

# EVIDENCE IN BANKRUPTCY COURT

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# WHY DOES IT MATTER?

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- Bankruptcy Court is full of contested matters – Fed. R. Bankr. P. 9014
- You may just want a decision, but the Judges always aware of the record, possibility of appeal, need to establish basis for their ruling
- New appellate judges at the district court level
- Best position to attack other sides' evidence if your own is in order

# EVIDENCE IN MOTION PRACTICE

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# DECLARATIONS

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- Motions should generally be supported with Declarations/Facts in Support:
  - Local Bankr. Rule 9013-1(d)(1)(A); include with motion statement of all reasons in support thereof, and “all affidavits, declarations and photographic or documentary evidence to be presented in support”
- Declarant should
  - (1) Have personal knowledge of facts alleged
  - (2) Be able to establish any attachments are authentic
- Evidence presented must be admissible

# PERSONAL KNOWLEDGE

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- Declarant should have personal knowledge of the facts stated - means firsthand knowledge based on events perceived by the witness through one of the five senses (here's what I saw, here's what I did, here's what I wrote)
- Declarant state facts that occurred or provide & authenticate documents
- Attorney saying “attached is a true and correct copy” is not likely from personal knowledge

# AUTHENTICATION OF DOCUMENTS

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- Declarant should be able to establish document is authentic – FRE 901
- FRE 901(a): proponent should “produce evidence sufficient to support a finding the item is what the proponent claims it is.” FRE 901(b) provides examples, and (b)(1) is the most basic: testimony by a witness with knowledge that an item is what it is claims to be.
  - Where it came from, how it was obtained
  - Who prepared it, how was prepared
- Attorney can authenticate documents produced by the opposing party in discovery

# HEARSAY

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- Hearsay means a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. FRE 801.
- Common methods of admission
  - Statement of a party-opponent FRE 801(d)(2)
  - Business Records FRE 803(6) – records made “at or near the time” of the events, “kept in the course of a regularly conducted business activity,” with certification of records custodian

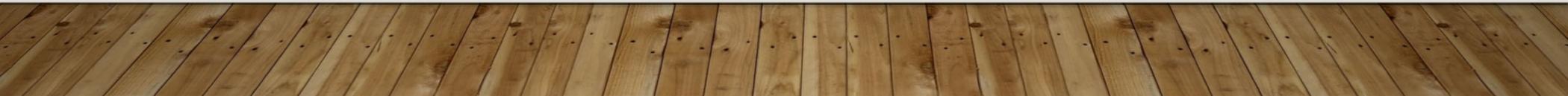
## EXAMPLE

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- *Latman v. Burdette*, 366 F.3d 774 (9<sup>th</sup> Cir 2004) – bank account records received in response to subpoena were inadmissible when submitted with trustee's declaration; trustee lacked personal knowledge of records' authenticity and no testimony was provided from the bank records custodian

# TRANSCRIPTS

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# ADMISSION OF 2004 EXAM TRANSCRIPTS

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- 2004 exam – examination under Fed. R. Bankr. P. 2004, approved by court, subpoena to testifying party
- Admissible like a deposition? Whose testimony and who offering against?
  - May use excerpts of deposition transcript in motion practice, including the excerpts of a deposition of the offering party. *Patsy's Italian Restaurant, Inc. v. Banas*, 508 F.Supp.2d 194, 198 (E.D. N.Y. 2007). The reasoning is that deposition testimony taken under oath, even if not admissible under Rule 32(a)(3), is at least as good as an affidavit.

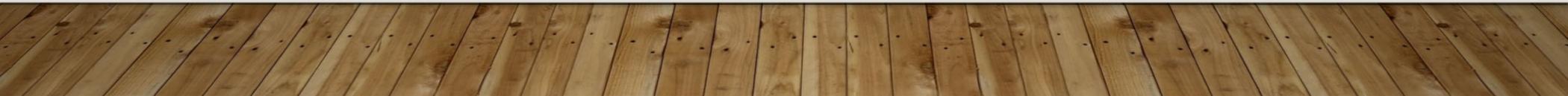
# ADMISSIBILITY ISSUES?

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- Who does the declaration to admit?
- Official/final transcript?
- Be aware of hearsay issues and issues with Rule 32(a).
- Be aware of Local District Court Rule 32(e): designating testimony pre-trial, opposing party has ability to counter-designate & object

# PROVING FACTS WITHOUT EVIDENCE

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# OFFERS OF PROOF – FRE 103

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- If court is excluding evidence, party may inform the court of the substance of the evidence by an offer of proof, stating what the evidence would have shown
- Testifying party or evidence must be in the courtroom to count

# JUDICIAL NOTICE – FRE 201

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- Court may 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” (like “its cold in Alaska in the winter”) or
  - (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
- Party requesting court to take judicial notice must provide the necessary information

# JUDICIAL NOTICE

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- Applies to facts, not law – just cite case law (and if unpublished or other source, look up citation style in the Bluebook)
- Court can take judicial notice that certain pleadings were previously filed in a case, but not of the *content* of those pleadings. See e.g. *M/V American Queen v. San Diego Marine Construction*, 708 F.2d 1483, 1491 (9th Cir.1983) (a court may not take judicial notice of otherwise inadmissible statements merely because they are part of a court record or file).

# “HIDDEN” EXPERTS

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# WHAT CONSTITUTES AN EXPERT REPORT OR TESTIMONY

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- Think about what could constitute an “expert” report – anything where based on experience, not personal knowledge/involvement with case
  - Appraisal – expert report
  - Comparative market analysis – expert report
  - Realtor weighing in on marketability, impacts on sale, ability to re-zone or subdivide – expert testimony

# EXPERT TESTIMONY – RULE 702

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- FRE 702: Testimony by Expert Witness. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
  - (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
  - (b) the testimony is based on sufficient facts or data;
  - (c) the testimony is the product of reliable principles and methods; and
  - (d) the expert has reliably applied the principles and methods to the facts of the case.

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- Declaration should establish declarant is Rule 702 expert
    - Profession, experience, training, etc; what facts opinion is based on; how applied facts of the case
  - Expert who prepared the material should be the one signing the declaration (see personal knowledge/authentication, *supra*)
  - *Zillow* – “not credible evidence of market value”
  - Restrictions on using tax assessed value as evidence of valuation
  - Debtor may testify as to value of property based upon perception. FRE 701 (authorizing opinion testimony of lay witness).

# DEFAULT JUDGMENTS

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# DEFAULT PROCEDURES

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- New Bankruptcy Local Rule 7055-1 (have own rule now, not just D. Court's)
- Default and Default Judgment can be in one motion
- But Ordering Granting Default and Default Judgment are (a) separate steps of process and (b) need to be in own final orders
- If no one has appeared, can do *ex parte*. But court can set either default or judgment for hearing.
  - Court can see default just by looking at docket
  - But establishing entitlement to judgment requires plaintiff to submit evidence

# ESTABLISHING THE DEFAULT JUDGMENT

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- Not enough that they just didn't answer – 7055-1(b)(2) – Evidence is required
- If verified complaint, can take that as factual submission and submit judgment along with default
  - Practice tip: Judges don't see this very often, would call out in motion when submitting your motion & RUO so they know where to look for the facts
- Otherwise, must put in evidence establishing entitled to judgment (monetary OR non-monetary)

# ESTABLISHING DEFAULT JUDGMENT

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- Put in the documents/facts that led you to file complaint, sufficient to meet Rule 11
  - Contract
  - Declaration from client
- Will be only one side of story, but uncontested
- If seeking affirmative relief (like “will record satisfaction of lien”) that’s like an affirmative injunction, must meet that standard

# APPLICATIONS TO EMPLOY

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# EMPLOYMENT APPLICATIONS

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- Professionals must be disinterested, and not hold or represent an adverse interest – Section 327 (a)
- Professionals must be employed on application – Fed. R. Bankr. P. 2014 (a) which must state “the specific facts” showing:
  - Necessity for employment; Name of person to be employed; The reasons for selection
  - The professional services to be rendered; Any proposed arrangement for compensation, and
  - **To the best of the applicant’s knowledge, all of the connections with the debtor, creditors, or any other party in interest, their attorneys or accountants, or the U.S. Trustee**

# SPECIFICITY IN APPLICATION....

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- Disinterested defined in Section 101(14):
  - (A) **not** a creditor, an equity security holder, or an insider;
  - (B) **not** a director, officer, or employee of the debtor (now or w/in past 2 years); and
  - (C) **no** interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.
- Describe facts of what did to determine were disinterested – state what you did to search, what results came up, etc.
- Just saying “we believe we’re disinterested” is a legal conclusion that the court makes, not declarant