You Be the Judge: Evidence and the Consumer Practitioner

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Join our networks to expand yours:

You Be the Judge: Evidence and the Consumer Practitioner

with

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and

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Contents

I. Why the Rules of Evidence Are Important in Bankruptcy Court

A. At the risk of stating the obvious, they are rules and not suggestions.

1. Rule 101 says that the Rules of Evidence (the Rules) govern *proceedings* in the courts, including the bankruptcy court. *See* Fed. R. Bankr. P. 9017.

2. The Rules are not divided into one set for jury trials and another for bench proceedings.

a. Yet there are frequent references to the "relaxed Rules of Evidence in bench-tried matters."

b. The most frequently stated justification for this asymmetric enforcement of the Rules is that, unlike jurors, judges are trained to detect improper evidence and can filter it out when they evaluate all of the evidence and arrive at a decision on the merits.

B. The Rules help ensure fairness.

1. One side may have prepared for the hearing, while the other side did not.

2. If judges let everything in and don't enforce the Rules, they reward sloppy practice, potentially to the detriment of the better-prepared party.

C. The Rules decrease the chances that judges will muddle the record and increase its size by allowing in matters that should not be admitted.

II. Getting Documents Into Evidence

A. Relevance is one of the most basic concepts undergirding the Rules.

1. In order to be admitted in a court proceeding, evidence must - first and foremost - be relevant to the subject of that proceeding.

a. If the evidence is not relevant, it does not matter whether it falls within a hearsay exception, or qualifies as expert testimony, or meets the criteria of any other Rules.

b. If it is not relevant, then it is not admissible.

c. See Rule 402.

2. To be "relevant," the evidence must have a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.

    a. Evidence may be "true," "reliable," and "accurate," but if it doesn't tend to make the existence of some fact that is of consequence to the judge's determination of the action any more or less probable, then it is not admissible.

    b. See Rule 401.

3. Even if a judge determines that a piece of evidence is relevant, Rule 403 gives the judge the discretion to exclude it if "its probative value is substantially outweighed by the danger of unfair prejudice" or "confusion of the issues," or if it would result in undue delay, a waste of time, or needless presentation of cumulative evidence.

    a. Note that Rule 403 talks about evidence "whose probative value is *substantially* outweighed by the danger of *unfair* prejudice."

    b. A common objection to the admission of evidence is that it is "prejudicial."

    c. Almost all evidence is "prejudicial" to someone, or the opposing party would not be trying to get it admitted.

    d. The fact that evidence is "prejudicial" is not grounds for the judge to exclude it; rather, the judge must determine whether the danger of *unfair* prejudice *substantially* outweighs the probative value of the evidence.

III. The Potential Effect of Pre-Hearing Orders

A. A bankruptcy court may appropriately exclude evidence for failure to comply with a pre-trial or scheduling order.

1. Rule 611(a) permits courts to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth, [and] (2) avoid wasting time . . . ."

2. For example, in the Western District of Wisconsin, the Bankruptcy Court's standard pre-hearing order requires parties to file an exhibit and witness list and proposed exhibits. Parties must then file any objections to (1) authenticity of the proposed exhibits and (2) competency and

qualification of proposed witnesses, or such objections will be deemed waived.

3. Other pretrial orders may require written declarations in lieu of direct oral evidence, as in *In re Gergely*, 110 F.3d 1448, 1452 (9th Cir. 1997), or the exchanging of lists of witnesses and exhibits by a certain date. *In re Hasan,* 287 B.R. 308, 310 (Bankr. D. Conn. 2002); *see In re Edwards*, 501 B.R. 666, 682 (Bankr. N.D. Tex. 2013) (ignoring scheduling order resulted in exclusion of evidence and certain oral testimony).

B. Failure to comply with pre-trial orders can also preclude presentation of legal theories.

1. For example, a failure to comply with an order requiring provision of "a thorough and complete legal argument, with citations to relevant legal authorities, supporting the party's contentions on the merits" has been deemed a waiver of theories alleged in a complaint. *See In re Miszkowicz*, 513 B.R. 553 (N.D. Ill. 2014).

IV. Admissibility of Tax Records

A. Rule 803(8) excepts "public records" from the rule against hearsay "regardless of whether the declarant is available as a witness." The rule applies to:

> A record or statement of a public office if:
>
> (A) it sets out:
>
> (i) the office's activities;
>
> (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
>
> (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
>
> (B) *the opponent does not show* that the source of information or other circumstances indicate a lack of trustworthiness.

Rule 803(8) (emphasis added).

B. Tax assessments may be "appropriately admitted under the agency records exception to the hearsay rule, Fed. R. Evid. 803(8), which holds such documents sufficiently reliable because they represent the outcome of a governmental

process and were relied upon for non-judicial purposes." *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 541 (4th Cir. 2007); *see also, United States HUD v. Cost Control Mktg. & Sales Mgmt.*, 64 F.3d 920 (4th Cir. 1995). The rule "is designed to obviate the constant attendance of public officers in court to prove routine matters." *Gilbert v. Gulf Oil Corp.*, 175 F.2d 705, 710 (4th Cir. 1949). "803(8) does not require any foundational testimony." *United States v. Doyle*, 130 F.3d 523, 546 (2d Cir. 1997) (quoting *United States v. Regner*, 677 F.2d 754, 761 (9th Cir. 1982)). However, "[a]dmissibility under Fed. R. Evid. 803(8) is but permissive and not mandatory, with admissibility or non-admissibility resting within the discretion of the trial court." *United States v. Gray*, 852 F.2d 136, 139 (4th Cir. 1988).

V. Authentication and Identification

A. Rule 901 is the rule on authentication and requires the proponent to "produce evidence sufficient to support a finding that the item is what the proponent claims it is." Whether authentication is sufficient is a matter of the trial court's discretion.

B. The Rules provides a non-exclusive list of ways to authenticate evidence, as well as a list of certain types of evidence that are "self-authenticating."

C. Examples of authentication methods:

1. Testimony of a witness with knowledge. Rule 901(b)(1).

2. Circumstantial evidence, or "Distinctive Characteristics and the Like," including "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Rule 901(b)(4).

3. Public records. Rule 901(b)(7) permits authentication through evidence about public records that:

   a. the document was recorded or filed in a public office as authorized by law

   b. the document is from the office where documents of the sort are kept.

D. Rule 902 provides a list of types of evidence that are self-authenticating. Particularly relevant in the bankruptcy context are records of a regularly conducted activity.

1. The foundation for admission of business records is normally made by the "custodian" of the records or some other person who knows how the business keeps its records.

    a. It is not necessary that the custodian be the person who actually assembled the records.

    b. Under Rule 902(11), Certified Domestic Records of Regularly Conducted Activity, and Rule 902(12), Certified Foreign Records of Regularly Conducted Activity, the party offering a business record may provide the necessary foundation for admission through certification satisfying the rule's requirements, which refer back to Rule 803(6).

    c. Rule 902(12) is especially helpful when the custodian is in a foreign country and would otherwise have to travel to the court to lay the foundation.

VI. Judicial Notice

A. Judicial notice is a concept that can be misapplied or over used.

1. Lawyers frequently ask judges to take judicial notice of this or that fact.

    a. Judicial notice is not a shortcut for getting evidence admitted to the exclusion of laying a foundation.

    b. Judges cannot take judicial notice of just any piece of evidence.

2. Rule 201 states that in order for a judge to take judicial notice of a fact, it has to be a fact that is not subject to reasonable dispute.

    a. The fact could be generally known within the territorial jurisdiction, such as that a particular restaurant is located on a particular corner in the town where the judge sits.

    b. Or the fact could be accurately and readily determined by sources whose accuracy cannot be reasonably questioned, such as the sun rises in the east and sets in the west.

3. A judge *may* take judicial notice of a fact, whether or not a party asks, if the judge determines that it meets the criteria set out in Rule 201.

4. A judge *must* take judicial notice of a fact if a party requests it and provides the information necessary to show that the fact meets Rule 201's

criteria. However, the judge must give an objecting party the opportunity to be heard if the objecting party makes a timely request to be heard.

5. Caution should also be exercised when asking the judge to take judicial notice of "the schedules and statements in the debtor's court file."

   a. Judicial notice of the fact that a debtor filed Schedules A through J, and filed them on a particular date, and that the schedules contain certain information, can be taken.

   b. But judicial notice of the fact that the debtor filed a Schedule I that indicates he makes $2,000 per month at his job does not mean that the debtor has proven that he does, in fact, make $2,000 a month at his job.

   c. All it means is that the judge has officially observed what anyone else who wished to do so could observe - that there is a piece of paper on file that says the debtor earns $2,000 per month, and that the parties do not have to waste time litigating whether there is a piece of paper on file that says so.

VII. Schedules as Binding Admissions (Statements of Opposing Party)

A. Rule 801(d)(2) contains an important exception to the hearsay definition: admissions by a party-opponent are not hearsay.

   1. Rule 801(d)(2) tends to be confusing for two reasons.

      a. First, an "admission of a party-opponent" for the purposes of Rule 801(d)(2) isn't an "admission" as that term is commonly used in non-legal contexts. In other words, an "admission of a party-opponent" does not have to be, in substance, a declarant's concession of something he or she would rather not concede.

      b. Second, admissions of party-opponents - which are not hearsay at all, can be confused with statements the declarant makes against his or her own interest, which are hearsay but are admissible under the Rule 804(b)(3) exception if the declarant is unavailable.

   2. What is an "admission of a party-opponent"?

a. It is a statement made by one party (or adopted by that party) that the party's opponent offers against the declaring party - that's it.

b. If the party made the statement, and his or her opponent is offering it against him or her, it is an admission of a party-opponent, and it is not hearsay.

c. It need not be against the declarant's interest.

d. It need not even be damaging in any way.

e. It need only be made by a party and offered by that party's opponent against the party.

3. Are the "statements" that the debtor makes on his or her schedules "admissions of a party-opponent"?

a. They are if the debtor's opponents offer them against the debtor at a trial or at a hearing.

b. The answer usually lies in the context - who made the statement, and who is seeking to admit it against whom.

B. Bankruptcy Rules and Case Law:

"A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed." Fed. R. Bankr. P. 1009(a). However, "statements contained in the schedules of a bankruptcy debtor can constitute binding admissions of the factual matters set forth in the schedules, especially when they have not been amended." Russell, *Bankruptcy Evidence Manual*, §§ 801.13, 801.22 (2011-12 ed.). *In re Desert Vill. Ltd. P'ship*, 337 B.R. 317 (Bankr. N.D. Ohio 2006) ("While the debtor is entitled to amend its schedules, the statements originally set forth therein carry strong evidentiary weight").

VIII. Owner Testimony on Value

A. In addition to the confusion generated by rules that govern whether evidence is admissible, confusion arises about who may provide certain kinds of evidence.

B. Parties often argue over whether a witness is an "expert" witness, and if it is determined that the witness is an expert, they often argue over the components and limitations of the expert witness's testimony.

1. But lay witnesses frequently testify in bankruptcy hearings and trials, and the rules governing lay witness testimony are often misunderstood.The rules governing when a lay witness may testify as to an opinion are particularly misunderstood.

C. Rule 701, Opinion Testimony by Lay Witnesses:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

D. Rule 701 does not bar a lay witness from testifying to his or her opinion, as some lawyers think; it simply limits a lay witness to giving opinions that are rationally based on his or her own perceptions, helpful in understanding his or her testimony, and not based on any kind of specialized knowledge.

E. In bankruptcy, questions about lay witness opinion testimony arise most frequently in two contexts.

1. First, a debtor offers an opinion about the value of something she owns, such as a home or a car, and the debtor is not a real estate or car valuation expert.

   a. The debtor can give an opinion about the value of her home or her car if the testimony meets the Rule 701 criteria.

   b. Often the debtor's opinion is not so much rationally based on her own perceptions as it is based on what her neighbor's house listed for in the paper, or what her realtor told her, or what she heard about housing costs at the Parent Teacher Organization meeting.

   c. Technically, an objection to lay witness opinion testimony that is based on these sources should be sustained.

   d. These opinions, however, often arise in the context of a bench trial or hearing. Rather than "striking" the debtor's opinion, a court may often allow the parties to argue as to the weight that the court should give such an opinion.

2. Second, a business owner offers his opinion as to the value of his business.

   a. The business owner is not a business valuation expert.

   b. But he can offer an opinion if the opinion meets the Rule 701 criteria.

F. Case Law:

"If the requirements of Rule 701 are met, then the general rule is that an owner of real property may give his or her opinion as to its value without having to qualify the owner as an expert. *E.g., Hidden Oaks v. City of Austin*, 138 F.3d 1036, 1051 (5th Cir.1998) ('[W]e adhere to the general rule that an owner [of real property] always may testify as to value, whether assessed as of the time of trial, or at some definitive point in the past.'); *In re Petrella*, 230 B.R. 829, 834 n.5 (Bankr. N.D. Ohio 1999) ('[A]n owner is competent to give his opinion as to the value of his property, often by stating the conclusion without stating a reason.')." *In re Deep River Warehouse, Inc.*, No. 04-52749, 2005 WL 1287987, at *10 n.7 (Bankr. M.D.N.C. Mar. 14, 2005). "[T]he owner of property is qualified by his ownership alone to testify as to its value." *LaCombe v. A-T-O, Inc.*, 679 F.2d 431, 433 (5th Cir. 1982). *See also*, *Glendale LLC v. AMCO Ins. Co.*, No. 3:11-CV-3-RJC-DCK, 2012 WL 3025122, at *1 (W.D.N.C. July 24, 2012); *United States v. Pritchett*, No. 5:09-CV-322-F, 2011 WL 197763, at n. 3 (E.D.N.C. Jan. 20, 2011). *See also United States v. 68.94 Acres of Land*, 918 F.2d 389, 397 (3d Cir. 1990) ("The Federal Rules of Evidence generally permit landowners to give opinion evidence as to the value of their land due to the special knowledge of property which is presumed to arise out of ownership.").

IX. Expert Witness Testimony

A. While the rules governing lay witness testimony may confuse some, the mere mention of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), will cause trial lawyers and some judges to cringe.

   1. This response is unwarranted.

   2. As the Committee notes to Rule 702 make clear, even after *Daubert*, rejection of expert testimony is the exception rather than the rule.

B. Rule 702 itself is very straightforward and does not distinguish between scientific expertise and other forms of expertise; it provides that

   1. if scientific, technical or other specialized knowledge will assist the trier of fact,

2. a witness qualified as an expert by

    a. knowledge,

    b. skill,

    c. experience,

    d. training, or

    e. education

3. may testify if

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

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

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

C. Much of the angst created by *Daubert* has to do with the nonexclusive checklist the opinion provides to assist the court in assessing the reliability of scientific expert testimony.

1. Most of the inquiries are more easily applied to purely scientific opinions.

2. The cases that have followed *Daubert* have made clear that a trial judge has a great deal of discretion in determining whether a particular expert's testimony is reliable.

3. The cases have also noted that the specific *Daubert* factors may not be particularly helpful in evaluating all types of experts.

4. The goal is to exclude expert testimony that is unreliable because

    a. the expert's methodology is merely speculative or untested,

    b. the underlying data are faulty,

    c. the "expert" lacks the knowledge or skill to apply a proven methodology, or

    d. for any other objective reason.

5. The question to be answered by the judge, acting as the *Daubert* "gatekeeper," is whether the party offering the expert has made a threshold showing that the expert's opinion is sufficiently reliable to be received into evidence; if the answer is "yes," the expert is qualified.

6. The judge, as the trier of fact, will determine what weight to give to the opinion in light of all the evidence in the case. The focus is on the reliability of the opinion as an opinion and not on the weight that the trier of fact will ultimately give to it.

7. One way to think of the judge's *Daubert* role in a bench trial is to liken it to the judge's role at summary judgment. If a reasonable trier of fact could find the facts in a manner consistent with the proponent's testimony, it doesn't matter whether the judge, as the ultimate trier of fact, is unpersuaded.

D. Although the *Daubert* "gatekeeping" function focuses on reliability rather than credibility, lawyers sometimes think that a *Daubert* hearing is necessary because they (or their experts) simply disagree with the conclusions of the other side's expert.

1. However, Rule 702 is not intended to provide an automatic challenge to the testimony of every expert.

2. At the gatekeeper stage, the fact that two experts reach different conclusions does not automatically disqualify either expert.

E. Below are some examples of Rule 702 issues that may arise in bankruptcy cases.

1. Suppose the proposed expert has been asked to opine about the value of the debtor's single-family home.

a. The expert has a high school education and has assisted buyers and sellers of homes for 25 years.

b. The expert's opinion probably should be admitted on the basis of his experience.

2. Suppose the proffered expert has a novel approach to valuation: he has a theory that the only factor relevant to valuation is the number of trees on the property.

a. He notes that this method has never failed him in his 25 years of experience.

b. This opinion probably should not be admitted.

3. Suppose the expert has the same qualifications but uses a more conventional approach to valuation.

a. An adverse party objects to the expert's testimony because the debtor's property is a luxury home and all of the expert's experience involves properties that sold for under $300,000.

b. Before ruling, the judge would probably need to know a little more about the differences between the under $300,000 market and luxury markets. If the methodology of valuation is the same, the judge probably will admit the testimony.

F. Most courts have held that a witness's qualifications should be assessed liberally and a judge should not exclude expert testimony on the basis of lack of a specific experience or educational background. The question is whether the expert is generally qualified, but the qualifications should relate to the issue on which the expert is testifying.

X. Chapter 13 Trustee's Right to Be Heard

A. 11 U.S.C. § 1302(b)(2) provides that the trustee shall -
"appear and be heard at any hearing that concerns -
(A) the value of property subject to a lien;
(B) confirmation of a plan; or
(C) modification of the plan after confirmation."

XI. Best Evidence Rule

A. Rule 1002 provides that an "original" writing, recording, or photograph is required *to prove the contents*.

1. Duplicates are admissible to the same extent as the original, "unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate." Rule 1003. A "duplicate" is "a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original." Rule 1001(e).

B. The main question that determines whether the rule applies is whether the proponent is trying to prove the contents of the document. The rule does not apply if the testimony is based on the witness's first-hand knowledge rather than knowledge of the contents of the document. *Waterloo Furniture Components, Ltd. v. Haworth, Inc.*, 467 F.3d 641, 648 (7th Cir. 2006). For example, to prove a

person is married, testimony of someone who attended the ceremony will suffice. The marriage license need not be introduced. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 578 (D. Md. 2007).

C. However, if a witness is basing testimony on knowledge acquired from the document, the original must be provided, though in many circumstances, a photocopy will be acceptable.

D. A proponent may use a summary to prove the content from "voluminous" sources. Rule 1006. The proponent must also have the originals or duplicates available to other parties and also to the court if the court so requests.

E. Rule 1004 governs the admissibility of the content of originals that have been lost, destroyed, or cannot be obtained through judicial process.

XII. Business Records Exception to the Hearsay Rule

A. Rule 803(6)'s records of regularly conducted activities exception has eight requirements:

1. a memo, report, record or data compilation in any form;

2. of acts, events, conditions, opinions, or diagnoses;

3. made at or near the time;

4. by or from information transmitted by a person with knowledge;

5. in the course of a regularly conducted business activity;

6. as part of the regular practice of the business;

7. by a custodian of the record or other qualified witness; and

8. for a "business," which is an institution, association, profession, occupation, or calling of any kind, whether or not conducted for profit.

B The business-records exception exists because organizations rely on reports to conduct their affairs. The assumption is that a business is motivated to ensure the accuracy of its records, thereby allaying the concerns generally associated with hearsay.

C. The first question to be asked in applying Rule 803(6) is not whether the document was found in the company's files, but what the document is used for.

1. For example, suppose the sales manager of a business keeps a record of competitors' prices over time in order to assess the impact of price competition in formulating the business's sales strategy.

2. Assuming that the other requirements of the rule are met, this record would probably qualify as a business record.

3. On the other hand, a one-time observation about a competitor's prices probably would not qualify.

D. There has been a lot of confusion about the requirement that the document must be made "by or from information transmitted by a person with knowledge."

1. Generally, if the source of the information recorded in the document can't be identified, Rule 803(6) is not available.

2. If a judge doesn't know who supplied the information, the judge can't tell whether the source had knowledge.

3. Similarly, a report in which the known author simply repeats what someone else told the author would not ordinarily qualify because the author lacked personal knowledge. That is why police accident reports are not admissible (unless, of course, the police officer actually witnessed the incident).

4. If, however, it is the regular practice of the business to verify the information contained in the report, it may meet the business-record exception even though the source of the information is unknown or is someone other than the person who prepared the document.

E. Also note Rule 803(7), which says that if a document qualifies as a business record, it may be used to show the absence of an entry in regularly kept records.

1. The document may be used to establish the nonoccurrence of an event or the nonexistence of a matter, if the event or matter is a type that is regularly recorded.

2. For example, a business record documenting all payments on an account may be used to show either that a payment was made (because it was recorded) or that it was not made (because it was not recorded).

XIII. Electronically-Stored Information (ESI)

A. The same Rules govern the admissibility of ESI. For a very thorough discussion of the application of the Rules to ESI, see *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 538 (D. Md. 2007).

1. The ESI must be relevant. Rule 401.

2. The proponent must show it is authentic. Rule 901(a).

3. If the ESI is offered for the truth of the matter asserted, it must not be inadmissible hearsay. Rules 803, 804, and 807.

4. The best evidence rule still applies. In the context of ESI, an "original" includes any printout "or other output readable by sight" that accurately reflects the information. Rule 1001(d).

B. Given the nature of ESI, authentication may be more difficult. Information stored electronically is easy to intentionally manipulate, and problems can arise through "operator error" as well as technical glitches with a system.

C. The goal is still always to show the item "is what the proponent claims it is." Methods of authentication will vary depending on the type of ESI (email, computer-stored records, text messages, etc.).

1. Common methods include:

[See chart on next page.]

Type of ESI	Common Methods of Authentication*
Email	Person with personal knowledge (901(b)(1)) Expert testimony or comparison to authenticated example (901(b)(3)) Distinctive characteristics/circumstantial information (901(b)(4)) Trade inscriptions (self-authenticating) (902(7)) Certified copies of business records (self-authenticating) (902(11))
Website Postings	Person with personal knowledge (901(b)(1)) Expert testimony or comparison to authenticated example (901(b)(3)) Distinctive characteristics/circumstantial information (901(b)(4)) Public records (901(b)(7)) System or process capable of producing reliable result (901(b)(9)) Official publications (902(5))
Text Messages	Person with personal knowledge (901(b)(1)) Distinctive characteristics/circumstantial information (901(b)(4))
Computer Stored Records and Data	Person with personal knowledge (901(b)(1)) Expert testimony or comparison to authenticated example (901(b)(3)) Distinctive characteristics/circumstantial information (901(b)(4)) System or process capable of producing reliable result (901(b)(9))

*as adapted from *Lorraine*, 241 F.R.D. at 554-62.

D. Testimony from the person drafting something presented as an exhibit satisfies the personal knowledge method in Rule 901(b)(1).

1. Testimony from a witness with knowledge of how the type of exhibit is routinely made will also suffice, as long as the witness also provides information about how the ESI is "acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so . . . ." *Lorraine*, 241 F.R.D. at 545.

E. The "distinctive characteristics" option is a flexible circumstantial option and includes "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." Rule 901(b)(4).

1. For example, the proponent of an email may point to facts in the email that only a particular person would have known to show the email came from that person.

2. A proponent may also point to content and circumstances indicating the exhibit was a reply to an authenticated document. For example, a printout of the email will contain the email addresses of the sender and recipient.

Of course, it is possible to gain unauthorized access to an email account, so testimony from a witness with knowledge of the sending or receipt may be necessary to authenticate the email.

F. Under Rule 901(b)(9), a proponent may use "evidence describing a process or system and showing that it produces an accurate result" to authenticate evidence. Although some courts may be willing to take judicial notice of the accuracy and reliability of a system, some may set the bar much higher and require proponents satisfy an eleven-step foundation for computer-stored records. *See In re Vee Vinhnee*, 336 B.R. 437 (B.A.P. 9th Cir. 2005).

G. Evidence may be authenticated by certain methods without the use of extrinsic evidence under Rule. 902. Common methods for self-authentication of ESI include:

1. Trade inscriptions under Rule 902(7), like a business email "showing the origin of the transmission and identifying the employer-company." *Lorraine*, 241 F.R.D. at 551-52 (citation omitted).

2. Certified domestic records under Rule 902(11).

09/01/2015

COMMON EVIDENTIARY ISSUES

You Be The Judge

- TRIAL EVIDENCE AND OBJECTIONS
  - Rule 101: The Rules of Evidence govern *proceedings* in the courts, including bankruptcy.
  - Are the Rules "relaxed" in bench trials?
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- REASONS TO OBJECT
  - Exclude improper evidence
  - Make a record on appeal
  - Prevent unfair treatment/tactics

Tactical: Will this matter come in anyway?
Necessary: Raise it or waive it

Jones' Dilemma

Joe Jones is a local real estate developer who buys, renovates and sells houses. He is currently renovating three single family homes in Patriot County. He also owns a cabin on a rural lake.

Reliable Bank is a long-time lender to Jones. It financed and has a mortgage all of his property.

Jones has a lending relationship with Sturdy Bank as well. It financed a large brick house on Temple Street and holds the first mortgage. Reliable holds a subordinate lien on the property. Jones considers Temple Street to be the "crown jewel" of his holdings.

The Dilemma Continues

Times are tough. Jones falls behind to both banks. Nothing is selling.

Jones hasn't made a payment to either bank in over two years.

Jones believes that if he can buy some time, he can sell the Temple Street house for enough to pay Sturdy Bank and have substantial money left over to pay down the Reliable debt. However, Jones really wants to use some of the excess proceeds over the payoff to Sturdy to fund the final renovations of the other houses Reliable Bank has a lien upon.

He floats this idea with his lenders, and they refuse. Each lender threatens foreclosure.

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Chapter 13

- Jones files Chapter 13 *pro se*. The valuations in his self-prepared schedules reflect he has no equity in any of the properties.

Reliable and Sturdy file motions for relief from stay alleging:

- lack of equity
- not necessary for effective reorganization
- lack of adequate protection.

The Hearing

- The day before the hearing, Jones hires Catherine Swanee, an experienced Chapter 13 attorney.
- Tax Assessment
  - During the hearing, Reliable's counsel presents copies of tax assessments for the properties.
  - The copies were not provided before trial.
  - There is an affidavit of the Patriot County Attorney stating the copies are exactly what the County Treasurer provided to him.

Question 1:

- Swanee objects based on lack of foundation or authentication.
- Would you admit these previously undisclosed documents?

Authentication and Identification

- Rule 901
  - Requires evidence to support a finding the matter is what the proponent claims
  - Common examples:
    - Testimony of a witness with knowledge
    - Public Records
- Rule 902
  - Self authentication. Extrinsic evidence of authenticity is not required. For example:
    - Domestic documents under seal or certified by public official
    - Commercial paper and related documents

Question 2:

- Assume the foundation and authentication objection is resolved.
- Are the tax assessments admissible as probative of the properties' values?

Debtor's Schedules

- Jones' schedules list the value of the Temple Street property as $150,000, the lake property is worth $75,000, and the remaining property as $250,000.
- Sturdy is owed $200,000
- Reliable is owed $350,000
- Reliable's counsel asks the court to take judicial notice of the debtor's schedules.

Question 3:

- Will you take judicial notice of the schedules?

Jones' Opinions

- Jones testifies the lake property is worth $150,000, and that he has done nothing to it since he purchased it in 2011.
- Jones believes that based on his own assessments of value and recent sales in the area, if he can just have some time and some of the cash from Temple Street its value will be $400,000 and everyone will prove to be over-secured and he can turn things around.
- He also testifies that the other properties are worth at least $300,000.

- Both lenders object to Jones' testimony, arguing hearsay and lack of qualification as an expert. The lenders also argue the debtor's schedules filed *pro se* are binding admissions as evidence of lack of equity.

Question 4:

- If the schedules are admitted, are the property values contained in the schedules binding on Jones?

- The Banks' lawyers also object to the testimony on the ground that Jones is not an expert.

Question 5:

- Do you permit Jones' testimony regarding value?

Question 6:

- If Jones moves to orally amend the values in the schedules, do you permit the amendment at hearing?

The Trustee's Position

- There are substantial unsecured creditors.
- The Trustee wants to participate and examine witnesses and present argument.
- The Trustee did not file any prehearing pleadings.

Question 7:

Should the Trustee be permitted to examine witnesses and present argument?

The Debt

- Reliable calls Ena D. Know (a loan officer) who offers a declaration to establish the amount of the debt.
- Swanee objects on the basis that her testimony is not the best evidence of the amount of the debt. She argues that the best evidence rule requires the actual bank records showing the loan balance offered.

Question 8:

- Do you admit the declaration and testimony?

Business Records

- Reliable offers Know's testimony regarding value.
  - She testifies she has an opinion based on her review of the file, her experience as a loan officer, and her review of an appraisal from two years ago.
- Swanee objects. She argues:
  - Know is not an expert and is not otherwise qualified to express an opinion.
  - The appraisal is hearsay and not relevant because it is outdated.

Question 9:

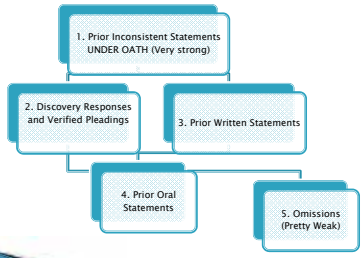
Do you permit Know to testify regarding her opinion of value?

Question 10:

- Do you permit admission of the appraisal?

Final Thoughts

Impeachment Hierarchy



TRIAL OBJECTIONS

- Common Objections
  - Relevance (FRE 403) (Waste of time/confusing)
  - Hearsay (FRE 802) (Not trustworthy)
  - Leading (FRE 611(c)) (Who's testifying?)
  - Speculation (FRE 602) (Asks witness to guess)
  - Argumentative (No question)
  - No Personal Knowledge (FRE 602)
  - No Foundation (How does he know?)
  - Compound Question (Which question to answer?)

Other Issues?

Thank You for Attending


-- The End --