



# OMG, How Will I Get in This Evidence?

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Moderator: Honorable Pamela Pepper

Judge: Honorable Stacey Meisel

Panelists: Julia Frost-Davies  
Demetra Liggins & Thomas Salerno



# Evidence and Bankruptcy

## Bankruptcy Rule: 9017

The Federal Rules of Evidence and Rules 43, 44, and 44.1 F. R. Civ. P. apply in cases under the Code.



# NCBJ Evidence Hypothetical: Code Ninja

- **Code Ninja, Inc., was founded in 2013 by former bankruptcy attorney, ironman competitor, and reality TV star James Mann.**
  - › Mann built a compound tucked into the hills above Sonoma Valley, where he offered ninja-style training camps for bankruptcy professionals looking to get into fighting shape.
  - › His week-long programs featured strength training, cardio, martial arts, a rigorous obstacle course, Spartan accommodations, daily drills on Bankruptcy Code section provisions (to keep both minds and bodies sharp), and a mandatory meal plan.



# NCBJ Evidence Hypothetical: Code Ninja (cont'd)

- Construction of the facility was financed by a \$100 million term loan from Largesse Bank, bearing 12% interest and maturing in 2017.
- The term loan was secured by substantially all of the assets of Code Ninja and backed by a personal guaranty from Mann.
- Additional capital was provided by way of a \$25 million equity investment by Mann, the sole shareholder in Code Ninja.

- Unfortunately, Code Ninja was never able to generate the revenue projected in its business plan and soon found itself in both covenant and payment default of its term loan.
- The company pinned its lack of success on:
  - › Its inability to convince enough bankruptcy attorneys to put down their phones long enough to complete the training program; and
  - › The proximity of luxurious wineries offering competing spa get-a-ways, and construction cost overruns, which the company blamed on its general contractor.



# NCBJ Evidence Hypothetical: Code Ninja (cont'd)

- **In the summer of 2015, Code Ninja filed a voluntary petition under chapter 11 of the Bankruptcy Code.**
- There were many lengthy and contentious battles throughout the Code Ninja Chapter 11, including multiple discovery disputes and a tense Rule 2004 examination of the work-out officer for the term loan lender.
- The Debtor has now filed a motion seeking confirmation of its Sixth Amended Plan of Reorganization.



# NCBJ Evidence Hypothetical: Code Ninja (cont'd)

## **The Plan of Reorganization**

- › Funded by an equity infusion by Mann and his new business partner, Sam Youri
- › Contemplates the conversion of the Code Ninja training facility into a plush culinary and wine institute focusing on locally sourced food, yoga, and mindfulness.
- › Provides for the cramdown of the term loan debt, stretching the maturity date to 2022 with a 7.5% interest rate.
- › The Plan has the support of its general unsecured creditors (primarily trade).
- › Largesse Bank has objected to confirmation on multiple grounds.

# Vignette 1: Business Records

- **FRE 803(6)**

- › ***Records of a Regularly Conducted Activity.*** A record of an act, event, condition, opinion, or diagnosis if:
  - a) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
  - b) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
  - c) making the record was a regular practice of that activity;

# Vignette 1: Business Records

- **FRE 803(6)**

- d) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
- e) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.



# Vignette 1: Business Records

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Is the Underwriting Memorandum admissible?

# Vignette 2: Opinion Testimony

## ○ FRE 702

- › 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;

# Vignette 2: Opinion Testimony

- **FRE 702**

- 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.
- › Fed. R. Civ. P. 26



# Vignette 2: Opinion Testimony

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Should the testimony be admitted?

# Vignette 3: Expert Report

- **FRE 703.** Bases of an Expert
  - › An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.
  - › If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.
  - › But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

# Vignette 3: Expert Report

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Should the report be admitted?

## Vignette 4: Impeachment Using Prior Inconsistent Testimony Under Oath

- **FRE 613:**

- a) Showing or Disclosing the Statement During Examination.**

When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

- b) Extrinsic Evidence of a Prior Inconsistent Statement.**

Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under FRE 801(d)(2).



## Vignette 4: Impeachment Using Prior Inconsistent Testimony Under Oath

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Can the testimony be used to impeach the witness?

- **Fed. R. Bankr. P. 2003.**
  - › **(c) Record of Meeting.** Any examination under oath at the meeting of creditors held pursuant to 341(a) of the Code shall be recorded verbatim by the United States trustee using electronic sounds recording equipment or other means of recording, and such record shall be preserved by the United States trustee and available for public access until two years after the conclusion of the meeting of creditors. Upon request of any entity, the United States trustee shall certify and provide a copy or transcript of such recording.

- **FRE 612. Writing Used to Refresh a Witness**
- **(a) Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory:
  - › **(1)** while testifying; or
  - › **(2)** before testifying, if the court decides that justice requires the party to have those options.

- **FRE 612. Writing Used to Refresh a Witness**
- **(b) Adverse Party's Options; Deleting Unrelated Matter.** Unless [18 U.S.C. § 3500](#) provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

- **FRE 612. Writing Used to Refresh a Witness**
- **(c) Failure to Produce or Deliver the Writing.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.



## Vignette 5: Refreshing Recollection/Past Recollection Recorded

Should the objection be sustained?

- **FRE 1006. Summaries to Prove Content**
  - › The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court.
  - › The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.



# Vignette 6: Admission of Summary to Prove Content

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Should the objection be sustained?

## Vignette 7: Stipulated Facts to Block Testimony or Other Evidence That Varies the Stipulation

- › Stipulations by parties regarding questions of fact are conclusive.
- › Parties need not offer evidence to prove stipulations, and are not allowed to disprove them.
- › Therefore, trial courts are bound by the facts and can not make contrary findings. *See* 9 WIGMORE, EVIDENCE 2588 (3d ed. 1940); *Burstein v. United States*, 232 F.2d 19 (8th Cir. 1956); *United States v. Kahriger*, 210 F.2d 565 (3d Cir. 1954); *Norwich Pharmacal Co. v. Rakway, Inc.*, 189 F.Supp. 348 (E.D.Pa.1960).



## Vignette 7: Stipulated Facts to Block Testimony or Other Evidence That Varies the Stipulation

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Should the court take the stipulated fact as is, or hear evidence as to the date of the payment?

# Vignette 8: Judicial Notice

- **FRE 201. Judicial Notice of Adjudicative Facts**
- **(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
- **(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice 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.

- **FRE 201. Judicial Notice of Adjudicative Facts**
- **(c) Taking Notice.** The court:
  - › **(1)** may take judicial notice on its own; or
  - › **(2)** must take judicial notice if a party requests it and the court is supplied with the necessary information.
- **(d) Timing.** The court may take judicial notice at any stage of the proceeding.
- **(e) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

# Vignette 8: Judicial Notice

- **FRE 201. Judicial Notice of Adjudicative Facts**
- **(f) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.



# Vignette 8: Judicial Notice

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Should the objection be sustained?

# Thanks for Participating

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