

**The Honorable Tony M. Davis
United States Bankruptcy Court
For the Western District of Texas, Austin Division**

Selected Evidentiary Issues

Slide Presentation prepared
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Evidence: Law & Lore

THE LAW OF EVIDENCE:

The Federal Rules of Evidence

- Applicable in Bankruptcy Courts

THE LORE OF EVIDENCE:

Practical considerations

- How to deal with evidence and objections effectively in a reactive courtroom environment
 - You need a relaxed, confident attitude

Practice Tip No. 1: The Roadmap

- Keep the “roadmap” in mind
 - Roadmap: list of substantive elements that need to be proven
- Remember who carries the burden of proof
 - For each element
 - Watch out for burden shifts and presumptions
- A checklist of sources for every pleading
 - Bankruptcy Code
 - Bankruptcy Rules
 - Local Rules

Issue 1

Judicial Notice of “Schedules and Statements”

Issue 1: Judicial Notice of “Schedules and Statements”

- Fed. R. Evid. 201: Courts can take judicial notice of adjudicative facts not subject to reasonable dispute if:
 - Fact is generally known within trial court’s territorial jurisdiction, or
 - Can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned

Issue 1: Judicial Notice of “Schedules and Statements”

- Courts have judicially noticed:
 - Speed limit on a given street at a given location
 - Prime rate of interest or LIBOR
 - Closing market prices for exchange-listed securities
 - Date and time of foreclosure sales
 - Current mortgage rates
 - Proceedings in other courts

Issue 1: Judicial Notice of “Schedules and Statements”

- Judges can take notice of:
 - The fact that schedules were filed
 - Date of schedule filing
 - The fact that specific property was listed
 - Information in schedules as an admission of the debtor
- Judges cannot take notice of:
 - Property values listed on schedules as valuation evidence, as proof of insolvency, or as proof of liquidation value

Issue 1: Judicial Notice of “Schedules and Statements”

- Fed. R. Evid. 201(d)
 - The court may take judicial notice at any stage of the proceeding
- Fed. R. Evid. 201(e)
 - Parties have a right to notice and an opportunity to be heard
 - If the court takes judicial notice before a party is notified, the party is entitled to be heard on request

Practice Tip No. 2 & 3

- Practice Tip No. 2: How to Make Objections
 - Anticipate and object in a timely manner
 - Stand and speak up when objecting
 - Don't object too often—object when it matters
 - Explain objection without coaching witness
 - Make sure court rules on your objection
- Practice Tip No. 3: Common Objections

Issue 2

Introducing Evidence Through Witnesses

Issue 2: Introducing Evidence Through Witnesses

Owner's opinion of value

- Fed. R. Evid. 701: Lay opinions limited to those:
 - rationally based on witness perception;
 - helpful to understanding witness' testimony or determining a fact; and
 - cannot be based on scientific, technical or specialized knowledge.
- Foundation required for personal knowledge
- Must be grounded in witness' perceptions

Issue 2: Introducing Evidence Through Witnesses

Owner's opinion of value

- Typically allowed by owners of houses and cars
- CFO of a business was allowed to opine on the value of the business
 - *S. Cent. Livestock Dealers v. Sec. State Bank of Hedley*, 614 F.2d 1056 (5th Cir. 1980)
- While admissible, might not be given much weight if expert testimony is available

Practice Tip No. 4: When to Lead on Direct

- Ask leading questions on direct when you are:
 - Addressing preliminary matters, undisputed facts, or new matters
 - Questioning witness who forgets
 - Questioning the adverse party on direct
 - Handling a witness who is hostile, reluctant, or has difficulty communicating
 - Asking a witness to contradict another witness' statement

Issue 2: Introducing Evidence Through Witnesses

Hearsay

- More of an issue with witnesses than documents
- In theory, hearsay is evidence which depends for its probative value on the credibility of someone who cannot be cross-examined
- Fed. R. Evid. 801 & 802: Out-of-court statement offered for truth of the matter asserted

Issue 2: Introducing Evidence Through Witnesses

Hearsay

- Can be admissible, if offered for another reason
 - To show notice, knowledge, or other state of mind
- If admitted for a limited purpose, it can only be used for the limited purpose
- Common exceptions:
 - Statement by party opponent
 - Witness' prior inconsistent statement

Issue 2: Introducing Evidence Through Witnesses

Admission of former testimony

- The declarant must now be “unavailable” under Fed. R. Evid. 804(a)
- Fed. R. Evid. 804(b)(1):
 - Former testimony was given by witness at trial, hearing, or deposition, and
 - Offered against a party who had opportunity and similar motive to develop the former testimony
- In bankruptcy, the requirement of “similar motive” is important because parties’ positions can change

Issue 2: Introducing Evidence Through Witnesses

Impeachment

- Must have a good faith basis for asking the impeaching question
- Most common form of impeachment in bankruptcy court: witness' prior inconsistent statement
 - If witness is a party: Prior statement admissible under Rule 801(d)(2)
 - If witness is not a party: Prior statement can be admitted under Rule 613(b) if:
 - Witness has opportunity to explain or deny statement
 - Opposing counsel may examine witness
- To be effective, make the contrast crystal clear

Practice Tip No. 5: When the Witness Forgets

- Ask a leading question
- Ask for a recess
- Use present recollection refreshed
- Use past recollection recorded
 - This is a record that:
 - Is on a matter the witness knew but cannot now remember
 - Was made or adopted by the witness when the matter was in memory, and
 - Accurately reflects witness's knowledge
 - Such a record is admissible as an exception to the hearsay rule: Fed. R. Evid. 803(5)

Issue 3

Introducing Evidence Through Documents

Practice Tip No. 6: Choreography for Documents

- Mark the exhibit for identification
- Allow opposing counsel to review exhibit
- Request permission to approach the witness
- Show witness the exhibit
- Establish foundation:
 - Witness is competent
 - Exhibit's relevancy
 - Exhibit's authenticity
 - Specific foundational questions
- Move for admission

Issue 3: Introducing Evidence Through Documents

“Business Records” hearsay exception

- Fed. R. Evid. 803(6)
- Lay foundation through testimony of “custodian or other qualified witness” that record:
 - was made at or near time of event
 - was made or sent by someone with knowledge
 - was kept in the course of regularly conducted activity
 - was made as a regular practice of conducting the activity

Issue 3: Introducing Evidence through Documents

“Business Records” hearsay exception

- The witness:
 - Someone who can:
 - Attest to document’s authenticity
 - Describe record-keeping process
 - Need not have been employed by the business when record was made

Issue 3: Introducing Evidence Through Documents

“Business Records” hearsay exception

- Documents must relate to purpose of business
 - Regularly created invoices and receipts
 - Financial statements and other accounting records
- Documents not relating to purpose of business:
 - One-time letters
 - Marginalia on document
 - Appraisal reports

Issue 3: Introducing Evidence Through Documents

“Public Records” hearsay exception

- Fed. R. Evid. 803(8)
- Record or statement of public office sets out:
 - A matter observed while under a legal duty to report, excepting criminal conduct observed by law enforcement
 - Factual findings from a legally authorized investigation in a civil case or in a criminal case against the government
- Tax assessment reports may be admissible under this exception

Issue 3: Introducing Evidence Through Documents

Market Reports and Similar Commercial Publications

- Fed. R. Evid. 803(17)
- Examples:
 - National Automobile Dealers Association (NADA) guide
 - Kelley Blue Book valuations

Issue 3: Introducing Evidence Through Documents

Documents with Independent Legal Significance

- Established by case law
- Excludes from hearsay 'verbal acts' in which statement itself affects legal rights of parties
- Examples:
 - Contractual promises
 - Contracts
 - Plans under chapter 11 or 13
 - Promissory notes

Issue 3: Introducing Evidence Through Documents

Liquidation Analysis

- In the Fifth Circuit, liquidation estimates in a confirmed plan are not hearsay
 - The plan is admissible as a document with independent legal significance
- *Gasmark Ltd. Liquidating Trust v. Louis Dreyfus Natural Gas Corp.*, 158 F.3d 312, 316 (5th Cir. 1998)

Issue 3: Introducing Evidence Through Documents

The “Best Evidence Rule”

- Requires original writing, recording, or photograph unless otherwise provided by rules or federal statute
 - Fed. R. Evid. 1002
- Duplicate is admissible unless there’s a “genuine” question of authenticity
 - Fed. R. Evid. 1003
- For electronically stored information, any printout or output readable by sight, if accurate, suffices
 - Fed. R. Evid. 1001

Practice Tip No. 7: Using the “Best Evidence Rule

The “Best Evidence Rule”

- The “Best Evidence Rule” will likely not come into play unless:
 - Fraud, forgeries, and altered documents are present
- These cases are rare

Issue 4

The 21st Century

Issue 4: The 21st Century

- Practice Tip No. 8: Information Preservation
- Courts are accommodating and encouraging the use of electronically stored information (ESI) in the courtroom
- Courts are applying the existing Federal Rules of Evidence to ESI

Issue 4: The 21st Century

Authentication of ESI

- Fed. R. Evid. 901(b)(4)
- Proponent can show item of evidence is what it purports to be by using:
 - Appearance
 - Contents
 - Substance
 - Internal patterns
 - Other distinctive characteristics

Issue 4: The 21st Century

Authentication of ESI

- Email exchanges
 - Authenticated by use of the “@” symbol, email addresses in body of email, and signature blocks at the end
- “Hash values” or “hash marks”
 - Unique identifier given to a data set
 - Digital equivalent of the Bates stamp
- “Metadata”
 - Information describing history, tracking, and management of document

Issue 4: The 21st Century

- *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 539 n.5 (D. Md. 2007)
- The *Lorraine* case contains extensive review and application of the Federal Rules of Evidence to:
 - Emails
 - Internet website postings
 - Text messages
 - Chat room content
 - Computer animation

Issue 4: The 21st Century

Admissibility of ESI under hearsay exceptions

- Text or Tweet?
 - “Present sense impressions”: Fed. R. Evid. 803
 - Description of event or condition, made while or immediately after perception
 - “Excited utterances”: Fed. R. Evid. 803
 - Statements relating to startling event or condition, made while declarant was under stress of excitement