STARTING OUT RIGHT:
EVIDENCE BASICS

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University of Texas School of Law
11th ANNUAL
CONSUMER BANKRUPTCY PRACTICE
July 23-24, 2015
Galveston, Texas

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BIOGRAPHICAL INFORMATION

Judge Davis received a Bachelor of Arts degree in economics and mathematics from the University of Minnesota in 1980. He graduated from the University of Virginia School of Law in 1983.

Prior to his judicial appointment in April of 2013, Judge Davis was a partner at Baker Botts for 19 years where he practiced corporate restructuring and bankruptcy law. Judge Davis was selected as a leader in his field -- bankruptcy and restructuring -- by Chambers USA and was repeatedly recognized as a Best Lawyer and Super Lawyer in Texas by those publications. He also served as a member of the Honorable Arthur L. Moller/David B. Foltz, Jr. American Inn of Court while in Houston. Judge Davis is currently serving as the Program Chair and a founding officer of the Honorable Larry E. Kelly American Inn of Court in Austin.

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I. Introduction

The law of evidence, in bankruptcy court, is contained in the Federal Rules of Evidence. But any meaningful discussion of evidence cannot end there, and for two reasons. First, much of what can and cannot be done in a courtroom is as much governed by the lore as by the law of evidence. Thus, some understanding of that lore is essential to effectively dealing with evidence and evidentiary objections in the courtroom. Second, evidence is usually dealt with on the fly, and amidst the activity taking place in the courtroom. Although evidentiary issues can, to some degree, be anticipated and prepared for in the quiet contemplation of the lawyer's office, making or meeting an evidentiary objection must generally be done on your feet in a reactive, and not a contemplative, environment.

For both these reasons, evidence is a particularly practical area of the law and is best understood as a part of the live courtroom setting. So, in addition to covering substantive aspects of evidence that frequently arise in bankruptcy, including judicial notice, and certain witness and document issues, this paper will also include "tips" that capture the more practical aspects—the lore—of evidence.

- **Practice Tip No. 1: Don't forget the roadmap! And the burden of proof!**

  Always have handy the "roadmap"—the list of the substantive elements that you have to prove to prevail in the trial or on the motion set for hearing. For instance, if you are prosecuting or defending a motion for relief from stay, know (and constantly remind yourself) that the movant must show either (1) cause, or that (2) the debtor has no equity in the property, AND the property is not necessary to an effective reorganization. And keep in mind that under Section 362(g), the party requesting relief has the burden of proof on the debtor's equity, but the party opposing relief has the burden on all other issues.

  Similarly, in a preference action, the trustee must always remember that he or she must establish each of the elements of section 547(b), and though the trustee enjoys a presumption on insolvency, if the transferee provides any

proof of solvency, the presumption is gone and trustee must then carry the burden of proof on that issue as well.

II. Judicial Notice Of "Schedules And Statements"

Rule 201 of the Federal Rules of Evidence allows courts to take judicial notice of 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." FED. R. EVID. 201(b). However, this rule only governs judicial notice of adjudicative facts. FED. R. EVID. 201(a). "Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case." 2 BARRY RUSSELL, BANKR. EVID. MANUAL § 201:2 (2014 ed.) (citing FED. R. EVID. 201 (1972 proposed rule) advisory committee's note). Some facts that courts have judicially noticed include:

- Speed limit on a given street at a given location. *United States v. Bradford*, 78 F.3d 1216, 1221 n. 8 (7th Cir. 1996).
- Prime rate of interest or LIBOR. *Transorient Navigators Co., S.A. v. M/S Southwind*, 788 F.2d 288, 293 (5th Cir. 1986); *Whitney Bank v. Point Clear Dev., L.L.C.*, No. 11-0657–WS–M, 2012. WL 2277597, at *1 n. 2 (S.D. Ala. 2012).
- Closing market prices for exchange listed securities. *In re USEC Secs. Litig.*, 190 F. Supp. 2d 808, 826 n. 14 (D. Md. 2002).
- Date and time of foreclosure sales. *Geibank Indus. Bank v. Martin (In re Martin)*, 97 B.R. 1013, 1020 (Bankr. N.D. Ill. 2006).
- Current mortgage rates. *Pylant v. Pylant (In re Pylant)*, 467 B.R. 246, 254 n. 9 (Bankr. M.D. Ga. 2012).
- Proceedings in other courts of record. *Antioch Co. Litig. Trust v. Hardman*, 438 B.R. 598, 610 n. 12 (S.D. Ohio 2010).

In the bankruptcy context, the court can take notice that schedules were filed, that they were filed on a given date, and that specific items of property were listed. *See Fla. Bd. of Trs. of Internal Improvement Trust Fund v. Charley Toppino & Sons, Inc.*, 514 F.2d 700, 704 (5th Cir. 1975) ("It is not error . . . for a court to take judicial notice of related proceedings and records in

cases before that court."); *In re Butts*, 350 B.R. 12, 14 n. 1 (Bankr. E.D. Pa 2006) ("The court may take judicial notice of the docket and the content of the bankruptcy schedules and other documents filed in the case for the purpose of ascertaining the timing and status of events in the case and facts not reasonably in dispute."), *aff'd*, No. 06-4594, 2007 WL 1722805, at *1 (E.D. Pa. June, 13 2007); *In re American Solar King Corp.*, 90 B.R. 808, 829 n. 41 (Bankr. W.D. Tex. 1988) (taking judicial notice of the proofs of claim and debtor's schedules filed in the proceeding).

However, a value listed on the schedules is likely not competent valuation evidence. Nor will the schedules suffice to prove insolvency, or establish liquidation values for section 547(b)(5) or the best interest of creditors test in section 1129(a)(7). *See In re Earl*, 140 B.R. 728, 730 n. 2 (Bankr. N.D. Ind. 1992) (noting that there is a "very crucial distinction between taking judicial notice of the fact that an entity has filed a document in the case, or in a related case, on a given date, i.e., the *existence* thereof, and the taking judicial notice of the truth or falsity [of the] *contents* of any such document for the purpose of making a finding of fact."). Nonetheless, information listed in the schedules could be valid as an estoppel or admission against the debtor on issues of valuation, venue or abstention. *See In re Jester*, 344 B.R. 331, 339-40 (E.D. Pa. 2006) (when deciding appropriate damages for violation of the automatic stay, the court took judicial notice that the debtor valued her vehicle at $100 in her schedules, and held her bound by that value as a judicial admission) and *In re Moore*, 269 B.R. 864, 869 n. 7 (Bankr. D. Idaho 2001) (treating statements contained within a debtor's schedules as admissions). Judicial notice can also be taken of omissions from a debtor's schedules and statement of financial affairs. *Job v. Calder (In re Calder)*, 907 F.2d 953, 955 n. 2 (10th Cir. 1990).

The party requesting judicial notice has the burden of persuading the trial judge that taking judicial notice of a particular fact is appropriate. To meet its burden a party must:

1. "[P]ersuade the court that the particular fact is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to a source 'whose accuracy cannot reasonably be questioned,' and

2. Must supply the court with the source material needed to determine whether the request is justified."

2 BARRY RUSSELL, BANKR. EVID. MANUAL § 201:3 (2014 ed.).

Rule 201(e) states that parties must be given notice and an opportunity to object to the court taking judicial notice of a particular fact. FED. R. EVID. 201(e). Although the request to be heard can (and sometimes must) be made after the court has already taken judicial notice, the request for hearing must be timely. A party may waive the right to object to the propriety of the court's taking judicial notice by failing to timely request a hearing in the bankruptcy court. *Hertzel v. Educ. Credit Mmgt. Corp. (In re Hertzel),* 329 B.R. 221, 233 (B.A.P. 6th Cir. 2005) (finding that a creditor waived its right to object to the bankruptcy court taking judicial notice by raising the issue for the first time on appeal) (citing *MacMillan Bloedel, Ltd. V. Flintkote Co.*, 760 F.2d 580, 587-88 (5th Cir. 1985) (suggesting that failure to request hearing after court took judicial notice waives matter on appeal)).

➢ Practice Tip No. 2: How to make objections

- Anticipate as much as possible objections you might make, or be forced to respond to
- Object in a timely manner
- Stand and speak up when objecting
- Don't object too often—object when it matters
- But do object often enough, and don't give up if you lose an objection once
- Explain your objection, but don't coach the witness
- Make sure the court rules on your objection

➢ **Practice Tip No. 3: Most common objections**

- Relevance
- Privileged communication
- Question is compound, confusing, ambiguous, argumentative, or misleading
- Asked and answered
- Question assumes facts not in evidence, or misstates the record
- Witness lacks personal knowledge
- Question calls for speculation
- Question on cross goes beyond the scope of direct, or on redirect, goes beyond the scope of cross
- Question calls for a narrative
- Move to strike when the witness responds to a question with a narrative, or provides an answer that does not respond to the question, or answers more than the question asked
- Hearsay
- Lacks foundation (could be anything, but most typically authentication, i.e., the document has not been shown to be what it purports to be)

III. Introducing Evidence Through Witnesses

Witnesses have a seemingly endless capacity to confound, confuse, frustrate, stymie and otherwise challenge lawyers. And then there are the witnesses called by the other side. Fortunately, the law and lore of evidence has developed in response to the challenges created by putting live, human beings on the stand, and so knowing that law and lore can give the lawyer some tools to address those challenges.

A. Owner's opinion of value

Under Rule 701, lay opinions are permitted, but are limited to those (a) rationally based on the witness's perception, and (b) helpful to understanding the witness's testimony or to determining a fact in issue. FED. R. EVID. 701(a-b). The opinion cannot be based on scientific, technical or other specialized knowledge. FED. R. EVID. 701(c). Before testifying, the lay witness must first lay a foundation as to his personal knowledge of the matter. FED. R. EVID. 602. Generally, "the opinion of a lay witness is helpful (1) when an expression of the witness's

personal knowledge can be conveyed in no other form, (2) where an accurate total impression was formed by a witness who is unable to account for all the details upon which it was based, or (3) most importantly, where an accounting of the details alone cannot accurately convey the total impression received by the witness." 2 BARRY RUSSELL, BANKR. EVID. MANUAL § 701:1 (2014 ed.).

Courts, including the Fifth Circuit, have generally held that an owner is competent to give opinion testimony on the value of property. *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 698 (5th Cir. 1975). *See also United States v. 329.73 Acres of Land, Situated in Grenada and Yalobusha Counties, State of Miss.*, 666 F.2d 281, 284 (5th Cir. 1982) (holding "the opinion testimony of a landowner as to the value of his land is admissible without further qualification…Such testimony is admitted because of the presumption of special knowledge that arises out of ownership of the land.") (citing *United States v. Sowards*, 370 F.2d 87, 92 (10th Cir. 1966)). Texas bankruptcy courts have also deemed owners qualified to testify on the value of their real and personal property. *In re Presto*, 376 B.R. 554, 573 (Bankr. S.D. Tex. 2007) and *Johnson v. Wells Fargo Bank, NA*, 2014 WL 667383 at *1 (N.D. Tex. Feb. 20, 2014) (citing *United States v. 329.73 Acres of Land*, 666 F.2d at 284).

Notwithstanding an owner's ability to testify as to the value of his property, such testimony will often be given little weight because it is not based on expertise. *Compare S. Cent. Livestock Dealers v. Sec. State Bank of Hedley*, 614 F.2d 1056, 1061-62 (5th Cir. 1980) (financial officer of feedlot could opine on value just as an owner of a business could opine on the value of a business); *with In re Meeks*, 349 B.R. 19, 22 (Bankr. E.D. Cal. 2006) (allowing the debtors to testify as to the value of their residence, but giving the testimony little weight). As with other testimony from lay witnesses, the testimony must be grounded not in the language of

opinion, but rather in the language of perception. Thus, the most compelling lay testimony as to value will include specific details within the personal knowledge of the witness, such as the age and condition of the property in question. Details about the state of repair and working condition of a car would be helpful, as would facts about work done to a house. If the debtor also happens to be an expert, his testimony could be allowed under Rule 702, instead of Rule 701, and given greater weight. FED. R. EVID. 701, 702. For example, a debtor who gives his opinion on the value of his property and is a real estate broker might qualify to testify as an expert. 2 BARRY RUSSELL, BANKR. EVID. MANUAL § 701:2 (2014 ed.).

> ➢ **Practice Tip No. 4: When to lead on direct**
>
> The general rule is that lawyers should ask non-leading questions on direct. In addition, non-leading questions make the witness's testimony much more compelling. Judges pay particular attention to what witnesses actually say, and "Yes, no, no, yes, and no" does not make for compelling testimony. But in each of the following situations it is generally considered proper to ask a leading question on direct:
>
> - When addressing preliminary matters, undisputed or inconsequential facts, or when introducing new matters (signposts)
> - When the witness forgets (more on this later)
> - When questioning the adverse party on direct
> - When the witness is hostile, reluctant, or has difficulty communicating
> - When the witness is being asked to contradict statements by another witness

B. Hearsay

Hearsay is not admissible, with exceptions of course. FED. R. EVID. 802. Hearsay is an out of court statement offered for the truth of the matter asserted. FED. R. EVID. 801(c). If the statement is offered for any other reason, the statement is admissible, but only for that reason. *Morrison v. W. Builders of Amarillo, Inc. (In re Morrison)*, 555 F.3d 473, 482-83 (5th Cir. 2009) (finding that an out of court statement was not hearsay because it was not offered for the truth, but offered to show knowledge of the statement); *Lentz ex rel. CDP Corp., Inc. v. Cahaba*

Disaster Relief, LLC and Equip. Leasing (In re CDP Corp., Inc.) 462 B.R. 615, 636-37 (Bankr. S.D. Miss. 2011) (finding that emails between the chapter 7 trustee and agents of parties were non-hearsay because they were not offered for the truth, but to show the parties' knowledge of pertinent facts). If the matter asserted in the statement is the only evidence available on that point, and the statement has been admitted, but for another purpose, the party bearing the burden of proof on that issue will lose. *Eisenberg v. United States*, 273 F.2d 127, 130 (5th Cir. 1959) (citing *United States v. Biener*, 52 F. Supp. 54, 56 (1943)). The most common "exceptions" to the hearsay rule (which are actually defined as not hearsay under the Federal Rules of Evidence) are statements by a party opponent, Rule 801(d)(2), and a witness's prior inconsistent statement, Rule 801(d)(1). FED. R. EVID. 801(d)(1-2). Exceptions to the hearsay rule that apply to documents are discussed below.

C. When Declarant Unavailable—Former Testimony

Rule 804(b)(1) contains an exception to the hearsay rule which allows for the admission of former testimony that: (1) was given as a witness at a trial, hearing, or lawful deposition during the current or a different proceeding; and (2) is now offered against a party who had, or whose predecessor in interest (in a civil case), had an opportunity and similar motive to develop the testimony by direct, cross-, or redirect examination. FED. R. EVID. 804(b)(1). The requirement that the party or predecessor in interest possess an opportunity and a similar motive to develop the testimony is intended to make sure that there was an adequate opportunity to develop the witness's testimony at the time the testimony was given. 30C MICHAEL H. GRAHAM, FEDERAL PRAC. & PROC. EVID. §7073 (2014 ed.). This limitation is particularly important in bankruptcy cases, where a party's allegiances and positions can change as the dynamics of the case change. *See Fed. Sav. & Loan Ins. Corp. ex rel. Am. Sav. & Loan. Ass'n v. Craig ex rel.*

Crabtree (In re Crabtree), 90 B.R. 871, 876-78 (Bankr. E.D. Tenn. 1988) (debtor testimony from 341 hearing inadmissible in adversary proceeding because movant had not asserted a claim against the defendants at the time of the testimony).

D. Impeachment

You must have a good faith basis for an impeaching question. Also, if the witness denies the impeaching material, you are then faced with the question of whether you will be able to use intrinsic evidence to prove up the impeaching material. If the impeaching material is germane to the issues in the hearing (called "non-collateral"), then you can prove up the impeaching material. If the material is not germane to the issues in the hearing (called "collateral"), then you are stuck with the witness's denial. *See* THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 257-258 (3d ed. 1992).

By far the most common form of impeachment used in bankruptcy court is the use of a prior inconsistent statement, usually one given in a deposition. Say the witness testifies at trial that a particular day was a sunny day. But when deposed a month earlier, the witness claimed it was raining on the day in question. The cross examining lawyer will first get the witness to commit to the sunny day story. Then, he or she will ask the witness to recall the circumstances of the deposition, particularly the fact that the witness swore at the deposition to tell the truth. Then, the examining attorney will call opposing counsel's attention to the page and line numbers of the deposition where the witness said it was raining, read the statements from the deposition, and then ask if the witness remembers the questions and answers. At this point the witness is impeached. If the witness is a party, the prior statement is admissible under Rule 801(d)(2). FED. R. EVID. 801(d)(2). If the witness is not a party, the statement can be admitted, but the

witness must have an opportunity to explain or deny the statement, and opposing counsel may examine the witness about the statement. FED. R. EVID. 613(b).

Rule 607 makes clear that you can impeach your own witness. FED. R. EVID. 607. You might first want to try to refresh your witness's recollection (see Practice Tip No. 5 below), but if your witness insists on an incorrect memory, you may need to impeach.

Finally, any debtors' lawyers wondering whether to go to the time and expense of seeking discovery from the lender should read *First Nat'l Bank of Durango v. Woods (In re Woods)*, 465 B.R. 196 (B.A.P. 10th Cir. 2012) *vacated on other grounds*, 743 F.3d 689 (10th Cir. 2014). The *Woods* court found that an appraiser called by a bank at the confirmation hearing could be impeached by prior, higher appraisals found in the bank's file, and the prepetition appraisals were party admissions under Rule 801(d)(2)(D)). *Id*. at 204-05.

➢ **Practice Tip No. 5: When the witness forgets**

- Ask a leading question
- Ask for a recess
- Use present recollection refreshed:
  - Ask: "Is there anything that might help you remember?"
  - Hand the memory-refreshing document to the witness, take it away from the witness, and then ask again
- Use past recollection recorded:
  - This is a record that:
    1. Is on a matter that the witness once knew but can't now remember,
    2. Was made and adopted by the witness when the matter was in the witness's memory, and
    3. Accurately reflects the witness's knowledge.
  - Such a record is admissible as an exception to the hearsay rule. FED. R. EVID. 803(5).

IV. Introducing Evidence Through Documents

Most documents are hearsay—out of court statements offered for the truth of the matter asserted in the document. But most documents are also admissible under one or more exceptions

to the rule against hearsay. However, the document must still be authentic, meaning it is what it purports to be, and of course it must be relevant. In addition, there is a certain choreography that should be followed when introducing and seeking admission of a document in evidence.

➢ **Practice Tip No. 6: Choreography for documents**

- Mark the exhibit for identification purposes
- Allow opposing counsel to review the exhibit
- Request permission to approach the witness
- Show the exhibit to the witness
- Establish foundation by showing:
  - Witness is competent
  - Exhibit is relevant
  - Exhibit is authentic
  - Specific foundation questions
- Move for admission

A. Business Records

Frequently, parties use the "Business Records" hearsay exception to introduce documents into evidence. This exception makes it easier to admit records that meet the criteria below because they are considered more reliable than other types of documents. FED R. EVID. 803 (1972 proposed rule) advisory committee's note. To be admitted, the movant must lay a foundation through testimony of a "custodian or other qualified witness" that the document:

- Was made at or near the time of the event,
- By someone with knowledge, or from information sent by a person with knowledge,
- Was kept in the course of a regularly conducted activity, and
- Making the record was a regular practice of that activity.

FED. R. EVID. 803(6).

A person who is in a position to attest to a document's authenticity and describe the record-keeping process is qualified to lay the appropriate foundation for this exception. *United States v. Smith*, 609 F.2d 1294, 1302 (9th Cir. 1979) (citing *United States v. Evans*, 572 F.2d 455, 490 (5th Cir. 1978), *cert. denied, Tate v. U. S.*, 439 U.S. 870 (1978)). To testify, the

custodian of records need not have been the custodian or employed by the business when the record was created. *In re McFadden*, 471 B.R. 136, 160-61 (Bankr. D. S.C. 2012). *See also Res. Fund. Co. v. Terrace Mortg. Co.*, 725 F.3d 910, 921-22 (8th Cir. 2013) (lender that sued originator for the repurchase of loans could introduce as business records documents ordinarily maintained by company that ran lender's repurchase operations). The event has to be one that the business records in the course of its business. *See Gray v. Busch Entm't Corp.*, 886 F.2d 14, 15-16 (2d Cir. 1989) (A statement made by the plaintiff to a nurse about how an accident happened was not admissible because it was not made in the ordinary course of business. The statement was, however, used for impeachment purposes.).

The motivation of the person who made the document is important. If the motivation is to create an accurate record of the business's activities, the document is probably reliable. Therefore, to be admitted under the business record exception as a record made as a "regular practice," the document must be related to the purpose of the business. For example, an accident report made after a workplace accident is unlikely to qualify as a business record. *Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943) (upholding court's decision to exclude a statement made by a deceased engineer about an accident at a railroad crossing because the record was made for use in court, not in the business). Such a document is considered less reliable because it was made for litigation, rather than for business purposes. *Id.* The following are clearly business records:

- Regularly created invoices or receipts. *Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 533 (5th Cir. 1986).
- Financial statements, ledger entries and other accounting records. *Official Comm. Unsec. Creditors ex rel Enron Corp., v. Martin (In re Enron Creditors Recovery Corp.)*, 376 B.R. 442, 454 (Bankr. S.D.N.Y. 2007).

Documents that are clearly not business records include:

- One-time letter. *Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187, 194-95 (4th Cir. 2003).
- Marginalia on a document. *United States v. Rhodes*, 788 F. Supp. 339, 342 (E.D. Mich. 1992).
- Appraisal reports. *In re Applin*, 108 B.R. 253, 261 (Bankr. E.D. Cal. 1989).

B. Public Records

Rule 803(8) contains an exception to the hearsay rule for a record or statement of a public office if it sets out: (1) the office's activities; (2) a matter observed while under a legal duty to report, not including a matter observed by law-enforcement personnel in a criminal case; and (3) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation, if neither the source of information nor other circumstances indicate a lack of trustworthiness. FED. R. EVID. 803(8).

Parties may be able to use the public records exception to get tax assessment reports introduced into evidence. In a recent opinion, one of the authors had this to say about tax appraisals, though the discussion, and the cases cited, assumed the reports would be treated as hearsay:

> While several courts have indicated that appraisal district valuations cannot be considered as probative evidence of market value, see, e.g., *Penrod v. Bank of N.Y. Mellon*, 824 F. Supp. 2d 754, 760 (S.D. Tex. 2011) (tax authority appraisal is "relevant to valuation for taxation purposes only" and not to "establish market value"); *Poswalk v. GMAC Mortg*., LLC, No. 3:11–CV–0465–D, 2012 WL 2193982, at *3 (N.D. Tex. June 15, 2012) (citing *Penrod*, in dicta, for the rule that appraisals cannot be considered evidence of value in Texas), these cases rely on Texas state court precedent, see *Hous. Lighting & Power Co. v. Fisher*, 559 S.W.2d 682, 686 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.), which pre-dates the adoption of the Texas Rules of Evidence, and no longer accurately represents Texas law. Under current Texas law, unlike under previous law—and at least when the evidence is not objected to on hearsay grounds—tax appraisals do provide some probative evidence of value. This fact has been recognized by numerous state and federal courts. *See, e.g.*, *F.D.I.C. v. Ambika Inv. Corp.*, 42 F.3d 641, 1994 WL 708818, at *3 (5th Cir. Dec. 1, 1994) (affirming a holding that unlike in "older Texas cases," due to

> "comprehensive changes in the Texas tax appraisal system," tax appraisals are probative of value); *In re Presto*, 376 B.R. 554, 573 (Bankr. S.D. Tex. 2007) (accepting appraisal as having some probative value); *Smith v. Grayson*, No. 03–10–00238–CV, 2011 WL 4924073, at *11 (Tex. Civ. App.—Austin Oct. 12, 2011) (explaining change in Texas evidence law and allowing use of appraisal district valuation as "some probative evidence" of value, when it was admitted without hearsay objection); *In re Marriage of C.A.S. & D.P.S.*, No. 05–11–01338–CV, 2013 WL 3204314, at *13 (Tex. Civ. App .—Dallas June 26, 2013) (same).

In re AMRCO, 496 B.R. 442, 446 n. 4 (Bankr. W.D. Tex. 2013).

C. Market Reports and Similar Commercial Publications

Rule 803(17) contains an exception to the hearsay rule for the admission of "market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations." FED. R. EVID. 803(17). The National Automobile Dealers Association (NADA) guide and Kelley Blue Book valuations are admissible pursuant to this exception. *In re Bouzek*, 311 B.R. 239, 243 (Bankr. E.D. Wis. 2004).

D. Documents with Independent Legal Significance

This doctrine, established by case law rather than the Federal Rules of Evidence, provides that "[i]f the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." FED. R. EVID. 801(c) (1972 proposed rule) advisory committee's note (citing *Emich Motors Corp v. Gen. Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), *rev'd on other grounds*, 340 U.S. 558 (1951)). The doctrine "exclude[s] from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct involving their rights." *Id*. Examples of documents with independent legal significance could include contractual promises, contracts, plans under chapter 11 or 13 and promissory notes.

E. Liquidation Analysis

A confirmed plan can also be considered a document with independent legal significance. In *Gasmark Ltd. Liquidating Trust v. Louis Dreyfus Natural Gas Corp. (In re GasMark, Ltd.)*, 158 F.3d 312, 316 (5th Cir. 1998), "[t]he trustee relied on the 23% Chapter 7 liquidation estimate for unsecured creditors contained in GasMark's Chapter 11 reorganization plan to prove that LDNG [creditor] received more than it would have received in a Chapter 7 proceeding." The court held that the liquidation estimate was not hearsay and that the Chapter 11 plan was admissible as a document with independent legal significance. *Id*. *See also Maloney–Crawford, Inc. v. Huntco Steel, Inc. (In re Maloney–Crawford, Inc.)*, 144 B.R. 531, 535 (Bankr. N.D. Okla. 1992) (using the estimated Chapter 7 liquidation analysis in the debtor's disclosure statement to determine if the creditor received more than under Chapter 7).

F. The "Best Evidence Rule"

The "Best Evidence Rule" is now contained in several of the Federal Rules of Evidence. Rule 1002, provides that "[a]n original writing, recording, or photograph is required in order to prove its content," except as otherwise provided by the rules or a federal statute. FED. R. EVID. 1002. *See Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1543 (11th Cir. 1994) ("Rule 1002 requires production of an original document only when the proponent of the evidence seeks to prove the content of the writing. It does not, however, require production of a document simply because the document contains facts that are also testified to by a witness.") (citations and internal quotation marks omitted); *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 51 (1st Cir. 1999) (quoting *Allstate* for the proposition that "there is no general rule that proof of a fact will be excluded unless its proponent furnishes the best evidence in his power" and reasoning that a plaintiff "can prove he filed a loan application simply through his own trial testimony" and does

not need to furnish the application). Rule 1001 states that for electronically stored information an "original" means "any printout-or other output readable by sight—if it accurately reflects the information." FED. R. EVID. 1001. Rule 1003 tempers Rule 1002 by providing that a duplicate is admissible to the same extent as an original, unless there's a "genuine" question as to whether the copy is authentic, or under the circumstances it would be "unfair" to admit the copy instead of the original. FED. R. EVID. 1003.

- **Practice Tip No. 7: Using the best evidence rule**

> Fraud, forgeries, and altered documents are not unheard of, but the cases in which they are present are fortunately rare. Unless you are working on one of those rare cases, the Best Evidence Rule is not likely to come into play.

V. The 21st Century

The prevalence of electronically stored information ("ESI") has led to much-needed amendments to the discovery rules in the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 26(a)(1)(A)(ii) (including ESI in initial disclosures), 26(b)(2)(B) (limitations on discovery of ESI), 26(b)(5) (implemented, in part, to help protect against the risk privilege waiver when producing ESI), 26(f)(3)(c) (directing parties to discuss discovery of ESI in discovery planning), 33(d) (including ESI in the options for producing business records), 34(a)(1)(A) (providing for the production of ESI), 34(b)(2)(D)-(E) (responding to requests for production of ESI and producing ESI), 37(e) (governing failure to provide ESI). In addition, courts are increasingly either accommodating or strongly encouraging the use of electronic presentations in the courtroom. For example see:

- http://www.txwb.uscourts.gov/node/220 – Procedures for Judge Tony M. Davis – Electronic Exhibits
- http://www.txwb.uscourts.gov/node/189 – Procedures for Judge Craig A. Gargotta – Electronic Exhibits

- http://www.txs.uscourts.gov/bankruptcy/judges/jb/home.htm#proc – Judge Jeff Bohm – Helpful Hints for Courtroom Appearances
- http://www.txs.uscourts.gov/bankruptcy/judges/ – Judge Marvin Isgur – Procedures

The rules of evidence do not contain extensive ESI provisions. *See Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 537-38, n. 5 (D. Md. 2007). Nonetheless, courts have applied the existing rules to ESI information in a variety of contexts. The problems most often addressed are those of authentication and hearsay.

Under Rule 901(b)(4), to prove that an item of evidence is what it purports to be, the proponent can use "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." FED. R. EVID. 901(b)(4). Observing that the "threshold for the Court's determination of authenticity is not high," the court in *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006), ruled that sufficient evidence for authentication of email exchanges could be found in the actual email addresses containing the "@" symbol, and the fact that the addresses often contain the name of the individual addressed in the email, either in the body of the email or in the signature blocks at the end of the email. *Safavian*, 435 F. Supp. 2d at 40. Another method of authentication is through the use of "hash values" or "hash marks" when making documents. A hash value is a unique identifier that can be assigned to a given data set, and has been called the digital equivalent of the Bates stamp. *See Lorraine*, 241 F.R.D. at 546-47. Still another method is the use of "metadata" or data about data. This is information contained in the electronic file of a document that describes the history, tracking, or management of the document. *Lorraine*, 241 F.R.D. at 547; *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646-47 (D. Kan. 2005).

Other issues that are presented by emails and email threads include admissibility under the business records exception, double hearsay, and direct or adoptive admissions. See the

extensive discussion in *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* MDL No. 2179, 2012 WL 85447, at *1 (E.D. La. Jan. 11, 2012) and *Safavian*, 435 F. Supp. 2d at 42-44.

The *Lorraine* case contains an exhaustive and instructive review and application of many evidentiary principles to various forms of ESI, including emails, internet website postings, text messages and chat room content, computer stored records and data, computer animation and computer simulations, and digital photographs. *Lorraine*, 241 F.R.D. at 554-62.

- **Practice Tip No. 8: Preserving information**

  Practitioners, and especially consumer practitioners, should be talking to their clients about how and where their ESI is stored (like, on their home PCs) and about taking steps to preserve that information.

As a parting shot, recall that under Rule 803, the first two listed exceptions to the hearsay rule are "present sense impressions"—statements "describing or explaining an event or condition, made while or immediately after the declarant perceived it," and "excited utterances"—statements "relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." FED. R. EVID. 803. So, why not a text or a tweet? Think about it.