).”
>
> *Tingling* at 721-22.

Hermosilla v. Hermosilla (In re Hermosilla), 450 B.R. 276 (Bankr. D. Mass. 2011) aff'd by *In re Hermosilla*, No. MB 11-045, 2011 Bankr. LEXIS 4285 (B.A.P. 1st Cir. Nov. 14, 2011).

> Plaintiff prevailed on a motion for summary judgment based on the admissions contained in the JPTM. In opposing the motion, debtor's counsel raised arguments that were directly contrary to the JPTM. Debtor's counsel was later sanctioned under 9011 for presenting arguments that were foreclosed by the admissions in the JPTM.

Fed. R. Civ. P. 15 (Fed. R. Bankr. P. 7015) – Trial by Implied Consent

While it is true that the JPTM supersedes the pleadings, it is nevertheless possible for an unpled issue to be tried by the explicit or implied consent of the parties.

Rule 15(b)(2) states "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings."

An issue can tried by implied consent when evidence supporting the claim is introduced without proper objection at trial and addressed on the merits in the post-trial proceedings. *See, e.g.*, *Premier Capital, LLC v. Crawford (In re Crawford)*, 841 F.3d 1 (1st Cir. 2016).

In the *Crawford* case, the First Circuit found that a creditor's objection to discharge for false oath under § 727(a)(4)(A) was tried by implied consent where the complaint and pre-trial pleadings did not identify the debtor's failure to list a retirement account as a basis for its claim but introduced evidence of the account and questioned the debtor repeated about it at the trial. Debtor's counsel objected to the introduction of the evidence on the basis that it was duplicative and not on the basis that it was in furtherance of an unpled claim. Debtor's counsel then tried to rebut the testimony of the undisclosed account. The court found that "[b]ecause Crawford failed to object to the trial of an unpleaded claim and engaged the merits of the claim, this Court cannot say that the bankruptcy court abused its discretion by finding Crawford impliedly consented." *Premier Capital, LLC v. Crawford (In re Crawford)*, 841 F.3d 1, 6 (1st Cir. 2016).

In order for an issue to be tried by implied consent, however, it must be clear from the proceedings that the unpled claim is being asserted – if the evidence at trial also supports the pled claims, the defendant cannot be said to have consented to a trial of the unpled claim. As the First Circuit explained:

> "'[T]he introduction of evidence directly relevant to a pleaded issue cannot be the basis for a founded claim that the opposing party should have realized that a new issue was infiltrating the case.' DCPB, Inc. v. City of Lebanon, 957 F.2d 913, 917 (1st Cir. 1992), superseded on other grounds, as recognized in Lamboy-Ortiz v. Ortiz-Velez, 630 F.3d 228, 243 n.25 (1st Cir. 2010). It is 'the defendant's inalienable right to know in advance the nature of the cause of action being asserted against him,' Doral Mortg., 57 F.3d at 1171, and thus '[i]t is not enough that an issue may be inferentially suggested by incidental evidence in the record; the record must demonstrate that the parties understood that the evidence was aimed at an unpleaded issue,' Galindo v. Stoody Co., 793 F.2d 1502, 1513 (9th Cir. 1986); see also Kenda Corp., Inc. v. Pot O'Gold Money Leagues, Inc., 329 F.3d 216, 232 (1st Cir. 2003) (citing Galindo for this proposition); Monod v. Futura, Inc., 415 F.2d 1170, 1174 (10th Cir. 1969) (stating that Rule 15(b) serves 'to bring the pleadings in line with issues actually tried and does not permit amendment to include collateral issues which may find incidental support in the record')."

Fustolo v. Patriot Grp., LLC (In re Fustolo), 896 F.3d 76, 84 (1st Cir. 2018).

VTB LB Appendix VI
04/2018
See Vt. LBR 7016-1(d)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

FORMAT FOR PRE-TRIAL STATEMENTS

Parties to an adversary proceeding must file a joint pre-trial statement at least seven (7) days before a trial is scheduled to begin. If the parties are not able to agree on the terms of the pre-trial statement, then each party must file and serve a separate pre-trial statement with an affirmation the party has made diligent, good faith efforts to produce a joint pre-trial statement, but was unable to do so.

The pre-trial statement must include the following information, in this sequence:

(a) the case caption of the both the bankruptcy case and the adversary proceeding;

(b) a brief procedural history of the case, including the dates: (i) the case was filed, (ii) the instant adversary proceeding was filed, (iii) the key pleadings and papers were filed in the case and adversary proceeding, and (iv) the pre-trial statement due date;

(c) a list of the undisputed material facts;

(d) a list of the disputed material facts;

(e) an outline of the contested legal issues (including whether the Court has jurisdiction to enter final orders on each issue);

(f) a summary of all evidentiary issues and any anticipated evidentiary objections;

(g) an assertion that any motions *in limine* will be filed contemporaneously with the pre-trial statement or no later than 1 week prior to the trial or evidentiary hearing, whichever is earlier;

(h) identification of witnesses, including: (i) the name of each witness who will testify, (ii) a brief summary of each witness's anticipated testimony, and (iii) the projected duration of each witness's testimony;

(i) a list of exhibits and an affirmation that the parties will copy, mark, and exchange exhibits (and prepare exhibits for use with the Electronic Evidence Presentation System, if the parties are using that) no later than a half hour prior to the hearing, so the Court and all counsel will have a complete set available to them throughout the trial;

(j) the estimated length of the trial;

(k) a notation that a digital audio recording of the trial will be available on the docket, or an assertion that an application to restrict access to the recording will be filed no later than 24 hours before the trial (see Vt. LBR 5007-1(b)(2)); and

(l) any unique circumstances the parties will ask the Court to address as part of the trial.

EXAMPLE
FOR EDUCATIONAL PURPOSES ONLY

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In re: DEBTOR, Debtor	Chapter 13 Case No. xx-xxxx-EDK
PLAINTIFF, Plaintiff v. DEFENDANT, Defendant	Adversary Proceeding No. XXXXXXX

FINAL PRETRIAL ORDER

1. **A TRIAL IS SCHEDULED FOR DATE.**

2. **Joint Pretrial Memorandum.** Absent further order of the Court, **the parties are ordered to file a Joint Pretrial Memorandum by DATE.** The Joint Pretrial Memorandum must be approved and signed by all counsel and unrepresented parties.[1] The Joint Pretrial Memorandum shall supersede the pleadings to the extent of any inconsistency and will govern the course of trial. The Joint Pretrial Memorandum must set forth the following:

[1] If the parties cannot cooperate in filing a Joint Pretrial Memorandum, then each party shall be responsible for filing, by the same date, a separate Pretrial Memorandum that contains the information required by this paragraph and a statement as to why the parties could not cooperate in filing the Joint Pretrial Memorandum.

a. A statement indicating the parties' attempts to resolve their dispute by mediation. In the event the parties agree in good faith to mediation, the Court will liberally consider any motion to postpone the trial to accommodate the mediation.

b. Facts to which the parties have stipulated.

c. The issues of fact which remain to be litigated.

d. The issues of law to be determined.

e. A brief summary of the Plaintiff's case.

f. A brief summary of the Defendant's case.

g. The name, address, and telephone number of each witness, separately identifying witnesses each party expects to present and those witnesses to be called only if the need arises.[2]

h. A list of witnesses whose testimony will be presented by means of a deposition.

i. A list of exhibits, other than those to be used for impeachment, pre-marked in the order in which they are expected to be offered (with separate numbering for plaintiff and defendant), separately identifying those exhibits which each party expects to offer and those which will be offered only if the need arises.

j. A statement confirming that the parties have exchanged exhibits.

k. If applicable, a statement disclosing any records of regularly conducted business activity under Fed. R. Evid. 803(6) that a party intends to present by certification, as permitted by Fed. R. Evid. 902(11) and (12), rather than by testimony of an authentication witness.

l. Any objections, including the grounds for the objection, to the calling of any witnesses, including experts, the presentation of testimony through use of a deposition, or the admissibility of documents or exhibits. Any objection not set forth in the Joint Pretrial Memorandum, other than objections under Fed. R. Evid. 402 and 403, shall be deemed waived unless excused by the Court for good cause shown.

m. The estimated length of trial (if different from the estimate set forth in the Rule 26(f) conference report).

3. **Trial Briefs.** No later than 7 days before trial (unless a shorter period is specified by the Court), counsel may, but need not, file trial briefs.

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[2] If an interpreter is required for any witness, it will be the responsibility of the party calling the witness to supply the interpreter. The Court cannot and does not supply interpreters.

4. **Exhibits and Demonstratives.**[3]

    a. Further information regarding exhibits may be found in the Court's separate Supplemental Order Regarding Trial by Video

    b. Written summaries and/or charts presented to the Court in conjunction with closing statements (as an aid and not as evidence) must be provided to opposing counsel prior to the commencement of the closing statement, and any objections must be raised prior to the commencement of the closing statement. Closing summaries and/or charts may not include information which was not presented and admitted into evidence or through testimony during the trial.

5. **Valuation Testimony.** Unless otherwise ordered by the Court in advance or at trial, any expert testimony as to the valuation of assets may be presented in the following manner:

    a. The direct testimony of the expert will consist of his or her appraisal report, which shall be under oath. A copy of the report must be delivered to opposing parties at least 7 days before the date of trial.

    b. Cross-examination will be conducted as if the witness had testified to the contents of the report.

    c. If the opposing party wishes to challenge the qualifications of the expert, it may do so in cross-examination.

6. **Proposed Findings of Fact and Conclusions of Law.** After trial, counsel may (by separate order) be required to submit proposed findings of fact and conclusions of law.

7. **Failure to Comply with this Order.** This Order and the deadlines set by the Court may not be modified absent further Court order. Failure to comply with the provisions of this Order may, pursuant to Fed. R. Civ. P. 16 and 37, result in sanctions, including the entry of a dismissal or default, exclusion of evidence or testimony, or monetary sanctions.

_____

Elizabeth D. Katz Dated
United States Bankruptcy

[3] The courtroom is equipped with an electronic presentation system for displaying trial exhibits. Questions regarding the electronic evidence presentation system should be directed to the Courtroom Deputy at Stephen_Reynolds@mab.uscourts.gov.

EXAMPLE: FOR EDUCATIONAL PURPOSES ONLY

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In re:	)	
	)	Chapter XX
DEBTOR,	)	Case No. XXXX
	)	
Debtor	)	
	)	
	)	Adversary Proceeding
PLAINTIFF,	)	No. XXXXX
Plaintiff	)	
	)	
v.	)	
	)	
DEFENDANT,	)	
	)	
Defendant	)	
	)	

SUPPLEMENTAL ORDER REGARDING
TRIAL/EVIDENTIARY HEARING BY VIDEO

- **Service of Order on Parties:**
- **Notice of Participation Due:**
- **Service of Order on Witnesses:**
- **Witness Information Due:**
- **Exhibit Delivery Due:**
- **Trial/Evidentiary Hearing Date:**

To expedite and facilitate THE TRIAL OR EVIDENTIARY HEARING ON X (the "Matter"), the Court orders as follows:

I. GENERAL PROVISIONS

1. **Trial/Evidentiary Hearing**. The trial/evidentiary hearing on the Matter shall be held by video on DATE. (the "Hearing"). No individual will be admitted into the courtroom for the Hearing or permitted to participate in the Hearing in any way not contemplated by this Supplemental Order. This Supplemental Order provides additional requirements related to the format of the Hearing, in addition to any requirements set forth in any pretrial or case management orders entered in relation to the Matter (collectively, the

"Pretrial Order"). The Pretrial Order remains in effect, but if any provisions of the Pretrial Order conflict with this Supplemental Order, the provisions of this Supplemental Order shall govern.

2. **Service of Supplemental Order.** Counsel and any pro se party shall serve a copy of this Supplemental Order on all witnesses they intend to call at the Hearing, and file a certificate of service by **DATE.** Service under this section does not replace any requirement to subpoena a non-party witness. *See* Fed. R. Civ. P. 45, made applicable to the Matter by Fed. R. Bankr. P. 9016. Counsel shall serve a copy of this Supplemental Order on the party they represent in the Matter by **DATE.**

3. **Hearing By Video** As a result of the dangers presented by the COVID-19 pandemic, compelling circumstances exist that constitute good cause to require that all aspects of the Hearing, including witness testimony, in the Matter proceed by video transmission rather than in person. *See* Fed. R. Civ. P. 43(a), made applicable to the Matter by Fed. R. Bankr. P. 9017. The Court finds that the procedures adopted herein will provide adequate and "appropriate safeguards" for purposes of Fed. R. Civ. P. 43(a) and ensure due process of law. These procedures will: (i) enable the Court to identify, communicate with, and assess the demeanor of all witnesses in real time; (ii) enable counsel for the parties or a pro se party to see and hear the testimony of witnesses, interpose objections, and communicate with the Court in real time; (iii) enable the parties, the witnesses, and the Court to have simultaneous access to an identical set of pre-marked proposed exhibits; (iv) avoid any undue influence or interference with witnesses in connection with their testimony; and (v) preserve the ability of the parties to communicate with their counsel during the Hearing off the record, as the Court deems appropriate.

4. **The Video Platform.** The Hearing shall take place remotely using Zoomgov.com videoconference technology ("Zoom"). Zoom is available without charge for persons attending the Hearing. All counsel and witnesses who participate in the Hearing must undertake appropriate set up and testing of Zoom. Instructions for use of Zoom (the "Participant Guide for Video Hearings") and links to its tutorials can be found on the Court's website at:
http://www.mab.uscourts.gov/pdfdocuments/mab_participant_video_guide.pdf

5. **Required Equipment**. The Participant Guide for Video Hearings provides information on what equipment counsel and interested parties must have to participate in the Hearing as well as helpful tips. By participating in the Hearing, counsel and interested parties affirm that they:

   a. Have reviewed the Participant Guide for Video Hearings;
   b. Have viewed Zoom tutorials as required by the Participant Guide for Video Hearings; and
   c. Understand that the Court will not provide technical support.

II. INFORMATION REGARDING HEARING PARTICIPANTS

1. **Limit on Participation by Video.** Parties and counsel are encouraged to limit video participation to those who are necessary to the conduct of the Hearing. If the number of individuals wishing to participate in the Hearing, in the Court's view, exceeds the number which would permit the efficient, stable, and reliable transmission of the Hearing by video, the Court may require that certain individuals participate in the Hearing only by telephone. The Court will provide to each individual participating by telephone separate dial-in instructions, which may be used with any telephone equipment. *See* ¶ V, 3 below for information on General Public Access.

2. **Notice of Participation.** Counsel and pro se parties (collectively "Participants") who will be actively participating in the Hearing shall notify Courtroom Deputy Stephen Reynolds, at stephen_reynolds@mab.uscourts.gov by **DATE**. The notification shall include the name and email address of each of the Participants as well as their respective roles in the Hearing. The notification must include the telephone number at which the Participants may be reached during the Hearing and what type of device they will be using. Each of the Hearing Participants must make reasonable efforts to be available for a test of Zoom when/if notified by the Courtroom Deputy. Prior to the Hearing, the Courtroom Deputy will send an email to each Participant providing the login information to appear at the Hearing. Those who receive the Hearing login information from the Court may not forward or otherwise share that invitation with any other persons except that counsel may share the login information with their client and members of their firm and/or staff as necessary. Prior to the Hearing, the Courtroom Deputy will provide Hearing login information to all witnesses designated by the parties as set forth in ¶ III, 2 below.

3. **Participation at Hearing.** All Participants expecting to participate in the Hearing and question a witness must attend the Hearing by video unless expressly exempted by the Court.

III. WITNESSES

1. **Remote Witness Testimony**. Each witness called to testify or be subjected to cross-examination at the Hearing must testify by contemporaneous video transmission using Zoom, as provided in this Supplemental Order. The Court will administer the oath to each witness during the Hearing, and witness testimony will have the same effect and be binding upon each witness in the same manner as if such witness was sworn in by the Court in person in open court.

2. **Witness Information**. To provide additional safeguards for the acceptance of testimony from witnesses who are not physically present in the courthouse during the Hearing, the Participant calling a witness must submit to the Courtroom Deputy, Stephen Reynolds, at stephen_reynolds@mab.uscourts.gov by DATE, with a copy by email to all Participants, a list of witnesses who are reasonably anticipated to testify at the Hearing which must contain:

   a. The name, title, and mailing address for receiving exhibits for each witness;

b. The place from which the witness will testify including city, state, and country (e.g. home, office - no addresses are required);
c. The email address to which the Courtroom Deputy can send login information to the witness; and
d. Whether anyone will be in the room with the witness during the testimony, and if so, who (name, title, relationship to the witness), and for what purpose.

3. **Responsibility for Remote Witnesses**. A Participant calling a witness shall be responsible for:

a. ensuring that the witness has received the login information from the Courtroom Deputy; and
b. ensuring that the witness has or has been offered access to: (i) all relevant exhibits prior to the Hearing; (ii) Zoom; and (iii) and internet service and required hardware at a suitable location sufficient to participate in the Hearing.

Witnesses must make reasonable efforts to be available for a test of Zoom when/if notified by the Courtroom Deputy.

4. **Non-Party Witnesses Who Are Subject to a Subpoena.** Non-party witnesses whose appearance has been compelled by a subpoena or who have agreed to appear without service of a subpoena ("Non-party Witnesses") shall promptly provide to the Participant who intends to call them as a witness all of the information contemplated in ¶ III, 2 above. The Non-Party Witness shall make reasonable efforts to ensure their participation by video as contemplated by this Supplemental Order, including, if the Non-Party Witness is unable to ensure access and a stable connection as recommended by the Participant Guide for Video Hearings, *see* http://www.mab.uscourts.gov/pdfdocuments/mab_participant_video_guide.pdf, http://www.mab.uscourts.gov/pdfdocuments/mab_participant_video_guide_final_8-6-20.pdf by appearing at a location offered by the Participant at which appropriate equipment has been provided.

5. **Conduct of the Witness During Testimony**. When called to testify, a witness must be situated in such a manner as to be able to view the video screen and be seen by the Court. The Court and the Participants must be able to clearly see the entire face and shoulders of the witness. Unless otherwise permitted by the Court, while a witness is testifying at the Hearing, the witness shall not communicate with any person by any means, such as email, text, or handwritten notes, other than through the witness's sworn testimony. During testimony, the witness will not access any exhibits, notes, documents, emails, texts, or other electronically stored information or exhibits, except as directed by counsel or the Court.

6. **Witness Responsibilities During Testimony.** Any witness who testifies during the Hearing is bound by the provisions of this Supplemental Order and is subject to the impositions of sanctions for failure to comply with this Supplemental Order as set forth in ¶ V, 5.

IV. EXHIBITS

See Pretrial Order for additional information regarding exhibits.

1. **Marking Exhibits**. Each Participant must pre-mark copies of the proposed exhibits that the Participant reasonably anticipates offering at the Hearing in the order in which they are expected to be offered (with separate numbering for Debtor and creditor), separately identifying those exhibits which each party expects to offer and those which will be offered only if the need arises.

2. **Organizing Exhibits**. All pre-marked proposed exhibits must be aggregated into a PDF file or files, with a table of contents and bookmarks for each individual exhibit contained in the file(s) ("PDF Exhibits").

3. **Delivering Exhibits to Opposing Participants and the Court**. Each Participant must send, by email or other electronic means as may be approved by the Court, the PDF Exhibits by **DATE** to: (i) opposing Participants; and (ii) the Courtroom Deputy, Stephen P. Reynolds, at stephen_reynolds@mab.uscourts.gov.

4. **Delivering Exhibits to Witnesses.** Each Participant must provide the PDF Exhibits to each witness who may testify at the Hearing and ensure that the PDF Exhibits are actually received by the witnesses by **DATE.**

5. **Presenting Exhibits at the Hearing**. Participants will utilize the Share Screen option on Zoom for the presentation of exhibits. Prior to the Hearing, the Participants must ensure that they are able to use Share Screen to enable the Court to identify and, if permitted, enter into evidence their proposed exhibits.

6. **Impeachment/Rebuttal Exhibits.** If a Participant wishes to use a document solely for impeachment or rebuttal purposes and such document was not contained in the PDF Exhibits or Exhibit Books, the Participant must be prepared to simultaneously email a PDF copy of the document to the Court and the witness during the Hearing.

V. ADDITIONAL PROVISIONS

1. **Courtroom Formalities**. Although it will be conducted by video, the Hearing constitutes a court proceeding and all formalities of a court proceeding must be observed in all respects, including proper decorum and attire. Unless otherwise ordered by the Court, the Participants must keep their video on at all times during the Hearing.

2. **Recesses**. Parties may request a private Zoom breakout room or confer during recess by telephone or by other means provided that there is no communication with a witness who has been called to the stand before that witness' testimony is concluded.

3. **General Public Access**. The Hearing is open to the public. The public is invited to listen to the Hearing by telephone. Any person wishing to listen to the Hearing by telephone must email the Courtroom Deputy. Please note that if a request is not made at least one

business day before the Hearing, the Courtroom Deputy may not be able to respond.

4. **Recording Prohibited; Official Record**. No person may record or capture images during the Hearing from any location by any means. The audio recording maintained by the Court will be the sole basis for creation of a transcript that constitutes the official record of the Hearing.

5. **Share Screen.** The Share Screen function can only be used as permitted by the Court.

6. **Failure to Comply with This Order.** Failure to appear at the Hearing or to comply with any terms of this Supplemental Order, including the deadlines set forth herein, may result in further orders including the imposition of sanctions on a witness, party, or counsel by, *inter alia*, reprimand, fine, award of attorneys' fees, exclusion of proposed exhibits, prohibition against a party from offering testimony, and/or the entry of a dismissal or default, all as the circumstances warrant.

Dated:

_____
Elizabeth D. Katz
U.S. Bankruptcy Judge

Introducing Electronic Evidence

Participants will learn the steps necessary to effectively introduce electronic materials (emails, text messages, social media posts, etc.) into evidence at trial or alternatively, how to exclude such evidence.

Lorraine v Markel American Ins. Co., 241 F.R.D. 534 (2007)

PROCEDURE:

I. Cross Motions for Summary Judgment
   a. Plaintiff's/ Counter Defendants (Jack Lorraine and Beverly Mack)
      i. Sought to enforce the reward of a private arbitrator finding that damage suffered by their yacht resulted from a lightning strike while the yacht was docked.
   b. Defendant/Counter-Plaintiff (Markel American Insurance Co.)
      i. Sought to enforce the arbitrator's finding that the damage to the yacht was caused by lightning as well, but also, the arbitrator's finding that damages were limited to $14,100 plus incidental costs.

FACTS:

1) Plaintiff's yacht was struck by lightning in May of 2004.
2) Plaintiffs filed an insurance claim with Defendant for the damage.
3) Defendant released payment to Plaintiffs for the damage known at that time, but Plaintiffs found additional damage to the hull of the yacht when it was removed from the water several months later.
4) Defendant refused to issue payment for the additional damage stating the damage was not from lightning and denied that the damage was covered by Plaintiff's policy.
5) In lieu of Defendants seeking a declaratory judgment in District Court the parties came to a private arbitration agreement, stating:
   a. "The parties to this dispute…have agreed that an arbitrator shall determine whether certain bottom damage in the amount of $36,000, to the Yacht CHESSIE was caused by the lightning strike occurring on May 17, 2004, or osmosis, as claimed by [Markel]."
6) The arbitrator found that some, but not all, of the damage was caused by the lightning strike and concluded the damage was limited to $14,100.
7) Both parties sought to confirm and enforce the arbitrator's decision.
8) Plaintiffs sought a modification of the arbitrator's award ($14,100 in damages) under Federal Arbitration Act, 9 U.S.C. § 10:
   a. Argued the arbitrator exceeded their powers in that the original arbitration agreement was meant to be an "all or nothing" determination, whether the damage was caused by lightning or not.
9) Both parties moved for summary judgment:

a. Neither party authenticated the arbitration agreement, award, and copies of e-mail correspondence between counsel, attached as exhibits to parties' motions for summary judgment, ostensibly supplied as extrinsic evidence of the parties' intent with regard to the scope of the arbitration agreement.

ISSUE:

I. **Meta issue**: What steps must be taken to ensure that electronically stored information (ESI) is authenticated and in turn admissible?
II. Did the arbitrator exceed his authority under the arbitration agreement thereby justifying entry of summary judgment?

HOLDING:

I. Whenever ESI is offered as evidence, the following five steps must be met for its admissibility:
   1) Is the ESI **relevant** as determined by **FRE 401** (hereinafter "**Rule 401**")?
   2) If relevant under **Rule 401**, is it **authentic** as required by **Rule 901(a)**?
   3) If the ESI is offered for its substantive truth, is it **hearsay** as defined by **Rule 801**, and if so, is it covered by an applicable exception (**Rules 803, 804 and 807**)?
   4) Is the form of the ESI that is being offered as evidence an **original** or **duplicate** under the original writing rule, of if not, is there admissible secondary evidence to prove the content of the ESI (**Rules 1001–1008**)?
   5) Is the probative value of the ESI substantially outweighed by the danger **of unfair prejudice** or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance?
II. Failure of both parties to authenticate electronically stored information (ESI) introduced as evidence to show the terms of the arbitration agreement precluded any entry of summary judgment.

ANALYSIS:

I. In the interest of the bar, the court provided a detailed outline of challenges associated with the admissibility of electronic evidence.

STEP 1: IS THE ESI RELEVANT? (RULES 401,402, AND 105)

I. To be relevant, evidence is sufficient if it has "any tendency" to prove or disprove a consequential fact in litigation.
II. Once evidence has been shown to be relevant, it presumptively is admissible unless the Constitution, a statute, rule of evidence or procedure, or case law requires that it be excluded.
III. The function of all the rules of evidence other than **Rule 401** is to help determine whether evidence which in fact is relevant should nonetheless be excluded.
IV. Here, the email and other evidence attached to party's motions for summary judgment were relevant, but were not authenticated.

STEP 2: IS THE ESI AUTHENTIC? (RULES 901-902;201)

I. Ensures evidence is trustworthy
II. Requires only a prima facie showing of genuineness and leaves it to the jury to decide the true authenticity and probative value of the evidence.
III. Factors to consider in evaluating the reliability of computer-based evidence include:
    1) error rates in data inputting, and security of the systems.
IV. What's required to authenticate computer-based evidence can depend on:
    1) Quality and completeness of the data input;
    2) Complexity of the computer processing;
    3) Routineness of the computer operation;
    4) Ability to test and verify results of the computer processing.

i. **Rule 901** sets out thresholds to test reliability

RULE 901(B) PROVIDES EXAMPLES OF HOW AUTHENTICATION MAY BE ACCOMPLISHED:

901(b) (1)	• "Knowledge" is liberally construed o No requirement that the authenticating witness have personal knowledge of the making of a particular exhibit if he or she has personal knowledge of how that type of exhibit is routinely made
901(b) (3)	• Allows authentication or identification by "comparison by the trier of fact or by expert witnesses with specimens which have been authenticated by any means allowable by **Rule 901 or 902,** as well as by using other exhibits already admitted into evidence at trial, or admitted into evidence by judicial notice under **Rule 201**
901(b) (4)	• Permits exhibits to be authenticated or identified by "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." o *Examples*: metadata (data about data) and the use of "hash values" or "hash marks" (unique numerical identifiers) when making documents
901(b) (7)	• Permits authentication by: "Public records or reports" as "public records are regularly authenticated by proof of custody, without more" • Need only show that the office from which the records were taken is the legal custodian of the records. o *Examples*: tax returns, weather bureau records, military records, social security records, INS records, VA records, official records from federal, state, and local agencies, judicial records, etc.
901(b) (9)	• Authorizes authentication by "evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." • Situations where the accuracy of a result is dependent upon a process or system which produces it

ii. **Rule 902** provides methods by which documents, including ESI, may be authenticated without extrinsic evidence. Commonly called, "self-authentication."
iii. Because **Rule 104(b**) applies in such cases of self-authentication, the exhibit and the evidence challenging its authenticity goes to the jury, which ultimately determines whether it is authentic.
iv. All examples contained in **Rule 902** could be applicable to computerized records.

THREE PROVISIONS OF RULE 902 IN PARTICULAR HAVE BEEN RECOGNIZED BY COURTS TO SELF-AUTHENTICATE ELECTRONIC EVIDENCE:

902(5) (official publications)	• To be admissible, the proponent may also need to establish that the official record qualifies as a public record hearsay exception under **Rule 803(8)**
902(7) (trade inscriptions)	• Labels or tags affixed in the course of business require no authentication • Business e-mails often contain information showing the origin of the transmission and identifying the employer- company. o The identification marker alone may be sufficient to authenticate an e-mail under this rule
902(11) (certified domestic records of regularly conducted activity)	• Functional equivalent of testimony offered to authenticate a business record tendered under **Rule 803(6)** because the declaration permitted by **Rule 902(11)** serves the same purpose as authenticating testimony • Contains a notice provision, requiring the proponent to provide written notice of the intention to use the rule to all adverse parties

OTHER METHODS OF AUTHENTICATION:

v. **Rule 201**- Parties may request the court to take judicial notice of adjudicative facts needed to authenticate an electronic record that are either:
   a. generally known within 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
vi. **Fed. R. Civ. P. 36** made applicable by Fed. R. Bankr. P. 7036- Permits a party to request that his or her opponent admit the genuineness of documents.
vii. **Fed. R. Civ. P. 26(a)(3)(B)** made applicable by Fed. R. Bankr. P. 7026– After a Party makes his/her pretrial disclosures of documents and exhibits, the opposing party has **14 days** to raise authenticity objections, otherwise, they are waived.

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STEP 3: IS THE ESI HEARSAY? (RULES 801-807)

I. To properly analyze hearsay issues there are **five separate questions** that must be answered:
   1) Does the evidence constitute a statement, as defined by **Rule 801(a)**?
   2) Was the statement made by a "declarant," as defined by **Rule 801(b)**?
   3) Is the statement being offered to prove the truth of its contents, as provided by **Rule 801(c)**? If so,
   4) Is the statement excluded from the definition of hearsay by **Rule 801(d)**? and
   5) If the statement is hearsay, is it covered by one of the exceptions identified at **Rules 803**, **804** or **807**?

STEP 4: IS THE ESI AN ORIGINAL OR DUPLICATE UNDER THE ORIGINAL WRITING RULE? (RULES 1001–1008)

I. Requires an original or duplicate original to prove the contents of a writing, recording or photograph unless secondary evidence is deemed acceptable.

Rule 1001	• Contains the key definitions that animate the rule: "original," "duplicate," "writing," "recording," and "photograph."
Rule 1002	• **Determines whether the original writing rule applies at all** • Requires the original to prove the contents of a writing, recording or photograph, except as excused by the remaining rules in Article X of the rules of evidence
Rule 1003	• Provides that duplicates are co-extensively admissible as originals, unless there is a genuine issue as to the authenticity of the original, or the circumstances indicate that it would be unfair to admit a duplicate in lieu of an original.
Rule 1004	• Identifies situations when secondary evidence may be introduced instead of an original
Rule 1005	• Describes how to prove the contents of public records, since something other than the original must be used
Rule 1006	• Permits introduction of written or testimonial summaries of voluminous writings, recordings, or photographs, provided the original or duplicates from which the summaries were prepared were made available to the adverse party at a reasonable time in advance of trial for examination or copying. o Example of secondary evidence
Rule 1007	• Allows the proof of the contents of a writing, recording or photograph by the deposition or testimony of a party opponent, without having to account for the nonproduction of the original o Another example of secondary evidence
Rule 1008	• Specialized application of **Rule 104(b)**, and it allocates responsibility between the trial judge and the jury with respect to certain preliminary matters affecting the original writing rule • Identifies three issues that are questions for the jury:

	○ Whether the writing, recording or photograph ever existed in the first place; ○ Whether some other writing, recording, or photograph that is offered into evidence is in fact the original; and ○ Whether "other" (i.e., secondary) evidence of contents correctly reflects the content of the writing, recording or photograph

STEP 5: IS THE PROBATIVE VALUE OF THE ESI SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE? (RULE 403)

I. ''Unfair prejudice' within its context means an undue tendency to suggest the decision on an improper basis, commonly, though not necessarily an emotional one."

II. Courts are particularly likely to consider whether the admission of electronic evidence would be unduly prejudicial in the following circumstances:

a. When the evidence contains offensive or highly derogatory language that may provoke an emotional response.
b. When analyzing computer animations, to determine if there is a substantial risk that the jury may mistake them for the actual events in the litigation.
c. When considering the admissibility of summaries of voluminous electronic writings, recordings, or photographs under **Rule 1006.**
d. When there is concern as to the reliability or accuracy of the information that is contained within the electronic evidence.

III. This balance of factors is handled by the judge under **Rule 104(a).**

APPROACHES TO AUTHENTICATING COMMON FORMS OF ESI:

E-mail	Methods of Authentication: • By direct (content) or circumstantial evidence (bearing of the sender's e-mail address) • Self-authentication through **Rule 902(7)** (trade inscriptions) • **901(b)(1)** (person with personal knowledge) • **901(b)(3)** (expert testimony or comparison with authenticated exemplar) • **901(b)(4)** (distinctive characteristics, including circumstantial evidence) • **902(11)** (certified copies of business record)
Website Postings	Methods of authentication: • **901(b)(1)** (witness with personal knowledge) • **901(b)(3)** (expert testimony) • **901(b)(4)** (distinctive characteristics) • **901(b)(7)** (public records) • **901(b)(9)** (system or process capable of producing a reliable result) • **902(5)** (official publications)

Text Messages and Chat Room Content	Methods of authentication: • **901(b)(1)** (witness with personal knowledge) and • **901(b)(4)** (circumstantial evidence of distinctive characteristics)
Computer Stored Records and Data	Methods of authentication: • **901(b)(1)** (witness with personal knowledge) • **901(b)(3)** (expert testimony) • **901(b)(4)** (distinctive characteristics) • **901(b)(9)** (system or process capable of producing a reliable result)
Computer Animation and Computer Simulations	Methods of authentication: • **901(b)(1)** (witness with personal knowledge) • **901(b)(3)** (expert witness) o Use of an expert witness to authenticate a computer simulation likely will also involve **Rule 702** and **703**.

Digital Photographs	Methods of authentication:
	• original digital images
	  o **901(b)(1)** (witness with personal knowledge)
	• digitally converted images
	  o **901(b)(1)** (witness with personal knowledge)
	  o **901(b)(9)** (system or process capable of producing a reliable result)
	• digitally enhanced images
	  o **901(b)(9)** (system or process capable of producing a reliable result)

CONCLUSION:

I. In this case the failure of counsel collectively to establish the authenticity of their exhibits, resolve potential hearsay issues, comply with the original writing rule, and demonstrate the absence of unfair prejudice rendered their exhibits inadmissible and resulted in the dismissal, without prejudice, of parties' cross motions for summary judgment.

II. Although each of these rules may not apply to every exhibit offered, as was the case here, each still must be considered in evaluating how to secure the admissibility of electronic evidence to support claims and defenses.

Judicial Notice (FRE 201)

Participants will learn what can be admitted by judicial notice and the risks of requesting that the judge take judicial notice of evidence.

I. Judicial Notice - Generally

A) **FRE 201 (a) Scope**. This rule governs judicial notice of an adjudicative fact only, not a legislative fact

B) **FRE 201(b): Kinds of facts that may be judicially noticed**. 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

C) **FRE 201(c): Taking Notice**. 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

D) **FRE 201(d): Timing**. The court may take judicial notice at any stage of the proceeding

E) **FRE 201(e): Opportunity to be heard**. 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

F) **FRE 201(f):** Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

G) **What is Judicial Notice and what purpose does it serve?**
   1) "Judicial notice is premised on the concept that certain facts . . . exist which a court may accept as true . . . without additional proof . . . It is an adjudicative device that substitutes the universal truth for the conventional method of introducing evidence." General Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1081 (7th Cir. 1997) (citations omitted); Amer. Prairie Constr. Co. v. Hoich, 560 F.3d 780, 797 (8th Cir. 2009) (same)

H) **When can a court take judicial notice?**
   1) "In order for a fact to be judicially noticed under [FRE] 201(b), indisputability is a prerequisite . . . the fact must be one that only an unreasonable person would insist on disputing." U.S. v. Jones, 29 F.3d 1549, 1553 (11th Cir. 1994)

2) "Caution must . . . be taken to avoid admitting evidence, through the use of judicial notice, in contravention of the relevance, foundation, and hearsay rules." Hoich, 560 F.3d at 797

II. Car/Boat kbb.com Valuation Hypo:

A) In a situation where a party is seeking to have the kbb.com valuation of an asset like a boat or car admitted into evidence...
   1) There are five steps for introducing electronic evidence:
      1. Relevance **FRE 401**
      2. Authenticity **FRE 901**
      3. Hearsay **FRE 801**, **802**, **803, 804**, **807**
      4. Form of Evidence **FRE 1001 – 1008**
      5. Probative value substantially outweighed by unfair prejudice or other factors **FRE 403**

B) **Is the valuation relevant under FRE 401?**
   1) Does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be? - most likely
   2) Arguments for relevancy:
      a) Attorneys could show the quality and completeness of the data inputs kbb.com uses. For example, showing how kbb.com considers all pertinent aspects of the vehicle such as VIN number, mileage, trim, amenities, color, etc. before making a valuation.

C) **Is the valuation authentic under FRE 901 or 902?**
   1) Can the proponent show that the evidence is what it purports to be?
   2) **FRE 901(b):** Lays out several examples of evidence that satisfies the authenticity requirement. Specific to this hypo...
      a) **901(b)(1)** Testimony of a Witness with Knowledge

D) **Does the valuation meet the requirements of FRE 201?**
   1) The court may judicially notice a fact that is not subject to reasonable dispute because it:
      a) is generally known within the trial court's territorial jurisdiction; or
      b) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned
         (i) Attorneys could touch on kbb.com's data collection process as discussed above and could also supply evidence showing that kbb.com is widely accepted and used by the automobile industry.

E) **Is the valuation hearsay?**
   1) Does the evidence constitute a statement, as defined by **FRE 801(a)**?
      a) yes
   2) Was the statement made by a "declarant," as defined by **FRE 801(b)**?
      a) yes
   3) Is the statement being offered to prove the truth of its contents, as provided by **FRE 801(c)**? If so,
      a) yes
   4) Is the statement excluded from the definition of hearsay by **FRE 801(d)?**
      a) no
   5) Although the statement is hearsay, **FRE 802** provides an exception when one of the Federal Rules of Evidence provides for its admissibility. **FRE 201**, Judicial Notice is an exception to the hearsay rule.
   6) If the statement is not admissible pursuant to Judicial Notice, potentially one of the exceptions identified at **FRE 803, 804** or **807** apply.
      a) **FRE (803)(17) Market Reports and Similar Commercial Publications**.
      b) **FRE (803)(18) Statements in Learned Treatises, Periodicals, or Pamphlets**.
      c) **FRE 804 Unavailable declarant.**
      d) **FRE 807 Residual Exception.**

F) **Does the original writing rule apply?**
   1) **FRE 1001(d)** For electronically stored information, "*original*" means any printout — or other output readable by sight — if it accurately reflects the information.
   2) **FRE 1002**. Requirement of the Original
      a) An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.
         (i) kbb.com printout would satisfy

G) **Rule 403. More prejudicial than probative?**
   1) Is the probative value substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time or needlessly presenting cumulative evidence?
      a) Depends on the fact pattern

Impeaching a Witness

Participants will learn how to effectively impeach a witness using documentary evidence and/or prior inconsistent statements.

Fed. R. Evid. 607
Any party, including the party that called the witness, may attack the witness's credibility.

Fed. R. Evid. 613
(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.
(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

(PARTS OF) Fed. R. Evid. 801
(a) STATEMENT. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
…
(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is **inconsistent** with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is **consistent** with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;
(B) is one the party manifested that it adopted or believed to be true;…

Impeaching with prior inconsistent statements

- This is only effective when the prior statement is both 1) clearly inconsistent and 2) admissible.

1. Make the witness commit to the fact to be impeached. (Often it is a statement that they made on direct examination.)
2. Make the witness acknowledge the date, time, place, and if applicable, that they were under oath at the time of the prior inconsistent statement.
3. Confront the witness with the prior inconsistent statement by reading it verbatim.
    a. If the witness acknowledges that they made the prior inconsistent statement, congratulations, you successfully impeached the witness.
    b. If the witness denies they made the prior inconsistent statement or reply that they do not remember whether they made the inconsistent statement, then show the inconsistent statement to opposing counsel and move to introduce it, or wait to introduce the inconsistent statement through another witness. Congratulations, you successfully impeached the witness.

Some pointers.

- Ask leading questions, each with one only one fact, that require a yes or no answer. If the witness is trying not to answer yes or no, repeat your question until they answer yes or no;
- Listen carefully to the testimony.
- Do not let the witness explain why they have contradicted themselves. If, after you've impeached them, they try to explain, put your hand up and say, thank you, you've answered the question. Move on to a new line of questions or end your cross examination.

Faculty

Hon. Heather Zubke Cooper is the Chief U.S. Bankruptcy Judge for the District of Vermont in Rutland. Prior to her appointment, she was a partner at Facey Goss & McPhee, P.C., a Vermont-based law firm. Judge Cooper has more than 20 years of experience in the financial and restructuring industry, having represented individual and corporate debtors and creditors in loan workouts and restructurings, liquidations, foreclosures, litigation, seizures and receiverships. She previously clerked for former bankruptcy judge Colleen A. Brown and practiced with Murphy & King, P.C. and Dunn, Kacal, Adams, Pappas & Law, P.C. Before entering private practice, Judge Cooper served as briefing attorney to Justice David L. Richards of the Texas Court of Appeals, Second District. She received her B.A. from the University of Houston in 1993 and her J.D. *magna cum laude* from South Texas College of Law in 1998.

Jonathan M. Horne is a partner with Murtha Cullina in Boston and a member of the firm's Litigation Department and Bankruptcy and Creditors' Rights Group. In his bankruptcy practice, he represents businesses and individuals in all aspects of the bankruptcy process. He also represents committees, trustees and debtors in connection with commercial bankruptcy and insolvency matters, including initiating and defending bankruptcy litigation, involuntary bankruptcy proceedings, state court receiverships, and advising and negotiating in connection with out-of-court workouts and forbearance agreements. In his litigation practice, Mr. Horne represents clients' interests in a wide range of commercial and business disputes, including D&O fiduciary litigation and complex contract and construction disputes in both state and federal court. He also represents clients in ERISA benefit claims with a focus on representing insurance companies in medical benefit claim cases. Mr. Horne has been recognized as a Rising Star by *Massachusetts Super Lawyers* since 2016. He is a member of ABI and is admitted to practice in Massachusetts and New York. Mr. Horne received his B.A. from Wabash College and his J.D. from St. John's University School of Law.

Hon. Elizabeth D. Katz is a U.S. Bankruptcy Judge for the District of Massachusetts in Springfield, appointed on March 13, 2017, and assigned to the Western and Central Divisions. On April 17, 2018, she was appointed to the First Circuit Bankruptcy Appellate Panel. From 1995-2007, Judge Katz was an assistant district attorney for the Northwestern District Attorney's Office, and she was chief of the District Court Prosecutors from 2000-07. She also was an associate at the firm of Katz, Argenio and Powers, PC from 2007-08 and later became an associate at the Ostrander Law Office from 2008-13, where she concentrated her practice on bankruptcy law. At Ostrander Law Office, she represented a chapter 7 trustee in adversary proceedings, counseled individuals and businesses in financial distress, and represented clients in bankruptcy cases. In 2013, she formed and operated The Law Office of Elizabeth D. Katz, focusing on criminal defense and bankruptcy law. Immediately prior to her appointment, she had been a founding partner at Rescia, Katz & Shear, LLP since 2015. An active member of the Hampshire County, Hampden County and Massachusetts Bar Associations, Judge Katz served as president of the Hampshire County Bar Association from 2012-14. She also was co-chair of both the Massachusetts Bar Association's Western Massachusetts Bankruptcy Symposium and the Western Division of the M. Ellen Carpenter Financial Literacy Program. In 2016, Judge Katz was awarded the Massachusetts Bar Association's Community Service Award. In addition, she has been a frequent panelist and lecturer on the topics of both criminal and bankruptcy law. Judge Katz

received her undergraduate degree from the University of Vermont in 1991 and her J.D. from Boston University School of Law, where she received the Edward F. Hennessey Award in 1994.

Kate E. Nicholson is the sole shareholder of Nicholson, P.C. in Cambridge, Mass., where she specializes in representing individuals, small businesses and trustees in all variety of bankruptcy matters. She is a member of ABI, for which she served on the Chapter 7 Committee of its Commission on Consumer Bankruptcy, and is a member of the Boston Bar Association, where she is serving as co-chair of the BBA Bankruptcy Section's Public Service Committee. Ms. Nicholson was named one of ABI's "40 Under 40" in 2017, and she was named a "Rising Star" by Thomson Reuters each year from 2014-19 and in *Super Lawyers* in 2021. She has presented on a wide range of bankruptcy issues and has written articles and educational materials for the Norton Annual Survey of Bankruptcy Law, the Boston Bar Association, Massachusetts Continuing Legal Education and ABI. She also taught legal research and writing at Boston University School of Law for several years. Ms. Nicholson received her B.A. from the University of Pittsburgh and her J.D. from Harvard Law School.