

**EVIDENCE RULES AND TRIAL TACTICS
IN BANKRUPTCY COURT**

Presenters

JONATHAN HOWELL, *Dallas*
Munsch Hardt Kopf & Harr PC

DEBRA L. INNOCENTI, *San Antonio*
Oppenheimer, Blend, Harrison & Tate, Inc.

CHRISTOPHER H. TRICKEY, *Austin*
Graves, Dougherty, Hearon & Moody, P.C.

Authors

JONATHAN HOWELL
DEBRA L. INNOCENTI
CHRISTOPHER H. TRICKEY

State Bar of Texas
BUSINESS BANKRUPTCY 101 COURSE

June 2, 2010
San Antonio

CHAPTER 5

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	EXAMINATION OF WITNESSES AND USE OF TRANSCRIPT TESTIMONY IN COURT	1
	A. Meeting of Creditors	1
	1. Generally	1
	2. Usefulness	1
	3. Strategy and Execution	2
	B. 2004 Exams	2
	1. Generally	2
	2. Usefulness	3
	3. Strategy and Execution	3
	C. Oral Depositions	3
	1. Generally	3
	2. Usefulness	4
	3. Strategy and Execution	5
	D. Transcript Testimony in Hearings	5
	1. Usefulness	5
	2. Strategy and Execution:	5
III.	HANDLING DOCUMENTARY EVIDENCE	6
	A. Introducing Exhibits	6
	B. Authentication of Documents	6
	1. Overview	6
	2. Original Required (the “Best Evidence Rule” or the “Original Writing Rule”)	7
	3. Means of Authentication	7
	4. Electronically-Stored Information	8
	5. Practice Tips	9
	C. Using Summaries, Demonstratives and Pedagogical Evidence	9
	1. Primary-Evidence Summaries	9
	2. Pedagogical Evidence	9
	3. Secondary-Evidence Summaries	10
	4. Practice Tips	10
IV.	TESTIMONY AND EVIDENTIARY OBJECTIONS	10
	A. Federal Rule of Evidence 611	10
	1. Generally	10
	2. Practice Tips	10
	B. Direct Examinations	11
	1. Generally	11
	2. Practice Tips	11
	C. Cross Examinations	12
	1. Generally	12
	2. Practice Pointers	12
	D. Objections	13
	1. Generally	13
	2. Practice Pointers	13

EVIDENCE RULES AND TRIAL TACTICS IN BANKRUPTCY COURT

I. INTRODUCTION

This paper is a guide to general trial tactics and evidence rules in the context of proceedings under the Bankruptcy Code.¹ In addition to the Federal Rules of Evidence, the series of statutes and rules governing discovery and evidence includes primarily the following sections of the Bankruptcy Code and Bankruptcy Rules²:

Section 341: Meetings of Creditors and Equity Security Holders

Rule 1001: Application of the Federal Rules of Bankruptcy Procedure and Federal Rules of Civil Procedure

Rule 2003: Meetings of Creditors and Equity Security Holders

Rule 2004: Examination

Rule 7030: Depositions upon Oral Examination

Rule 7031: Depositions upon Written Questions

Rule 7032: Use of Depositions in Adversary Proceedings

Rule 7033: Interrogatories to Parties

Rule 7034: Production of Documents and Things and Entry upon Land for Inspection and Other Purposes

Rule 7035: Physical and Mental Examination of Persons

Rule 7036: Requests for Admission

Rule 7037: Failure to Make Discovery; Sanctions

Rule 9017: Evidence

It is important to remember that different districts and even different judges within the same district have conflicting views on obtaining and presenting evidence and sometimes impose deadlines for the exchange of exhibits prior to contested matters and adversary proceedings. You should always consult the local rules, local standing orders and judges' procedures to determine what additional requirements you must meet.

¹ The "Bankruptcy Code" or the "Code" means title 11 of the United States Code.

² "Bankruptcy Rules" means the Federal Rules of Bankruptcy Procedures.

II. EXAMINATION OF WITNESSES AND USE OF TRANSCRIPT TESTIMONY IN COURT

Unlike most practice areas, bankruptcy law allows practitioners multiple opportunities to examine parties under oath in a bankruptcy case. Opportunities to examine parties under oath in a bankruptcy case may occur in several formats, both formal and informal, and during various phases of the bankruptcy case.

Both the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure facilitate opportunities to examine parties in a bankruptcy case. This part of the article will discuss the many ways in which the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure permit the examination of parties under oath in a bankruptcy case, the various tactics that may be employed to maximize an examination of a party, and the effective use of transcripts at subsequent hearings or trial.

A. Meeting of Creditors

1. Generally

With limited exceptions, section 341 of the Bankruptcy Code requires that the U.S. trustee convene and preside over a meeting of creditors within a reasonable time after the commencement of a bankruptcy case.³ While a representative of the court cannot attend or participate in the meeting of creditors, any representative of a creditor, including attorneys, may do so.⁴

At the meeting, the U.S. trustee will examine a representative of the debtor under oath.⁵ Once the U.S. trustee has finished examining the representative, creditors or representatives of the creditors will have an opportunity to examine the debtors' representative under oath.⁶ The entire examination, including the representative's testimony, will be recorded, and a certified copy or transcript of the recording should be made available by the U.S. trustee upon request.⁷

2. Usefulness

An examination of a debtor's representative at a meeting of creditors has many benefits. Similar to a deposition or in-court examination, the debtor's

³ 11 U.S.C. § 341(a)

⁴ *Id.* at § 341(c)

⁵ *See* 11 U.S.C. § 343; FED. R. BANKR. P. 2003(b). In most Chapter 11 bankruptcy cases, an attorney with the U.S. Trustee's Office will conduct the meeting of creditors on behalf of the U.S. trustee. In most Chapter 7 bankruptcy cases, the Chapter 7 trustee will conduct the meeting of creditors. Similarly, in most Chapter 13 bankruptcy cases, the Chapter 13 trustee will conduct the meeting of creditors.

⁶ *See* 11 U.S.C. § 343; FED. R. BANKR. P. 2003(b)

⁷ FED. R. BANKR. P. at 2003(c)

representative must respond directly and under penalty of perjury to any questions posed by the U.S. trustee or a representative of a creditor and will face serious penalties if it is discovered that his or her responses were untruthful. In contrast to a deposition and in-court examination, however, the meeting of creditors will likely occur within the first few months of a bankruptcy case; thus, depending on the number of issues in the bankruptcy case and the amount of time allowed to debtor's counsel in preparing the bankruptcy filing, it may prove difficult for debtor's counsel to thoroughly prepare a representative of the debtor for the various lines of questioning he or she may encounter.⁸ Relatively speaking, the meeting of creditors is an inexpensive means for a creditor to directly examine a representative of a debtor. And since the purpose of the meeting of creditors is to encourage creditor participation and transparency in the bankruptcy process, there are no strict procedures on how creditors or their representatives must pose questions when examining the debtor's representative.

On the other hand, the meeting of creditors has its limitations, namely the limited amount of time allocated to each creditor to examine the debtor's representative. The U.S. trustee conducts numerous meetings of creditors each week and, as a result, is under a tremendous amount of pressure to conduct and conclude each meeting of creditors in a timely and efficient manner. Therefore, the meeting of creditors is not conducive for a creditor who is trying to examine a representative of the debtor for the purpose of discovering a multitude of unknown facts.

3. Strategy and Execution

The meeting of creditors can be a powerful tool for an attorney representing a creditor in a bankruptcy case. The strategy employed by a creditor's attorney will depend on the type of bankruptcy case, the creditor he or she is representing, and the goal of that creditor. If, on the one hand, the attorney is representing a trade creditor in a Chapter 11 bankruptcy case, and the goal of that creditor is to continue its relationship with the debtor, the creditor's attorney will want to prepare an outline of questioning to prove that the creditor is a party to an executory contract and/or to determine if and when the debtor intends on assuming the executory contract. If, on the other hand, the attorney is representing a secured lender in an individual's Chapter 7 bankruptcy case,

and the secured lender's goal is to except its debt from the debtor's discharge, then the creditor's attorney should prepare an outline of questioning to ascertain whether the facts of the case support a cause of action based on section 523 of the Bankruptcy Code.

Regardless of the strategy employed, an attorney for a creditor participating in a meeting of creditors should not be so focused on satisfying the goals of his or client that he or she fails to come away from the meeting of creditors with an understanding of the factors that caused the debtor to file bankruptcy, the debtor's strategy for successfully completing the bankruptcy case, and the other issues the debtor must resolve throughout the course of the bankruptcy case. An attorney attending a meeting of creditors should typically be able to discover this information simply by listening to the examination of the debtor by the U.S. trustee and other creditors. With any bankruptcy case, there will be a lot of moving pieces that could impact your client, and it is important for the attorney to identify those moving pieces and their potential impact, in addition to whether there are sufficient facts to support the current goal of your client.

As with any examination of a potentially hostile witness, particularly at an early stage in a case, a creditor's attorney should attempt to pose his or her line of questioning to the debtor's representative in a pleasant manner. In the event the creditor's attorney becomes adversarial, he or she runs the risk of causing the debtor's representative to become defensive and less forthcoming. If the debtor's representative offers information that assists a creditor's positioning in the bankruptcy case, in most instances, it is a better for the creditor's attorney to use of that information for purposes of negotiating settlement or for a later hearing or trial on the matter than to argue the point to a representative of the debtor who is legally unsophisticated.

B. 2004 Exams

1. Generally

Federal Rule of Bankruptcy Procedure 2004 provides that a court may order the examination of any entity to take place at any time or place it designates upon a motion of a party-in-interest and for cause shown.⁹ A "party in interest" includes any party involved in the bankruptcy case, including but not limited to, the debtor, the U.S. trustee, a creditor, or a prospective purchaser of estate property. An "entity" may be a person, estate, a trust, a governmental unit, or a U.S. trustee.¹⁰

The scope of the examination is limited to acts, property, liability, or financial condition of the debtor,

⁸ In a Chapter 7 or Chapter 11 bankruptcy case, the meeting of creditors should be scheduled no more than forty (40) days after the commencement of the case. In a Chapter 13 bankruptcy case, the meeting of creditors should be scheduled no more than fifty (50) days after the commencement of the case. *Id.* at 2003(a)

⁹ FED. R. BANKR. P. 2004(a)

¹⁰ 11 U.S.C. § 101(15)

any matter that may affect the administration of the bankruptcy estate, or to the debtor's right of discharge.¹¹ With limited exceptions, the scope of the examination may also relate to the operation of the debtor's business, the desirability to continue the debtor's business, the source of any money or property to be acquired by the debtor for purposes of confirming a plan, the consideration in exchange for such money or property, or any other matter related to the bankruptcy case or the formulation of a plan.¹²

The attendance of an entity for examination and the production of documentary evidence may be compelled by subpoena.¹³ However, the attendance of any entity, other than the debtor, as a witness is not required unless the lawful mileage and witness fee for one day's attendance has first been tendered.¹⁴

2. Usefulness

The primary benefit of a 2004 exam is its breadth. Unlike traditional discovery devices, a 2004 exam allows a debtor, trustee, U.S. trustee, a creditor, or any other party-in-interest to examine "any entity" on matters related to the bankruptcy case. If, for example, a Chapter 7 trustee has reason to believe that a debtor scriptiously transferred assets prior to commencing its bankruptcy case, a 2004 exam allows the Chapter 7 trustee to compel the alleged transferee to sit for a deposition and produce relevant documents. It makes no difference whether the transferee is an affiliate, a trade creditor, or a family member of the debtor. If, on the other hand, the Chapter 7 trustee believes that the transferee's deposition may be cost-prohibitive, the transfers can be examined by compelling the production of account records from the debtor's and/or transferee's bank.¹⁵

Another benefit of a 2004 exam is that it can be employed prior to the commencement of any litigation or dispute. So, for example, if a Chapter 11 trustee wants to determine if the debtor held any claims that are worth pursuing on behalf of the bankruptcy estate, the Chapter 11 trustee may utilize a 2004 exam in making this determination. Similarly, 2004 exams are often employed in the context of an allocation/valuation dispute, compelling parties to produce documents in their possession relating to key assets of the debtor.¹⁶

¹¹ FED. R. BANKR. P. 2004(a)

¹² *Id.*

¹³ *Id.* at 2004(c), 9016

¹⁴ FED. R. BANKR. P. 2004(e)

¹⁵ David Lee Tayman, *Strategic Uses of a Rule 2004 Exam*, 25 No. 6 Bankr. Strategist 3 (2008)

¹⁶ *Id.*

3. Strategy and Execution

Along with the meeting creditors and those discovery devices found in the federal rules of civil procedure, which are applicable in all adversary proceedings and some contested matters, 2004 exams are one of three basic discovery devices that a bankruptcy practitioner may implement. In most instances, a bankruptcy practitioner will move for a 2004 exam after the meeting of creditors. At this stage, an experienced bankruptcy practitioner will have used the meeting of creditors to have an overall grasp of the facts encompassing the bankruptcy case and some knowledge as to which tactics or causes of action would benefit his client. Accordingly, the 2004 exam will be used as a device to come to a final determination as to whether such tactics or causes of action should indeed be pursued. Whatever the underlying intent of the bankruptcy practitioner, however, the practitioner must justify that intent as falling within the permissible scope of a 2004 examination, as previously discussed. Thus, it is often said that a 2004 exam is more "inquisitive" than the "accusatory" nature of discovery devices found in the federal rules of civil procedure.¹⁷

While 2004 exams often occur before a contested matter or adversary proceeding, a party in interest may move for a 2004 examination after the contested matter has commenced or complaint has been filed. In these situations, however, a motion for a 2004 examination is probably best reserved for trying to compel third parties to produce documents or testify, particularly if those discovery devices found in the Federal Rules of Civil Procedure are available.¹⁸

Once the court has granted the motion for 2004 examination, the movant may issue a subpoena with the court's order attached as an exhibit. Although the geographical reach of a subpoena is limited by Rule 45 of the Federal Rules of Civil Procedure, the bankruptcy practitioner issuing the subpoena will have the added comfort of otherwise knowing that the court has compelled the requested deposition or document production.

C. Oral Depositions

1. Generally

For the most part, depositions outside of a 2004 examination, are limited to adversary proceedings. Federal Rule of Bankruptcy Procedure 7030 incorporates Federal Rule of Civil Procedure 30 by reference. Rule 7030 encourages counsel for the parties to schedule depositions and stipulate to the number and terms of the deposition amongst

¹⁷ *Id.*

¹⁸ *Id.*

themselves.¹⁹ If a particular party or counsel is overly litigious or unresponsive, this can be difficult. Under such circumstances and for other reasons set forth below, counsel should seek leave of court:

- the prospective deponent has already been deposed; or
- a party seeks to take a deposition prior to the Rule 26(f) conference.²⁰

When counsel wishes to depose a person for an opposing party for oral examination, counsel must give that person reasonable written notice to every party in the adversary proceeding.²¹ Generally, two weeks or more is considered a reasonable amount of notice.

The notice must state the time, place, and if the deponent is an organization or business, then the name and address of the deponent, or, at a minimum, a general description sufficient enough to identify the person.²² In addition, counsel must specify the medium by which the deposition will be recorded, whether by video, court report, etc. Notably, the noticing party bears the cost of recording unless the party of the person to be deposed suggests an alternative medium that is ultimately pursued. Under such circumstances, the party of the deponent bears the costs.²³

If, however, counsel wishes to depose a person of a party that is an organization or business, then the notice of deposition sent to that party should name the corporate entity, partnership, association, governmental unit, etc. That party will then designate one or more corporate officers, directors, managing agent, or designated representative. Although discretionary, it's the best practice for the notice to also provide the topics upon which the person will testify.²⁴

In the event a party to be deposed cannot travel or the cost of travel would be too expensive, counsel for the parties may stipulate to the deposition being taken telephonically, through videoconference, or other remote means.²⁵

The examination and cross-examination of a deponent should generally proceed as they would at trial under Federal Rules of Evidence.²⁶ Any

objections must be stated on the record, but absent harassment or delay, the examination should proceed. Typical form objections include:

- Vague;
- Compound;
- Argumentative;
- Asked and answered;
- Assumes facts not in evidence;
- Misstates the evidence; and
- Lacks foundation.

In addition to objections based on form, counsel defending a deposition should also object to any question that calls for a response that would be inadmissible under the Federal Rules of Evidence, as previously mentioned, to preserve the objection at a later hearing or trial. An objection to the relevance of a question is not waived by a failure to object during the deposition. If a question posed by the counsel taking the deposition is objected to by opposing counsel, then counsel taking the deposition should rephrase the question rather than running the risk of losing evidence.

2. Usefulness

Absent leave of court, oral depositions may last up to seven (7) hours. Usually, a bankruptcy practitioner representing a creditor or interest holder has already used the meeting of creditors to become familiar with the bankruptcy case and determine whether it has any causes of action available to it. From this information, together with facts discovered during an informal investigation, an adversary proceeding has been commenced. Very likely, written discovery has been utilized to give the parties a better understanding of the strengths and weaknesses of their causes of actions and defenses. So oral depositions will be used to: (i) discover unknown facts from the deponent; and (ii) test various theories or specific causes of action on the deponent.

With respect to the former reason for taking a deposition, rare is the case where counsel for one party or another knows both sides of the story or all of the relevant facts. Consequently, counsel who is taking the deposition should use the examination of an opposing party as an opportunity to fill in any gaps or clarify particular aspects of the case that remain uncertain.

As for the latter reason for taking a deposition, it is unlikely that counsel taking a deposition will have another opportunity to truly try and prove a particular theory or cause of action through testimony until trial. Trial is not the forum for testing theories or causes of action. It is the place to present your evidence. If there is not enough evidence to prove a theory or cause

¹⁹ See FED. R. BANKR. P. 7030; FED. R. CIV. P. 30(a)(1).

²⁰ See FED. R. CIV. P. 30(a)(2).

²¹ See *id.* at (b)(1).

²² See *id.*

²³ See *id.* at (b)(3).

²⁴ See *id.* at (b)(6).

²⁵ See *id.* at (b)(4).

²⁶ *Id.* at (c)(1).

of action, then the counsel taking the deposition needs to know, and a deposition is usually the last chance for counsel to find out.

3. Strategy and Execution

Once a deposition begins, counsel taking the deposition must state the following:

- his or her name and business address;
- the date, time, and place of the deposition;
- the deponent's name;
- the officer's administration of the oath or affirmation to the deponent; and
- the identify of all persons present.

with an opposing party should be prepared to ask open-ended questions that broadly cover certain key topics, such as the deponent's background and business, his or her interactions with your client, the debtor, and/or other creditors prepetition, and the deponents involvement in events leading up to the bankruptcy case and after the bankruptcy case commenced.

Counsel who is taking the deposition should then be prepared to exhaust each broad topic that is discussed. Key questions for exhausting a particular topic are who, what, where, why, when, and how. To prevent any omissions, very often those questions should be followed up with questions such as the following:

- Was there anyone else?
- What else?
- Anywhere else?
- Any other reason?
- Any other time?
- Was there any other way?

Such simple questions will likely prove very effective for learning previously unknown, but relevant, facts. In addition, counsel taking the deposition should limit their use of pronouns and always describe and assign an exhibit number before referencing any document for purposes of making a clear and useful record.

In terms of demeanor, it is important for counsel who is taking the deposition to try to appear affable. If counsel who is taking the deposition is adversarial, the deponent will likely become uncooperative and less forthcoming.

Finally, if a practitioner must determine if there is sufficient evidence to support a particular theory or cause of action or would like to flush out an opposing party's defenses, counsel who is taking the deposition, he or she should do so after he or she is satisfied that sufficient facts have been discovered. At this point,

leading questions may be more effective than open-ended questions. And any questions posed to the deponent should attempt to admit facts that support those theories and causes of action that are being pursued. While there is a risk that the deponent's response may not support a cause of action or theory, it is better that counsel taking the deposition learns of the deponent's response at a deposition than for the first time in court at a hearing or trial.

At the end of the deposition, the officer must state on the record that the disposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.²⁷

D. Transcript Testimony in Hearings

1. Usefulness

Deposition testimony may generally be used at any hearing or trial against another party if three conditions are met. First, the party must have been present or represented at the taking of the deposition or had reasonable notice of it. Secondly, the transcript must be used to the extent it would be admissible under the Federal Rules of Evidence (e.g., hearsay) if the deponent was present and testifying. Third, the use of the transcript is allowed for on one of the following reasons:

- contradict or impeach testimony;
- the deponent was an officer, director, managing agent, or corporate designee;
- the deponent is unavailable as a witness; or
- the deposition is from a previous case involving the same parties or successor-in-interest and similar issues.²⁸

2. Strategy and Execution:

To properly impeach a witness with his or her deposition testimony, the first step is to highlight the question answered differently at trial:

- Do you remember giving your deposition on [date]?
- Do you remember that the deposition was being recorded?
- Do you recall having been sworn in to tell the truth?
- Did you tell the truth on that date?
- Did you have an opportunity to review the transcript of the deposition?

²⁷ *Id.* at (b)(5)(C).

²⁸ FED. R. BANKR. P. 7032(a)(1); FED. R. CIV. P. 30(a)(1); see also Robert L. Paddock, et al., *Evidence Rules and Trial Tactics in Bankruptcy Court* (State Bar of Tex./Nuts & Bolts of Bus. Bankr. Course, Houston, Tex.), Sep. 29, 2009, at 1.

- Did you correct any errors on the transcript?
- Did you sign the transcript to attest to its accuracy?²⁹

Then the questioner should proceed:

- Please turn to page ____, and review line ____.
- During your deposition, you were asked the following question: _____.
- And what was your answer to that question?³⁰

If the deponent was an officer, director, managing agent, or designee of an adverse party that is an organization or company, then a transcript of the deponent's transcript may be used in a hearing. First, however, the transcript needs to be introduced into evidence.³¹

If a deponent is unavailable to be a witness for trial or a hearing, then a transcript of his or her deposition testimony may be used at a hearing or trial. A deponent is unavailable as a witness if:

- he or she is dead;
- the deponent is more than 100 miles from the hearing or trial unless his or her absence was coerced;
- the deponent cannot testify because he or she is imprisoned, ill, old, or ill;
- the deponent was subpoenaed to appear as a witness at trial or a hearing but did not comply with the subpoena; or
- exceptional circumstances.³²

Once an attorney introduces testimony from a deposition, an adverse party may require the introduction of other parts that, in fairness, should be considered, so that testimony is not taken out of context.³³

Unless the court orders otherwise, a party must provide the court a memorialization of any deposition testimony it wishes to introduce, but need not provide it in transcript form.³⁴

²⁹ Paddock, et al., *supra* note 27, at 1.

³⁰ *Id.* at 2

³¹ FED. R. CIV. P. 30(a)(3); *see also* Paddock, *supra*, note 27, at 2.

³² FED. R. CIV. P. 30(a)(4); *see also* Paddock, *supra*, note 27, at 2.

³³ FED. R. CIV. P. 30(a)(6); *see also* Paddock, *supra*, note 27, at 3.

³⁴ FED. R. CIV. P. 30(a)(3); *see also* Paddock, *supra*, note 27, at 3.

III. HANDLING DOCUMENTARY EVIDENCE

A. Introducing Exhibits

There is an expected order for introducing exhibits, which may vary depending on the existence of stipulations, pre-marked exhibit binders, and deadlines for the exchange of potential exhibits. Some courts prefer that all exhibits be offered into evidence at once and objections ruled upon prior to argument. You should always consult local rules and judge-specific procedures—calling local counsel when needed. Consider, too, that even if all exhibits, their foundation and authenticity are stipulated, you still may need to introduce rebuttal evidence.

- 1) Pre-mark your exhibit so that you can reference it precisely, “the document marked Exhibit ‘A’ for identification purposes.”
- 2) Provide a copy to opposing counsel to examine.
- 3) Lay the foundation for the exhibit. Authentication is discussed below.
- 4) Offer the exhibit into evidence: “Debtor offers the document marked Exhibit ‘A’ for identification into evidence.”
- 5) Present a copy of the exhibit to the court.
- 6) Opposing counsel will then voice any objections to the exhibit and may also conduct a *voir dire* examination of the sponsoring witness concerning the foundation or authentication.
- 7) The court will make a ruling. If the judge forgets, ask for one. You will need to get a ruling for appeal purposes.
- 8) The witness may then testify about the exhibit.

B. Authentication of Documents

1. Overview

All documentary evidence introduced in a bankruptcy proceeding must be authenticated under Federal Rule of Evidence 901. Rule 901 provides that “the requirement of authentication or identification as a condition precedent is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”³⁵ A proponent “may authenticate a document with circumstantial evidence, ‘including the document’s own distinctive characteristics and the circumstances surrounding its discovery.’”³⁶ Courts in the Fifth Circuit do not require conclusive proof of authenticity before allowing the

³⁵ FED. R. EVID. 901(a)

³⁶ *In re McLain*, 516 F.3d 301, 308 (5th Cir. 2008)(citing *United States v. Arce*, 997 F.2d 1123, 1128 (5th Cir.1993).

admission of disputed evidence.³⁷ Only “prima facie showing of authenticity” is required.³⁸ Rule 901 does not limit the type of evidence allowed to authenticate a document.³⁹ It merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be.⁴⁰

2. Original Required (the “Best Evidence Rule” or the “Original Writing Rule”)

To prove the contents of a document, the original document is required.⁴¹ If the contents are not sought to be proved, then evidence other than the original document is admissible without reference to Rule 1002.

However, Rule 1003 provides that a duplicate is admissible to the same extent as an original “unless (i) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.”⁴² Accordingly, under normal circumstances, the convenience of placing a copy of the document into the record allows use of the copy.⁴³

Rule 1004 also provides for use of a copy of a document when the original document was lost or destroyed, the original is not obtainable, the original is in the possession of the opponent, or the document is not closely related to a controlling issue in the case. The party offering the document may not have destroyed the original as part of a fraudulent design.⁴⁴

3. Means of Authentication

³⁷ *McLain*, 516 F.3d at 308 (citing *United States v. Jimenez-Lopez*, 873 F.2d 769, 772 (5th Cir.1989)).

³⁸ *In re Charter Graphic Services, Inc.*, 230 B.R. 759, 766 (Bankr. N.D. Tex. 1998).

³⁹ *McLain*, 516 F.3d at 308 (citing *Jimenez-Lopez*, 873 F.2d at 772).

⁴⁰ *Id.*

⁴¹ FED.R.EVID. 1001, 1002

⁴² FED.R.EVID. 1003

⁴³ See *Buziashvili v. Inman*, 106 F.3d 709, 717 (6th Cir. 1997)(“Photocopies are allowed into evidence as if they were originals.”); *U.S. v. Haddock*, 956 F.2d 1534, 1545 (10th Cir. 1992), modified on other grounds, 961 F.2d 933 (10th Cir. 1992)(“...due to modern and accurate reproduction techniques, duplicates and originals should normally be treated interchangeably. However, despite our age of technology, a trial court must still be wary of admitting duplicates ‘where the circumstances surrounding the execution of the writing present a substantial possibility of fraud.’”).

⁴⁴ *Priva v. Xerox Corp.*, 654 F.2d 591 (9th Cir. 1981); *Estate of Gryder v. C.I.R.*, 705 F.2d 336 (8th Cir. 1983).

Generally, documents are offered through a witness. The witness should have personal knowledge of the document’s authenticity, including observing its creation or having familiarity with the signature on the document.⁴⁵ To identify a document sufficiently to warrant its admissibility, a witness need not be able to attest familiarity with every page.⁴⁶

Sample colloquy for authenticating a letter:

- Are you familiar with the handwriting of Jane Doe?
- How are you familiar with Ms. Doe’s handwriting?
- What sort of documents did you witness Ms. Doe write?⁴⁷
- [Show the witness Exhibit ‘A’ for identification.]
- Do you recognize the handwriting of this letter?
- Whose handwriting is it?
- [Move the letter into evidence.]

-or-

- Please identify the document marked as Exhibit ‘A.’
- Whose signature appears on page 3 of this document?
- How are you able to recognize it?

Authenticating a business record requires a witness testifying to the elements set out in Fed. R. Evid. 803(6). The witness must prove that (i) the record is a memorandum, report, record or other compilation of data, (ii) the witness is the custodian of the record, (iii) the record was made from information transmitted by a person with knowledge of the facts, (iv) the record was made at or near the time of the acts, events, conditions, opinions, or diagnoses appearing on it, (v) the record was kept in the course of regularly conducted business activity, and (vi) the record was made as part of the regular practice of that business activity.⁴⁸ If these requirements of Rule 803(6) are

⁴⁵ *U.S. v. Whittington*, 783 F.2d 1210, 1215 (5th Cir. 1986); *Hall v. United Ins. Co. of America*, 367 F.3d 1255, 1261 (authentication of a signature or handwriting requires proper foundation detailing the witness’s familiarity with the party’s handwriting).

⁴⁶ *Whittington*, 783 F.2d at 1215.

⁴⁷ See *Hall*, 367 F.3d at 1255 (“...the lay witness must provide more detailed information regarding any ‘correspondence,’ ‘documents,’ or the like, relied upon to establish familiarity. Such instruments must be identified with particularity.”)

⁴⁸ FED.R.EVID. 803(6)

met, the witness does not need to have personal knowledge about the creation of the offered document, have personally participated in its creation, or even know who actually recorded the information.⁴⁹

Sample colloquy for authenticating a business record:

- Are you familiar with the document marked Exhibit 'A' for identification purposes?
- What is it?
- What is the function of this document?
- Was this document prepared in the ordinary scope of the business of your company?
- Was it prepared at or near the time of the acts, events, conditions, opinions, or diagnoses appearing in it? [e.g. Were the entries in the ledger made at or near the time of the recorded sales? Were the entries made by someone who had personal knowledge of the sales?]
- Where are these documents stored after they are prepared?
- From where were these documents retrieved?
- Is it a regular part of your business to keep and maintain records of this type?
- Are these documents of the type that would be kept under your custody or control?

If no witnesses with personal knowledge can sponsor a document, it may be introduced through an expert witness testifying to the authenticity of a signature or other distinct characteristics of the document.⁵⁰

Some documents can be authenticated by counsel herself. For example, the production of documents by the opposing party in discovery is enough to authenticate them.⁵¹

Rule 902 sets out other “self-authenticating” documents that do not require a sponsoring witness. Such documents including domestic documents under seal, foreign public documents, certified copies of public records, official publications, newspapers and periodicals, documents with trade inscriptions, certified domestic records of regularly conducted activity, and

other documents that possess on their face indicia of authenticity.⁵²

4. Electronically-Stored Information

Just as with “hard copy” evidence, a party seeking to admit an exhibit need only make a prima facie showing that it is what he or she claims it to be.⁵³ Courts have observed that “[a]uthenticating a paperless electronic record, in principle, poses the same issue as for a paper record, the only difference being the format in which the record is maintained”⁵⁴ However, “[t]he paperless electronic record involves a difference in the format of the record that presents more complicated variations on the authentication problem than for paper records. Ultimately, however, it all boils down to the same question of assurance that the record is what it purports to be.”⁵⁵

- **E-mails** may be authenticated by (i) a witness with personal knowledge, 901(b)(1); (ii) expert testimony or comparison with authenticated exemplar, 901(b)(3); (iii) distinctive characteristics, including circumstantial evidence, 901(b)(4); (iv) trade inscriptions, 902(7); and (v) certified copies of business record, 902(11).⁵⁶
- **Website Postings, Text Messaging and Chat Room Content** may be authenticated (i) by a witness with personal knowledge, 901(b)(1); (ii) by expert testimony, 901(b)(3); (iii) by distinctive characteristics, 901(b)(4); (iv) as a public record, 901(b)(7); (v) as a system or process capable of producing a reliable result, 901(b)(9); and (vi) as an official publication, 902(5).⁵⁷
- **Computer-Stored Records and Databases** may be authenticated (i) by a witness with personal knowledge, 901(b)(1); (ii) by expert testimony, 901(b)(3); (iii) by distinctive characteristics, 901(b)(4); and (iv) as a system or process

⁵² Fed. R. Evid. 902

⁵³ *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 538 (D. Md. 2007).

⁵⁴ *In re Vee Vinhnee*, 336 B.R. 437, 444 (9th Cir. BAP (Cal.) 2005).

⁵⁵ *Vee Vinhnee*, 336 B.R. at 444

⁵⁶ THE SEDONA CONFERENCE COMMENTARY ON ESI EVIDENCE AND ADMISSIBILITY (March 2008) at 4 (citing *Lorraine*, 241 F.R.D. at 555).

⁵⁷ THE SEDONA CONFERENCE COMMENTARY ON ESI EVIDENCE AND ADMISSIBILITY (March 2008) at 4 (citing *Lorraine*, 241 F.R.D. at 556).

⁴⁹ FED.R.EVID. 902(11). *Resolution Trust Corp. v. Eason*, 17 F.3d 1126, 1131-32 (8th Cir. 1994).

⁵⁰ See FED.R.EVID. 901(b)(3) *et seq.*

⁵¹ *Charter Graphic Services, Inc.*, 230 B.R. at 766 (citing *Federal Trade Commission v. Hughes*, 710 F.Supp. 1520, 1522 (N.D.Tex.1989)).

capable of producing a reliable result, 901(b)(9).⁵⁸

5. Practice Tips

- Whenever possible (some courts require it), assemble and pre-mark your exhibits. Collect all the documents that you intend to offer as exhibits in a tabbed binder with a cover page identifying each document. Be prepared to provide copies to the court and other parties and to argue authenticity of the documents prior to the start of the hearing.
- Create a foundation and authenticity checklist for each exhibit. Have it handy for your direct examination of sponsoring witnesses or when drafting affidavits and proffers.
- You can avoid having to authenticate documents during a hearing or adversary proceeding by conferring with opposing counsel and entering a stipulation or by serving requests for admissions asking the opposing party to admit that the attached document is a true and correct copy.
- Read the local rules (both bankruptcy and district court) to determine if you must exchange potential exhibits a required number of days prior to the hearing.

C. Using Summaries, Demonstratives and Pedagogical Evidence

1. Primary-Evidence Summaries

The Federal Rules of Evidence provide for using summaries of voluminous documents in lieu of the documents themselves. Rule 1006 of the Federal Rules of Evidence provides:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place. The court may order that they be produced in court.

When a Rule 1006 summary is admitted, it is used *as evidence itself*.

There are five pre-conditions to admitting a Rule 1006 summary chart. First, the documents must be so

“voluminous” that they “cannot conveniently be examined in court” by the trier of fact.⁵⁹ The documents must be “sufficiently numerous as to make comprehension ‘difficult and ... inconvenient.’”⁶⁰ Second, the proponent of the summary must also have made the documents “available for examination or copying, or both, by other parties at [a] reasonable time and place.”⁶¹ Third, the proponent of the summary must establish that the underlying documents are admissible in evidence.⁶² Fourth, a summary document “must be accurate and non-prejudicial.”⁶³ The information on the document must summarize the information contained in the underlying documents accurately, correctly, and in a non-misleading manner.⁶⁴ The information on the summary must also not be embellished by or annotated with the conclusions of or inferences drawn by the proponent, whether in the form of labels, captions, highlighting techniques, or otherwise.⁶⁵ Fifth and finally, a summary document must be “properly introduced before it may be admitted into evidence.”⁶⁶ In order to lay a proper foundation for a summary, the proponent should present the testimony of the witness who supervised its preparation.⁶⁷

2. Pedagogical Evidence

Pedagogical evidence or devices, on the other hand, are *not* evidence themselves but rather an illustrative aid to summarize or argue how to construe the actual admitted evidence.⁶⁸ A pedagogical device “(1) is used to summarize or illustrate evidence, such as documents, recordings, or trial testimony, that has been admitted in evidence; (2) is itself not admitted into evidence; and (3) may reflect to some extent,

⁵⁹ *U.S. v. Bray*, 139 F.3d 1104, 1109 (6th Cir. 1998)

⁶⁰ *Bray*, 139 F.3d at 1109 (citing *United States v. Seelig*, 622 F.2d 207, 214 (6th Cir.1980)).

⁶¹ FED.R.EVID. 1006; *Bray*, 139 F.3d at 1109.

⁶² *Id.* (citing *Martin v. Funtime, Inc.*, 963 F.2d 110, 116 (6th Cir. 1992)); *Matter of Brackin*, 148 F.3d 953, 957 (Bankr. N.D. Ala. 953); *Wright v. Southwest Bank*, 554 F.2d 661 (5th Cir.1977).

⁶³ *Id.* (citing *Gomez v. Great Lakes Steel Div., Nat'l Steel Corp.*, 803 F.2d 250, 257 (6th Cir. 1986)).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* (citing *Martin*, 963 F.2d at 115-16)

⁶⁷ *Id.* (citing *United States v. Scales*, 594 F.2d 558, 562-63 (6th Cir. 1979).

⁶⁸ *Bray*, 139 F.3d at 1111; *United States v. Wood*, 943 F.2d 1048, 1053-54 (9th Cir. 1991); *cf. United States v. Sawyer*, 85 F.3d 713, 740 (1st Cir. 1996).

⁵⁸ THE SEDONA CONFERENCE COMMENTARY ON ESI EVIDENCE AND ADMISSIBILITY (March 2008) at 4-5; *See also In re Vee Vinhnee*, 336 B.R. 437, 446-47 (proposing an eleven-step checklist for establishing authenticity).

through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary's proponent."⁶⁹

Pedagogical exhibits are governed by Federal Rule of Evidence 611(a), which provides that the "court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." The court is given wide-latitude both in determining whether evidence is admissible and in controlling the mode and order of its presentation.⁷⁰

3. Secondary-Evidence Summaries

Secondary-evidence summaries are a combination of Rule 1006 summaries and pedagogical devices. "[T]hey are not prepared entirely in compliance with Rule 1006 and yet are more than mere pedagogical devices designed to simplify and clarify other evidence in the case."⁷¹ Secondary-evidence summaries are not evidence.⁷²

4. Practice Tips

- If possible, confer with counsel and execute a stipulation concerning any Rule 1006 summaries.
- If you intend to rely on PowerPoint or other computer-generated displays, contact the court's staff in advance to learn what the courtroom is and is not equipped to do.
- Contact local counsel to learn what your judge's preference might be as to demonstratives and technology.
- Always have a back-up for computer and technology breakdowns. Consider creating color printouts in a spiral bound notebooks as back-up or an alternative.
- Prepare demonstratives as early in the process as possible. Sometimes graphically and visually representing your case helps you focus on the story and most meaningful issues.
- Always, always read the local rules and any judge-specific practice guides.

⁶⁹ *Bray*, 139 F.3d at 1111

⁷⁰ *Manley v. AmBase Corp.*, 337 F.3d 237 (2nd Cir. 2003).

⁷¹ *Bray*, 139 F.3d at 1112.

⁷² *Id.*

IV. TESTIMONY AND EVIDENTIARY OBJECTIONS

Bankruptcy Courts follow the Federal Rules of Evidence when it comes to presenting testimony and other evidence. Whether you are presenting such evidence at a preliminary hearing to employ a professional or during the trial on a motion to lift the stay, you should be prepared to present your case, including making appropriate objections, in a manner which complies with the Federal Rules of Evidence. The Bankruptcy Judge will act as judge and jury, but you should still be prepared to know and follow the applicable rules.

A. Federal Rule of Evidence 611

1. Generally

Rule 611 governs the presentation of witnesses, both on direct and cross, and the presentation of evidence. The rule provides as follows:

Rule 611. Mode and Order of Interrogation and Presentation.

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

2. Practice Tips

The headings of the subparts to Rule 611 are insightful.

First, "Control by Court." Remember that the Bankruptcy Judge is in charge of his or her courtroom, and despite what the rules may say or what makes more sense to you or your client as to which witness or piece of evidence should be heard first or in what manner, the Judge is the ultimate arbiter.

Also key here is that you should always look for ways to present your case efficiently. No one wants to have his or her time wasted with multiple iterations of

the same testimony or documents. In this regard, stipulations with the opposing side as to undisputed facts and documents are a must.

Finally, it is interesting that the rule allows for some measure of embarrassment for witnesses, just not that which is "undue."

Second, "Cross-Examination." In terms of cross exams, remember that they are limited to the scope of the direct exam. This is different than in Texas state court, where cross is wide open. But, if you can argue that your cross exam questions (which don't appear directly relevant to the merits of the case), are instead directed at the witness's credibility, you may get some latitude from the Judge. Be cautious when taking this approach, however, so as not to have your own witnesses suffer the consequences of the same "latitude." What's good for the goose is good for the gander.

Also, even if you are getting this latitude, don't abuse it. You should always "move on" when the Judge says something like: "Counselor, move on to another subject." Always listen to the Judge and Obey!

Third, "Leading Questions." Remember that leading questions are fine on cross, but not usually on direct. You may have prepared a very detailed direct exam outline, but it's still amazingly easy to ask a leading question once you get into the flow of the exam. Don't worry, everyone makes this mistake, and it's easily corrected. Just take a step back and make your question shorter. If you get flustered, try and ask a "who, where, when" kind of question, or just simply: "What happened next?"

You can frequently fall into the trap of asking your own witness leading questions if you are trying to save time. If allowed at all, leading questions on direct should really be limited to matters which are not contested or inconsequential. Frequently, the Judge will permit this kind of questioning as long as it is saving everyone a bit of time.

B. Direct Examinations⁷³

1. Generally

The basics of a direct examination are known to us all. You have to ask the Who? What? When? Where? How? and Why? (sometimes) questions. These questions allow the witness to tell his or her own story, and prevent you from asking leading questions. Knowing your case inside and out makes it much easier to ask these open-ended questions of your star-witness. If you know they have left something out of their answer, your questions can more naturally

explore "what else" there may be, and yet still be open-ended.

2. Practice Tips

Some things to remember when putting your witness on direct:

- Prepare your Witness. Don't assume that just because your witness is also your client, that this means he or she understands the importance you have assigned to certain facts or how those facts relate to legal points. Believe it or not, your witness cannot read your mind. So the point is, practice asking questions with your witness. Explain to them what the courtroom experience will be like. This doesn't mean coaching your witness as to what to say, but it does mean being on the same page as to what story you are trying to tell.

- Allow your Witness to Tell the Story. Just because you have practiced with your client doesn't mean that it's now okay to skip details. The Bankruptcy Judge can't read your mind either, so take enough time to connect the dots by asking questions which build upon one other in an understandable way. When you tell a joke, you don't start with the punch line. When you read a novel, you don't start with Chapter 5. Putting on a story with the direct exam works the same way.

- Don't ask Leading Questions. This looks unprofessional, especially if you keep doing it. The effect is that: (1) it makes the witness look like they don't know what they are talking about, or (2) that the substance of your question is not what happened either. The caveat to this rule is when you are going over matters which are undisputed, or when everyone can agree to save time by asking questions in such a manner.

- Use Pictures, or your Exhibit Notebook. It helps the Judge (and you) to keep track of where things stand in the story, and how it fits together, if you are able to present pictures and other demonstrative exhibits (whether admitted or not), during the course of the witness's testimony. Ask your client to explain what a particular picture shows. Alternatively, use your exhibit notebook as an easy way for moving from one part of your story to another. This assumes, of course, that you've organized your exhibit notebook in such a fashion. Finally, do your homework as to the courtroom's technology for displaying such exhibits in the courtroom. Don't assume the Court or its staff will know how to work the Elmo for you.

- Be Prepared for Redirect. After your star witness has been cross-examined, you may feel that the other side scored some points to which you want to respond. Resist the urge to do so. First, going over the "bad points" which the other side scored will only

⁷³ Many thanks to former U.S. Bankruptcy Judge Frank Monroe (now at GDHM), former U.S. Magistrate Alan Albright (now at Bracewell & Giuliani), and Mike McKetta (GDHM) for these suggested practice pointers.

serve to emphasize their case -- not yours. Instead, use re-direct as an opportunity to remind the Judge of the strengths in your case. Limit such questions to your strongest issue. Second, there is a risk that your star witness will give an even more damaging answer to your re-direct questions. In this regard, only ask the re-direct questions if you and your witness have sufficiently prepared for them, and you are absolutely sure that you have a killer response.

- **Be Prepared for the Attack of the Zombies.** Sometimes, even if you and your client have prepared ad nauseum, and even when your client is the smartest person you've ever met outside of the courtroom, they become a zombie once they get on the witness stand. Such witnesses usually can't tell you what day it is, let alone why they couldn't make their interest payments to the bank -- they just become too nervous or confused by the courtroom experience. In such a case, be ready to pull the plug on that witness and get them off the stand. Before you do, make sure that you ask whatever questions, or get in whatever other evidence, that you cannot get in with any other witness.

- **Know How to Get an Exhibit into Evidence.** This includes laying the proper foundation for the exhibit, but also understanding the "Mother May I's" for doing so. A common manner for tendering an exhibit is seen with business records, as shown in detail above.

- (1) Mr. Witness, please state your name.
- (2) Who is your employer?
- (3) Are you the custodian of the financial records for your employer?
- (4) Do you have those records with you here today?
- (5) Your honor, may I approach the witness?
- (6) Let me hand you what has been pre-marked as Exhibit A.
- (7) Do you recognize Exhibit A?
- (8) What is Exhibit A?
- (9) [insert questions for proving up business records, detailed above]
- (10) Are these records either the originals or true and correct copies of the same?
- (11) Your Honor, we move to admit Exhibit A, the financial business records of Mr. Witness's employer.

C. Cross Examinations

1. Generally

This is when you do get to put words into the mouth of the witness. Ask those leading questions. For example: "Isn't it true, Mr. Witness, that you completed a \$100,000 renovation on your house the week before you filed for bankruptcy?" But

remember, none of us are Perry Mason, so don't try for too much theatre.

Also, because everyone knows that you should never ask a question you don't already know the answer to, I haven't listed it below in the practice pointers. It bears repeating, however: "NEVER ASK A QUESTION YOU DON'T ALREADY KNOW THE ANSWER TO."

2. Practice Pointers

Some things to remember when cross-examining a witness:

- **Get in and Get Out.** Cross examinations should not be exhaustive searches for the nooks and crannies of a case -- that's what 2004 exams and depositions are for. Make 3 or 4 points with your cross, hopefully in 30 or 40 minutes, and sit down. You don't have to cover every single topic which opposing counsel did on direct.

- **Ask Easy, but Controlled Questions.** Make your questions straightforward and to the point, so that the witness can't wiggle out of answering them. It's much easier for a witness to evade answering your question if it is too complex or uses words and phrases that are filled with legalese. At the same time, make sure that your leading questions are leading in the right direction. That is to say, you have to stay in control of the story with your questions. Don't let the adverse witness co-opt your story by using his or her own "magic words." Your goal should be to illicit "Yes" or "No" answers.

- **Consider Whether to Cross at All.** This is a foreign concept to many attorneys, because the opportunity to cross examine a witness is what we all went to law school for, right? But sometimes, the witness on direct just did a much better job at hanging himself than you could ever pray for. Also, instead of getting something into evidence through a cross-exam, you may be better served (read, it may be safer), to get that testimony in through your own friendly witness.

- **Listen and Be Quick on Your Feet.** You may have prepared a killer cross examination outline, but that doesn't mean you will be able to stick to it exactly. You have to be ready to seize upon the openings a witness presents you with, even if they may take you by surprise. But don't forget: "Never ask a question that you don't already. . . (you know the rest)." Frequently, because you have spent the time preparing that outline, you can ask questions of the witness in a more conversational manner. Before you know it, you have covered everything in your outline without ever having looked at it.

- **Don't Fight.** There is no reason to fight with a witness, especially on cross-examination. Sure, they are adverse, but that doesn't mean you have to beat

them up along the way. Being contrary only makes you look unprofessional in the eyes of the Judge and ill-prepared to handle the difficult parts of your case. If the witness wants to fight with you, let the Judge handle it.

D. Objections

1. Generally

Objections are the means by which you keep the other side honest. The Bankruptcy Judge is paying attention, but you cannot expect the Judge to protect your case for you.

2. Practice Pointers

- Don't be Afraid to Object. You are there to protect your client and his or her case, so object when you need to. For example, the hearsay objection is a wonderful tool, but is often under-employed. Know the exceptions to the rule so that you can make a cogent argument as to why opposing counsel's attempt to get around your objection doesn't work.

- But, Don't Abuse the Objection Process. If the other side let you put on your witness without too much interruption, you should try and afford them the same courtesy. That doesn't mean you shouldn't object when you absolutely have to, as when you need to preserve a point for appeal purposes. Sometimes, however, objecting too much shows that you feel the witness is scoring too many points. As with cross-exam points, be prepared to make 2 or 3 relevant and strong objections, and let the rest of them ride.

- Authentication. After putting together several motions in preparation for trial, or in the discovery process, most everyone can agree upon whether the key documents are what they purport to be. So don't abuse this objection, as it will frequently be a waste of time for the Judge and your case. The best bet is to try and reach stipulations as to authenticity and admissibility of your exhibits.

- Know the Basis for Your Objection. This seems pretty obvious, but sometimes you find yourself jumping out of your seat with an "Objection!" -- but you haven't the slightest idea why. For example, when objecting to a question during your opponent's cross-exam of your star witness, you shouldn't object that the question is "Leading." Also try not to say: "I just don't like the question." The point is, before your hearing or trial, you should already be aware of the 2 or 3 issues to which you will need to object. Prepare your objection, just like you prepare your story on direct, so that when you stand up for the objection you can make a clear and concise statement as to why the question is improper.

- Be Prepared for Bad Rulings on Your Objections. With apologies to our judiciary present,

there will be rulings at a hearing or trial which you won't be pleased with. When confronted with such a circumstance, don't complain. Accept the decision, preserve error if you need to, and move on. Frequently, if you got one or two rulings you aren't happy with, the other side probably feels the same way about one or two of the rulings that went your way.

- Get a Ruling on Objections.⁷⁴ In order to preserve error for appellate purposes, you should make sure and get a ruling on objections, either for or against you. If you believe a piece of testimony or an exhibit is critical to your appeal, but the Judge has already sustained an objection against it, be prepared to make an offer of proof under FRE 103.

⁷⁴ See Federal Rule of Evidence 103.

