

Educational Materials

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of Bankruptcy Judges

OMG, HOW WILL I GET THIS
EVIDENCE IN?!



**"OMG! HOW WILL I GET THIS EVIDENCE IN?!"
LITIGATING IN BANKRUPTCY COURT ©
Thomas J. Salerno, Esq.
NATIONAL CONFERENCE OF BANKRUPTCY JUDGES
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SPEAKERS

HON. PAMELA PEPPER received her undergraduate degree in theater from Northwestern University and her J.D. from Cornell Law School, where she was a notes editor on the Cornell Law Review and co-winner of the Sutherland Moot Court competition. She clerked for Frank M. Johnson, Jr. on the Eleventh Circuit Court of Appeals. Between 1990 and 1997, she was a federal prosecutor in Chicago and Milwaukee. From 1997 to 2005, she was a solo criminal defense practitioner, representing clients in federal and state court. She holds a graduate certificate in dispute resolution from Marquette University, and in the past has been an adjunct professor at Marquette Law School. The Seventh Circuit Court of Appeals appointed her to the bankruptcy bench for the Eastern District of Wisconsin on July 5, 2005, and she served as chief judge from July 1, 2010 to December 8, 2014. In May of 2014, President Obama nominated her to a seat on the United States District Court for the Eastern District of Wisconsin; she was confirmed by the Senate on November 20, 2014, and sworn in to the district court bench on December 8, 2014.

Judge Pepper is a member of the American Bankruptcy Institute, formerly served as education director and chair of its Consumer Bankruptcy Committee, and currently serves on the board of directors, the education committee and the nominating committee. She belongs to the National Conference of Bankruptcy Judges, having served a term as the Seventh Circuit representative on the Board of Governors, and a term as secretary for the 2013-14 year. She also has served on the national conference education committee, and chaired that committee for the 2014 conference in Chicago. She completed two terms as an associate editor of the American Bankruptcy Law Journal. She has served on the Human Resources Advisory Council of the Administrative Office of U.S. Courts and currently serves on the OSCAR working group and the Judicial Data Working Group for the Administrative Office. She frequently speaks at Federal Judicial Center programs, and is a member of the Center's Bankruptcy Judges' Education Advisory Group. She speaks at bar associations across the country on topics such as the rules of evidence in bankruptcy, the intersection of criminal and bankruptcy law, and litigation skills.

HON. STACEY MEISEL is a Bankruptcy Judge for the U.S. Bankruptcy Court, District of New Jersey. She became a United States Bankruptcy Judge on September 24, 2015; the first African-American selected for this position in New Jersey. Prior to joining the bench, Judge Meisel was a founding member of Becker Meisel LLC, founded in 1998 and now known as Becker LLC. While at the firm, she was co-chair of the bankruptcy, insolvency and creditors' rights practice group.

In 1997, Judge Meisel became a member on the New Jersey Panel of Bankruptcy Trustees appointed by the United States Department of Justice, and the first African-American woman to serve in this position in New Jersey. She remained in this role until her appointment to the bench.

Judge Meisel was very active with the Bankruptcy and Federal bars. Prior to her appointment to the bench, she served on the Merit Selection Committees in 2006, 2013 and 2014, which were responsible for recommending candidates to the Third Circuit for the New Jersey bankruptcy judgeship vacancies. In 2014, the United States Bankruptcy Court for the District of New Jersey selected her to serve on the New Jersey Court Registry of Mediators. Judge Meisel also served on the Lawyers Advisory Committee to the Board of Judges of the United States Bankruptcy Court, District of New Jersey from 2011 until her appointment to the bench. In 2013, she was appointed as a Trustee to the Association of the Federal Bar of New Jersey. She also served on the ABI Advisory Board for the Mid-Atlantic Bankruptcy Workshop and was chair of the 2011 Workshop Attendance Committee.

A strong believer in social responsibility, Judge Meisel volunteered for the Essex County Volunteer Lawyers for Justice from 2002 until her appointment; she helped launch the New Jersey Bankruptcy Lawyers Foundation in 2004; she served on the Board of Directors of the Children's Home Society of New Jersey from 2004 until 2010; she served on the Board of Directors for Legal Momentum – The Women's Legal Defense and Education Fund from 2014 until her appointment; and served as Treasurer for the Board of Trustees for the Newark Boys Chorus School from 2013 until her appointment.

Judge Meisel continues to serve by participating on various panels on a variety of issues. Judge Meisel is also a co-author of the *Consumer Bankruptcy Manual*, a Thomson Reuters publication. Recently, Judge Meisel was appointed to serve a three (3) year term on the NCBJ Rules Committee.

JULIA FROST-DAVIS is a partner at Morgan, Lewis & Bockius LLP in its Boston office. She focuses her practice on the representation of creditors in complex Chapter 11 cases. A seasoned commercial litigator, she counsels clients facing commercial and bankruptcy litigation and appeals and regularly represents investors and lenders throughout the capital structure on all aspects of restructuring and related litigation, including debtor-in-possession financing, distressed M&A transactions, claim and plan negotiation and litigation, and out-of-court work-outs.

Recent representative matters include acting as counsel to DIP lenders in *Energy Future Holdings* and related cases; representation of the UMWA health and retirement funds in connection with the chapter 11 cases of *Alpha Natural Resources, Inc.*, *Arch Coal, Inc.*, *Patriot Coal Corp.*, *Peabody Energy Corp.*, and *Walter Energy, Inc.*; representation of pre-petition secured lenders in *Relativity Fashion, LLC*, and representation of noteholders in receivership proceedings involving a 55 megawatt biomass fueled electric generating facility.

Julia has been a panelist for several trial practice workshops for the American Bankruptcy Institute and is the co-author of *Debtor in Possession Financing Orders: Line by Line* (Aspatore Books). She also serves as treasurer and a director of the Honorable Tina Brozman Foundation.

DEMETRA L. LIGGINS is a Partner in Thompson & Knight's Bankruptcy and Restructuring Practice Group in the Firm's Houston office. She has nearly 15 years of experience in business finance and restructurings for a variety of large and small public and private companies. Demetra helps navigate her clients through complex corporate reorganization and distressed acquisitions. She works on both in-court and out-of-court restructurings. Demetra is highly regarded for her ability to quickly and efficiently help clients assess the effects of a bankruptcy on their corporate and financial transactions. She is a trusted business partner who works with her clients to identify and achieve their goals in the bankruptcy process.

Demetra received a J.D., *cum laude*, from the Cumberland School of Law at Samford University in 2000 and a B.S. in Business Administration, *cum laude*, from Christian Brothers University in 1997. Following law school, she clerked for the Honorable U.W. Clemon, Chief Judge for the United States District Court for the Northern District of Alabama. Demetra is licensed to practice in both Texas and New York.

Demetra is actively involved in numerous organizations, including serving as Houston Chapter Chair of the International Women's Insolvency and Restructuring Confederation (IWIRC); a member and former Chair of the Bankruptcy Section of the Houston Bar Association; a member of the Women's Energy

Network; a member of the Women's Business Alliance, Greater Houston Partnership; a former Fellow of Leadership Council on Legal Diversity; and a Fellow of the Texas Bar Foundation. Her accolades include being named to *Texas Rising Stars*® by Thomson Reuters, as a Law Firm Rainmaker by *Diversity & the Bar*, and to Houston's "Top Lawyers" by *H Texas* magazine. She has also been featured in *Law360*'s Minority Powerbroker Q&A series.

THOMAS J. SALERNO is a partner in Stinson Leonard Streets' financial restructuring practice, resident in the firm's Phoenix office. He has been involved in restructurings in the United States, the United Kingdom, Germany, France, Switzerland and the Czech and Slovak Republics. In addition, he taught *Comparative International Insolvency* at the University of Salzburg. Mr. Salerno was named as one of 12 Outstanding Bankruptcy Attorneys in 1998 and 2000 by *Turnarounds & Workouts*, a newsletter published by Beard Group, Inc. in Washington DC, and is a member of the select group of insolvency professionals listed in the *K&A Restructuring Professionals Registry*. He is also listed in *The Best Lawyers in America* and selected as the Restructuring Lawyer Of The Year in Phoenix for 2009 and 2013 by this publication. He was selected by his peers for inclusion in *Southwest Super Lawyers*, a distinction honoring the top 5 percent of lawyers in the region, from 2007 until present. In 2007, Mr. Salerno was one of three Arizona-based lawyers to be listed in *The International Who's Who of Insolvency & Restructuring Lawyers*. He is rated AV by Martindale-Hubbell's rating system.

Mr. Salerno has extensive experience representing distressed companies, acquirers and creditors in financial restructurings and bankruptcy proceedings, pre- and post-bankruptcy workouts, and corporate recapitalizations. He has represented clients in diverse industries such as casinos, resort hotels, real estate, high-tech manufacturing, electricity generation, agribusiness, construction, health care, airlines and franchised fast-food operations. He has also served as an expert witness on US insolvency law in litigation in Germany. He has represented parties in insolvency proceedings in 30 states and five countries. Mr. Salerno headed the US delegation to the Czech Republic in advising the Czech Government in the historic revamping of its bankruptcy law, which took effect in January 2008. He has also advised on revamping insolvency laws in the Dominican Republic and Costa Rica. He is a member of the UNCITRAL working group on its Insolvency Law Reform Project, completed in early 2007. He was lead counsel in the historic Chapter 11 proceeding resulting the sale of the *Phoenix Coyotes* to the NHL (the first time the NHL has acquired one of its teams) in 2009.

In addition to numerous articles in both national and international journals, Mr. Salerno is the author of "An Overview of the Restructuring Process," which appeared in *Best Practices for Corporate Restructuring*, published in 2006 by *Aspatore Books*. He is also the co-author of "Chapter 11 Cases Involving Professional Sports Franchises: Special Issues" published in *Collier's On Bankruptcy*; the *Executive Guide to Corporate Bankruptcy*, originally published in 2001 by Beard Publications (with the Second Edition published in 2010); co-author and an executive editor of the three-volume treatise *Advanced Chapter 11 Bankruptcy Practice*, published by Aspen Law Publications; and co-author of the two volume *Bankruptcy Litigation and Practice; A Practitioners' Guide – 4th Edition*, also published by Aspen Law Publications. Mr. Salerno served as a director of the American Bankruptcy Institute, where he also served on the executive committee, and formerly was a director of the American Bankruptcy Board of Certification, Inc. He is a past chair of the Bankruptcy Section of the State Bar of Arizona and a Fellow of the American College of Bankruptcy.

Mr. Salerno is a graduate of Rutgers University (BA, 1979, *summa cum laude*) and University of Notre Dame School of Law (JD, 1982, *cum laude*), where he served on the *Notre Dame Law Review*.

PART I

**DIRECT EXAMINATIONS
IN BANKRUPTCY LITIGATION**

*“Every man is bound to leave a story better than he
found it.”*

Mary Augusta Ward
Robert Elsmere (1888)



1. WHAT DO I NEED TO PROVE THROUGH THIS WITNESS?

- Outline of fact/opinion to be elicited from witness
- List of Exhibits to be offered into evidence through the witness
- Alerts—where and how can this witness hurt my case on direct or on cross?
- Do I need/want this witness—if rather no what are my alternatives?

2. IMPORTANCE OF EARLY CONTACT

- Get to the witness early and first if possible
- Memorialize their testimony—by recording or signed written statement
- If not hostile, do NOT take deposition unless there is a compelling reason
- Get the witness invested in your case—make him or her a part of the team
- Get documents and physical evidence

3. PREPARE THE WITNESS—PART I (DEPO PREP)

- The beginning of good direct comes with preparation for the possible deposition from the other side
- Assist the witness in the preparation for the deposition
 - Review statements or transcripts of recorded statements
 - Deposition prep is fine—Witness should not be defensive

4. PREPARE THE WITNESS—PART II (TRIAL PREP)

- Go over with witness their role in the trial
- Review all prior statements with witness
- Review all documents related to witness' testimony
- Review documents to be admitted by witness
- Talk about documentary admission procedure—*See* Part II
- Rehearse at least critical parts if possible.

5. PREPARE THE WITNESS FOR CROSS EXAMINATION

- Reduce the fear of cross

- Talk about the likely cross examination topics in the testimony
- Best advice:
 - Listen to the question
 - Be truthful
 - Don't guess or speculate—"If you don't know, say you don't know."
- Rehearse with a sample cross—"sandpaper" the witness

6. ***"PRESENTATION" OF THE WITNESS***

- The witness is the "Star"
 - Get Court comfortable with witness
 - Try to have Court look at witness rather than you ("location, location, location")
 - Encourage witness to look at the Judge
 - Rehearse work with the exhibits
 - Give the witness credibility with your own attention, deference and respect

7. ***THE "EXPERT" WITNESS***

- "An expert is a fool 50 miles from home." Prof. Frank Booker, Univ. of Notre Dame Law School (1980)
- *FRE 702*—an expert must be qualified as such in order for such testimony to be admissible. Two (2) prerequisites:
 - ***First***, testimony must be subject of "scientific, technical, or other specialized knowledge" needed to assist trier of fact to understand evidence or to determine a fact in issue.
 - ***Second***, expert witness must be qualified as an expert by:
 - Knowledge;
 - Skill;
 - Experience;
 - Training; or
 - Education.
- *Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993) (trial court has to "ensure that the courtroom door remains closed to junk science"—the trial court as "gatekeepers").
- *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (review of factors trial courts should consider in determining whether proffered expert testimony "is the product of reliable principles and methods").

- *Lippe v. Bairnco Corp.*, 288 BR 678 (SDNY), *aff'd* 99 Fed. Appx. 274 (2d Cir. 2004).
- *In re Med Diversified, Inc.* 346 BR 621 (Bankr E.D.N.Y. 2006) (Bernstein, J.)¹ — the Court as advocate?
 - *See also* Bernstein, Seabury & Williams, “The Empowerment of Bankruptcy Courts In Addressing Financial Expert Testimony,” 80 *Am. Bankr. L.J.* 377 (Summer 2006).
- ***Specific FREs Related To Expert Witnesses***
 - ***FRE 702*** – experts may testify as to opinions, while lay witnesses may not (FRE 701)
 - ***FRE 703*** – the facts/data relied upon by experts, even if inadmissible by themselves (such as hearsay, etc.), if of the type reasonably relied upon by experts, may form the basis of expert’s opinion.²
 - ***FRE 704(a)*** – experts (with exceptions related to criminal matters) may testify as to “ultimate issue” (*e.g.* signature is forged).
 - ***FRE 615*** – be sure to exclude adverse expert witnesses! Don’t give them time/opportunity to bolster their case by sitting through your expert’s testimony!
 - ***FRE 706*** – court can appoint its own experts. This has been used in bankruptcy cases to evaluate proposed sale transactions (*PMH Resources*) and to resolve valuation issues in contested, complex matters (*Calpine Energy*).
 - ***FRE 1006*** – summaries are admissible if underlying documents are disclosed and made available to other side. Summaries are very helpful in dealing with experts, particularly in bankruptcy cases.

¹ Judge Bernstein retired from the bench on July 31, 2007 and, as of August 1, 2007, is a law professor at John Marshall Law School in Atlanta.

² This makes practical sense. Without it, how would an appraiser ever be able to opine about comparable sales?

8. PRESENTATION OF TESTIMONY

- Organized presentation—if the Court is lost, you’re lost!
- Preliminary questions to get settled in
- “Headline”: Hit a high point early
- Use Visuals and Exhibits—if it fits
- Pacing—Questions that are too open allow witness to ramble and are boring to hear

—Work up short-answer-questions and long-answer-questions

—Rehearse—“We will get there.”

9. “CHALLENGES”—AKA PROBLEMS

- Inability to lead
- Jumping ahead by witness
- Problem of omitted testimony
- The “bad” witness—too young; too forgetful; too much the advocate; just plain sleazy

PART II

INTRODUCTION OF DOCUMENTARY EXHIBITS

*“It is for ordinary minds, and not for psychoanalysts,
that our rules of evidence are framed.”*

Benjamin N. Cardozo
Shepherd v. United States,
290 U.S. 96, 104 (1933)



1. INTRODUCTION

A. TWO “BIBLES”

- *Fundamentals Of Trial Techniques* by Thomas A. Mauet (Little Brown & Co.)
- *Bankruptcy Evidence Manual* by Hon. Barry Russell (West Bankruptcy Series)

B. “I-A-O-U” RULE FOR DOCUMENTARY EXHIBITS

- *Identify*
- *Authenticate*
- *Offer*
- *Use only after admitted*
- *See Section 3, below—Recite and use the “Evidence Mantra”*

2. MARKING THE EXHIBIT

A. “WALKING” METHOD

- Present to Clerk
- Request that exhibit be marked “Trustee’s Exhibit Number X”
- Show Exhibit to opposing counsel
- Get permission to approach witness (if needed in your Courtroom)
- Hand Exhibit to witness

B. “EXHIBIT BINDER” METHOD

- Obtain numbering system from Clerk and prepare Binder with all your exhibits numbered or lettered.
- Notebooks for:
 - You
 - Witness
 - Judge
 - Opposing Counsel
 - Extra (2)

3. **THE “EVIDENCE MANTRA”**

A. **THE FOUR ESSENTIAL PHRASES**

“*Memorize and Recite*”—three (3) simple question that will deceive people into believing you know what you’re doing! Amaze your friends!

- **Identification:** “Sir/Ma’am, I hand you what has been marked as Trustee’s/Debtor’s/Creditor’s/Officious Meddler’s Exhibit “X” for identification, and ask you to examine it please. Can you identify Exhibit “X” for the record?”
- **Authentication:** “Is that a copy of your signature on page 3?” or “Is this a copy of the letter that you received on or about X date?”
 - “Is this a complete copy of the letter?”
- **Offer.** “Trustee offers Exhibit “X” into evidence.”
- **NOW** you can use the Exhibit!

B. **OFFERING THE EXHIBIT**

- VERY important—without this step the exhibit is not in the evidentiary record.

4. **EVIDENTIARY OBJECTIONS—“JUST WHEN IT WAS GOING SO WELL...”**

A. **INITIAL TESTS—[“OPRAH”]—IS THE EXHIBIT/ EVIDENCE...**

- Offered?
- Probative vs. Prejudicial?
- Relevant? (aka “material”)
- Authenticated?
- Hearsay?

B. **PROBATIVE VS. PREJUDICIAL—“WEIGHT THE EFFECT”**

- Is it probative?
- Is it unduly prejudicial?

C. RELEVANCE—FEDERAL RULES OF EVIDENCE (“FRE”) 401

1. RELEVANT EVIDENCE—

- Makes a fact of consequence to the outcome of the proceeding more probable or less probable

2. FRE 403—WHEN RELEVANT EVIDENCE IS INADMISSIBLE—OR “WHEN GOOD EVIDENCE GOES BAD”

- Danger of unfair prejudice
- Confusing
- Misleading
- Delay or waste of time
- Needlessly cumulative evidence—“the Exhibit speaks for itself”

D. AUTHENTICATION—FRE 901

- Proof must be offered the Exhibit is, in fact, what it is claimed to be
- **Common Objection**—“Lack of foundation”
- **“Self Authenticating Documents”—FRE 902**

—Twelve (12) types of documents that are “self authenticating”

—May still be irrelevant, or prejudicial, but don’t need a witness to lay an evidentiary foundation

—**The “Self Authenticating Twelve”**

- Domestic public documents under seal (FRE 902 (1))
- Domestic public documents not under seal (FRE 902(2))
- Foreign public documents (FRE 902(3))
- Certified copies of records (FRE 902(4))
- Official publications (FRE 902(5)) (*e.g.* Dept. of Agriculture Bulletin)
- Newspapers and periodicals (FRE 902(6))
- Trade inscriptions (*e.g.* “made by XYZ Co.”) (FRE 902(7))
- Acknowledged documents (*e.g.* notarized documents) (FRE 902(8))
- Commercial paper and related documents (FRE 902(9))
- Presumptions under acts of Congress (FRE 902(10))
- Certified domestic records of regularly conducted activity (*e.g.* certified “business records exception documents”) (FRE 902(11))

- Certified foreign records of regularly conducted activity (FRE 902(12))

E. HEARSAY—“He’s just telling me what the other guy said.”

- *See* FRE 801-807
- ***What is “hearsay?”*** A statement by someone other than by the witness on the stand (the “Declarant,” in FRE 801(b) lingo) offered to prove the truth of the matter asserted. FRE 801(c).

—“John told me Sarah told him she never even read the financial statement.”

- ***What is a “statement?”*** Oral or written assertion, or non-verbal conduct. FRE 801(a).

—***Oral:*** “John told me Mary told him...” (this can be “double hearsay,” or “hearsay written hearsay”).

—***Written:*** Document authored by someone other than the declarant.

—***Non-Verbal:*** “I saw John nod his head ‘yes’ when asked the question.”

- ***Hearsay Is Not Admissible—FRE 802***

—Why? No chance to challenge the Declarant on cross examination.

- ***What Is Not Hearsay? FRE 801 (d).***

—***Two things:***

- ***Prior statement by witness*** - if made at the trial or hearing (therefore presumably under oath) and subject to cross examination which is: (a) inconsistent with declarant’s testimony in another trial, hearing or deposition at which time declarant is under oath; ***or*** (b) consistent with current testimony and introduced to rebut inference of recent fabrication; ***or*** (c) one of identification of a person.
- ***Admission by a party opponent***—statement offered against a party which is: (a) party’s own statement in either individual or representative capacity; ***or*** (b) a statement in which party has manifested an adoption or belief in its truth; ***or*** (c) a statement by a person authorized by the party to make a statement concerning the subject matter; ***or*** (d) a statement by the party’s agent or servant

concerning a matter within the scope of the agency or employment made during such agency/employment; *or* (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

- **Hearsay Exceptions—“So its hearsay, but it’s OK hearsay.” FRE 803-804, 807. Three Kinds:**
 - **Exceptions Whether Declarant Is Available Or Not—“The Big 23” (FRE 803)—(the exceptions that usually come up in bankruptcy cases are set out in bold and italics)**
 - ***Present sense impression (“She said, ‘look at that great sunrise!’”)* –FRE 803(1).**
 - Excited utterance (“Just after the car almost hit us, he said ‘Man I’m glad I hid that stolen money where my wife could find it!’”) FRE 803(2).
 - Then existing mental emotional or physical condition (“He told me he was suffering from depression.”) FRE 803(3).
 - Statement made for purposes of medical diagnosis/treatment (“She told me, as the attending doctor, that she suffered from seizures.”) FRE 803(4).
 - ***Recorded recollection (witness showing the witnesses own notes from prior time when notes were made when events were fresh in witness’ mind)*** FRE 803(5).
 - ***Records of regularly conducted activity (written report kept in ordinary course of business)*** FRE 803(6).
 - ***Absence of entry in records kept in regularly conducted activity—***FRE 803(7).
 - ***Public records/reports (police or other public agency records, reports, etc.)*** FRE 803(8).
 - ***Records of vital statistics (birth or death certificates, etc.)*** FRE 803(9).
 - ***Absence of public record or entry (prove through testimony that appropriate person searched and could not find the public record)*** FRE 803(10).
 - Records of religious organizations (marriage certificates, etc.) FRE 803 (11).
 - Marriage, baptismal and similar certificates –FRE 803(12).

- Family records (family genealogies, engravings on family, jewelry, etc) FRE 803(13).
 - ***Public records of documents affecting an interest in property (deeds, bill of sale, etc)—803(14).***
 - ***Statements in documents affecting an interest in property—FRE 803(15).***
 - Statements in “ancient” documents (documents in existence 20+ years whose authenticity is not in dispute) FRE 803(16).
 - ***Market reports, commercial publications (directories, market quotations generally used and relied upon by public or persons in particular occupations) FRE 803(17).***
 - ***“Learned treatises” (if used by expert witness in direct examination) FRE 803(18).***
 - Reputation concerning personal or family history (regarding a person’s birth, marriage, death, blood relationships) FRE 803(19).
 - Reputation concerning boundaries or general history (regarding reputation in general community established before dispute arose) FRE 803(20).
 - ***Reputation as to character (among associates or in community) FRE 803(21).***
 - Judgment of previous conviction (for felonies, not including *nolo contendere* pleas—even if on appeal) FRE 803(23).
- ***Exceptions Only When Declarant Is Not Available—“The Big 6” (FRE 804)***
- ***“Unavailability”***—can’t obtain testimony because of: (a) privilege; (b) unlawful refusal to testify; (c) asserts lack of memory; (d) dead or ill; (e) outside scope of service of process. FRE 804(a).
 - ***Former testimony*** (under oath at trial, hearing or deposition) FRE 804(b)(1).
 - ***Statement under belief of impending death*** (no one tells a lie when they think they’re about to meet their maker!) FRE 804(b)(2).
 - ***Statement against interest***—(see also FRE 801(a)—Statement by party opponent) FRE 804(b)(3).
 - ***Statement of personal or family history*** (declarant’s own out of court statement regarding

own birth, marriage, divorce, family, or about those same things regarding a blood relative) FRE 804 (b)(4).

- **Forfeiture by wrongdoing** (where declarant was involved in making sure he/she was unavailable as a witness) FRE 804(b)(6).
- **“Residual” Exception—“Yeah, it’s blatant hearsay, but its good blatant hearsay”—FRE 807**
 - Any Statement not covered by exception in FRE 803 or 804 if court determines: (a) involves material facts; **and** (b) better evidence is not available; **and** (c) interests of justice will be served.
 - Must be disclosed to other party in advance, with name/address of declarant.

F. WHAT IF IT’S NOT THE ORIGINAL?

- So what?—See FRE 1003

G. See also Common Evidentiary Objections attached hereto as Appendix I.

5. “BUSINESS RECORD POLKA”

- **Problem:** So what if the document came out of someone’s business files from 8 years ago—the person who signed/sent it isn’t around, nor is the person who received it? It’s classic hearsay at that point.
- **Solution:** Do the “Business Record Polka”! See FRE 803(6). Ask the following six (6) questions:

- **QUESTION NO. 1**

Q: “Can you identify Exhibit X?”

A: “It’s a [business record].”

- **QUESTION NO. 2**

Q: “When was it made?”

A: “It was made at the time of the transaction it recorded.”

• **QUESTION NO. 3**

Q: “Who made it?”

A: “My Bookkeeper.”

[It was made based on information from a person that had actual knowledge off what was entered.]

• **QUESTION NO. 4**

Q: “How is this record prepared?”

A: “It’s prepared regularly in the course of our business.”

• **QUESTION NO. 5**

Q: “Who is the person responsible for these records?”

A: “My Bookkeeper and I are.”

• **QUESTION NO. 6**

Q: “Where is the Original?”

A: “At my office.”

Q: “What’s the difference between Exhibit 14 and the original?”

A: “There is no difference.”

6. COMBATING OBJECTIONS

- Keep your cool.
- Think about every objection that could be made to your evidence.
- Lay the proper foundation to begin with.
- Be prepared to respond.
- When the objection is made respond with rule that allows the evidence.
- See Common Evidentiary Objections, Appendix I.

PART III
EFFECTIVE CROSS EXAMINATIONS
IN BANKRUPTCY LITIGATION

“More cross-examinations are suicidal than homicidal.”

Emory R. Buckner
Francis Lewis Wellman
Art Of Cross-Examination
(1936)



1. ***UNDERSTANDING THE PURPOSES OF CROSS-EXAMINATION—***

- To ***blunt*** the effect of a good direct examination.
- To ***discredit*** a biased, wavering or untruthful witness or sloppy expert.
- To ***highlight*** helpful facts ignored or minimized in direct examination of a hostile witness.
- To ***obtain factual building blocks*** to support your closing argument or post-trial brief.
- The “slaughterhouse theory” of cross examination—keep those doggies rollin....

2. ***TO CROSS OR NOT TO CROSS—THAT IS INDEED THE QUESTION!***

- Is it always necessary?

3. ***“THIRTEEN RULES OF EFFECTIVE CROSS-EXAMINATION IN BANKRUPTCY LITIGATION.”***³

- *Items marked with” iii” are derived from interviews with various bankruptcy judges.*
- **Preliminary Observation.**
 - Learning to effectively cross-examine takes practice and experience. Even very experienced bankruptcy litigators review transcripts and wince at misfired questions or omitted questions or follow-ups!
 - There is rarely a “perfect” cross-examination, but some are more effective than others.


³ Not sold in any store—act now and receive a set of Ginszu steak knives and a three-year supply of Rice-a-Roni, “the San Francisco treat!”

- **RULE ONE: CHOOSE YOUR “THEMES” AND AVOID “OVERKILL.”**

- ▣ Overextensive or overaggressive cross-examination detracts from effectiveness, and can make the judge sympathize with the witness being “bullied.”
- ▣ At the end of a cross-examination, a judge should be able, in a summary fashion, to tick off the handful of points central to the examiner’s *theme*.⁴
- ▣ “Themes” are chosen or refined based upon either (or both) discovery and/or testimony on direct.
- ▣ It is apparent to most experienced bankruptcy judges when a cross-examination has no clear objective or themes—the cross-examinations tend to ramble, often become argumentative, and a re-hash of direct examination.
- ▣ Choose your points well—picking apart a witness’ every word is ineffective, looks like quibbling, and ultimately dilutes the impact of the stronger points.
- ▣ Be sure to return to your themes if a difficult witness insists on moving away from the issues.

⁴ One judge interviewed said he likes a summary at the conclusion of a cross-examination by the examiner (such as “So, to summarize, you testified to X, correct? And Y, correct? And Z, correct?”). This judge acknowledged that such testimony may be cumulative and subject to an “asked and answered” objection, but he finds it helpful.

- ***RULE TWO: PREPARE. PREPARE. PREPARE. (Did I mention preparation?)***

- A trial is a play—no actor likes to perform a play without adequate preparation.
- The only way to choose effective “themes” is to be prepared—
 - Where does this witness’ testimony fit into the scheme of the case?
 - What “factual building blocks” is this witness providing to the other side that need to be discredited or minimized, or what facts do you need from this witness for your case?
-  Avoid “fishing expeditions,” otherwise known as discovery in open Court! Nothing is worse than a lawyer’s attempt to do discovery through cross-examination—it is often unorganized and leads to confusion or worse (*e.g.* factual testimony adverse to a lawyer’s case).
- In order to be prepared for effective impeachment, you must be very familiar with depositions taken of key witnesses and other discovery taken in the case.

Example

In preparation for cross-examinations of key witnesses, and where wording is crucial (*see* Rule Three, below), the following is helpful:

Cross-Exam Outline

1. The sky was blue on October 14, 1999—correct? [Depo. Tr. At 51:1-3].
2. You were in a position to see the sky that day, correct? [Depo. Tr. At 53:5-18].


Etc.

This allows you to go right to the impeachment spot without fumbling around.

- Preparation is **KEY** to effective impeachment! (*See* Rule Three, below.)

- ***RULE THREE: LEARN TO EFFECTIVELY IMPEACH BASED ON PRIOR INCONSISTENT TESTIMONY!***

- Impeachment is allowed only under Fed. R. Evid. 801(d). Elements: The prior statement from which the impeachment will come: (1) must be ***inconsistent*** with the testimony; and (2) must have been ***given under oath*** subject to the rules of perjury. Interestingly, a lawyer may impeach his or her own witness. FRE 607.
- Most common uses of impeachment—changes in testimony from a prior deposition or judicial proceeding.

 Learn to set up an impeachment! In order for it to be effective and helpful to the trier of fact, the cross-examiner must first clearly establish: (1) that the testimony given in the trial is clearly inconsistent with the prior statement under oath; and (2) that inconsistency is material and relevant.

Example⁵

Q: Sir, you testified on direct examination that the sky was blue on Saturday, October 14, 1999, isn't that correct?

A: Yes.

Q: You recall I took your deposition on August 1?

A: Yes.

Q: And you were under oath at that deposition, isn't that correct?

A: Yes, I believe so.

Q: Sir, do you recall the following exchange—counsel, deposition transcript, page 10, starting at line 12—:

Q (by me): So what color was the sky that day?

A (by you): What day?

Q: October 14, 1999.

A: It was red—a bright red.

Do you recall that, sir?

A: Yes, I suppose.

⁵ In some jurisdictions, local rules of practice require that the witness be shown the transcript and counsel must allow the witness to read along to ensure the transcript is being correctly read. Check your local jurisdiction.



DO NOT: (1) Ask the witness if he/she was lying under oath then, or now; (2) Ask if he or she is trying to change his/her testimony; (3) Ask if you read it correctly; or (4) Ask anything else. **THE POINT IS MADE, THE IMPEACHMENT IS DONE.** At this point, it will be up to the other side on re-direct examination to attempt to rehabilitate the witness.⁶

⁶ If you are prepared and impeach properly and effectively once or twice with a witness, you'll find either the witness stops playing with you and flies right, or gets so flustered he or she anticipates impeachment. An example of the latter occurred in the cross-examination of a feasibility expert in a recent contested plan confirmation where the debtor's expert was impeached 3 times—he was a bit “skittish” after that:

Q (By Mr. Salerno): Sir, in the debtor's projections, they use a five percent FF&E [Furniture, Fixtures and Equipment] reserve, correct?

A (By Debtor's Expert): That's correct.

Q: And isn't it true—particularly with older limited service hotel properties—that a four to five FF&E is not considered sufficient by many industry experts in order for that hotel to remain competitive.

A: Yes—in fact, during the deposition on Monday, I believe you played a tape in which Mr. Warnick—the principal and founder and owner of our firm—made that very statement. However, I would point out—well, if you're going to ask me to give an answer, Mr. Salerno—

Q: Keep going, sir. I'm not cutting you off—just keep going.

A: —let me qualify it. I mean, these yes and no answers are just leading you to a track that you'd like to go, but I don't think they're fair in terms of getting to the facts of the issues. Yet generally speaking, more than four percent is the industry norm, but we're talking—now let's qualify that—let's put conditions—

Q: Qualify away, sir.

A: You're talking more than four percent for a reserve over the entire life of the property, which can be at as much as 40 or 50 years, and we're talking about a seven-year period here.


Q: Sir, are you done?


A: And you're also talking generally and not looking at market-specific issues. Yes. I will answer yes, but—


* * *


Q: So the truth is, the founder of your company, Warnick & Company—Richard Warnick—believes that four to five percent is not sufficient in limited hotel service industry; isn't it?

A: Generally speaking, over the long haul of the property, a 50-year term—40 to 50 year life.

 Most common mistakes that annoy judges, and worse, detract from the effectiveness of your cross-examination:

 Attempting to impeach when the testimony given in Court is not clearly inconsistent—it leads to quibbling and argument.

 Attempting to impeach before clearly establishing the inconsistent testimony (*e.g.* going right to deposition transcript without refreshing the judge’s recollection as to what the “offending” testimony was).

 Attempts to impeach where the inconsistency is less than clear.

Example

Q: So sir, you testified on direct that the sky was blue on October 14, 1999—correct?

A: Yeah.

Q: Sir, and turn to—

A: Sir, if I can—

Q: Keep going—keep going—

A: —if I might just add. The—well, you’re saying yes, no, yes, no, but there’s more to the matter. The issue of having sufficient FF&E reserves is an issue of remaining competitive. If you look in a specific market, and the remainder of the competitors in that market are older properties, are properties that aren’t maintaining the same reserve levels, then a four percent reserve may well be sufficient. And in fact, in these submarkets, nearly 60 percent of the properties are over ten years old, and a third of them are over 20 years old, and most of them are owned by mom and pop operators. So if you want to take a broad generality and try and apply it to the specific circumstances, I just don’t think that’s fair.

Q: Sir, I’m asking you, generally speaking, if in the limited service hotel sector a four to five percent FFE reserve is not sufficient—that’s the point of these questions.

A: Generally speaking, yes.

Q: And the debtor’s hotels are limited service hotels, correct?

A: Yes.

Whew! I thought we’d never get to that “generally, yes” answer! The expert was flustered, and came across as wanting to “qualify” everything.

Q: Sir, you recall that I took your deposition (etc.)?

A: Yeah, I forget the date—whenever it was.

Q: You were under oath at the deposition, correct?

A: Yeah, I raised my right hand and all that.

Q: Do you recall the following exchange—counsel, deposition transcript, page 52, line 7—

Q (by me): So what color was the sky then—that day—do you know?

A (by you): I don't remember.

Q: Was it red? Blue? Orange?

A: I don't recall—it could've been.

Q: Could have been what?

A: Red, orange—I'm not real sure.

Do you recall that, sir?

This is wasted impeachment—it's unclear, and ineffective. If this is done too often, it insults and annoys the judges.



Ill-prepared counsel trying to impeach! You lose the flow and effect.

Example

Q: Now, if I heard correctly you said the sky was blue on the fourteenth of October, right?

A: You heard correctly.

Q: Fine. You remember I took your deposition (etc., etc.).

A: Yeah, yeah.


Q: Now...hold on, it's here somewhere...uhmm, [to co-counsel] Where's the transcript? Do you have it?... If the Court will give me just a Oh, here it is...no, that's the other one.... Oh, oh, right—here it is.... Now, sir, you were under oath at that deposition, weren't you?


A: I raised my right hand and all that.

Q: Very good. Now, do you remember when I asked you...just a second.... It think it was about page 12 [flipping through transcript].... No, maybe page 22 [more flipping].... With the Court's indulgence.... Oh, here it is—page 32, starting on line 7—no, 8—....


At this point, the effectiveness and pace is lost.


- ***RULE FOUR: CONTROL THE FLOW AND THE PACE—IT’S YOUR SHOW!***

 Judges like concise, crisp, and organized cross-examinations—keep it moving as much as possible. Difficult witnesses can slow you down, but try to keep on your pace.

 A key element to this is good preparation and a clearly defined objective or “theme”—without it, cross-examinations can become confused, rambling and ineffective.

 Use leading questions unless there’s a good reason not to.

 With a difficult or evasive witness, ask the Court to instruct the witness to answer directly—Bankruptcy Judges know when a witness is being difficult, and it hurts the witness’ credibility.

 Avoid compound questions! They’ll not only draw an objection (and slow down your pace), but also confuse the witness and maybe the judge.

Example


Q: So, you’d agree with me that there’s no equity in these properties and the debtor really can’t put together a feasible plan of reorganization, wouldn’t you?

A: Which question...I’m not sure...

[Opposing Counsel]: Objection! The question is vague and compound. The witness clearly doesn’t understand it.

[Whereupon counsel debate on the record for 3-5 minutes about whether the question was clear, and by the end of the exercise, everyone has forgotten what the whole point of the question was.]

- ***RULE FIVE: DON'T LET DIFFICULT COUNSEL OR WITNESSES THROW YOU OFF YOUR THEMES OR QUESTIONS.***

 If you think a question is important, don't let an evasive or difficult witness fluster you—go back to your question.

Example


Q: Sir, you'd agree that the 9% interest rate proposed in the debtor's plan would be too low if the loan-to-value was 100%, wouldn't you?


A: Well, I wonder if the values were properly determined in light of the current market conditions.

Q: That's fine, sir, but my question to you is if the loan-to-value was 100%, the debtor's proposed 9% interest rate would be too low, correct?

A: Well, how are you defining loan-to-value? I'm not sure we're talking about the same thing here....

[Etc., etc. After a few rounds of this, the Judge will likely instruct the witness to answer the question. For a real life example, see, note 4, supra.]

 If necessary, ask the Court to direct a witness to answer a question. While you may not get it on your first request, after numerous/repeated evasive answers, the Court will help rein in the witness.

 Don't let verbose opposing counsel, making long-winded speaking objections, throw you! In fact, the more obstreperous they become, the more they will annoy the Judge, and more importantly telegraph to the Judge that they're worried about what the testimony is going to be.

Example

Q: So the sky was blue on October 14, 1999, isn't that correct sir?

[Opposing Counsel]: I object, your Honor! That question is vague and ambiguous, and argumentative! It has no relevance to this matter, and is clearly designed to badger this witness. It may also involve inadmissible hearsay, and also violates the best evidence rule. As counsel is fully aware, whether the sky was blue or gray or purple or yellow is perhaps the ultimate conclusion in this case, blah, blah, blah.

[Court]: Overruled.

Q: Sir, the sky was blue on October 14, 1999, correct?

A: Yes.

- ***RULE SIX: BE SURE YOU’VE COVERED YOUR THEMES.***



As part of your preparation, be sure your bases are fully covered. Don’t leave out crucial questions!

Levity Break

In a terrible accident at a railroad crossing, a train smashed into a car and pushed it nearly four hundred yards down the track. Though no one was killed, the driver took the train company to court.

At the trial, the engineer insisted that he had given the driver ample warning by waving his lantern back and forth for nearly a minute. He even stood and convincingly demonstrated how he’d done it. The court believed his story, and the suit was dismissed.

“Congratulations,” the lawyer said to the engineer when it was over. “You did superbly under cross-examination.”

“Thanks,” he said, “but he sure had me worried.”


“How’s that?” The lawyer asked.

“I was afraid he was going to ask if the damned lantern was lit!”



At the end of cross-examination, ask the Court for a moment to collect your thoughts and double check your notes. If co-counsel is in the courtroom, ask to be sure you’ve covered everything.

- ***RULE SEVEN: WHILE PREPARATION IS CRUCIAL, DON'T GET WED TO YOUR NOTES.***

 Often, attorneys are so focused on their notes and covering their questions, they don't listen to the witness' answers and miss wonderful follow up questions.

Example


Q: So, on April 18, 2000, this debtor didn't have sufficient cash available to even make its payroll, did it?

A: We would have except for the money we loaned our [non-debtor] affiliate to cover *its* cash shortages.

Q: Right, but this debtor couldn't meet its payroll burden, correct?


[And counsel moves on, without following up on why a debtor was lending a non-debtor affiliate money when it was itself facing cash shortfalls].

- ***RULE EIGHT: AVOID "JURY-DIRECTED" HISTRI-ONICS.***

 Bankruptcy Judges are very sophisticated triers of fact in most of the areas in which testimony is given in bankruptcy cases (*e.g.* valuation, feasibility, etc.)—Bankruptcy Judges are not usually swayed by the types of histrionics that may help influence a jury (such as righteously indignant objections,⁷ eye-rolling, etc.). Get to the point.

⁷ After all, why just "Object" when you can "***OBJECT, YOUR HONOR, TO THAT RIDICULOUS QUESTION!***"

- ***RULE NINE: DON'T TRY TO MAKE YOUR CLOSING ARGUMENT THROUGH YOUR CROSS EXAMINATION.***


 Too often, lawyers try to get hostile witnesses, through cross examination, to agree to their entire theory of the case. This doesn't work—just get the factual building blocks and save the eloquent concluding argument for your closing argument or post-trial brief.


Example

Q: So you'd agree with me, sir, that given the assumptions we've just been through, there's no possible way the debtor's plan could ever be feasible, isn't that correct?


[The hostile witness will argue with you, and understandably so. This question is really argumentative, and belongs in closing arguments.]

- ***RULE TEN: KNOW WHEN TO STOP (Or “Please, question responsibly”).***

 Too often, lawyers beat a dead horse—make your points, sit down, and shut up! The Bankruptcy Judge will be grateful for your brevity, and a well-made point will hit the mark the first time effectively.


 Asking too many questions opens up areas that allow the witness to expound, qualify, or explain away problematic testimony.

- ***RULE ELEVEN: DON'T SIMPLY REHASH DIRECT.***

 Some lawyers, believing they simply must cross-examine every witness, use their cross-examination simply re-hashing the witnesses' direct testimony. It's not only boring to Judges, but it emphasizes the direct by allowing the witness to repeat it again.

- Sometimes, rehashing direct may have a tactical purpose—such as if competing experts used the same methodology, and counsel wishes to bolster the methodology.

- ***RULE TWELVE: THE JUDGE CAN READ!***

 Many judges hate it when lawyers ask witnesses to read from a document that's already in evidence to make a point—it's already in evidence. Having the witness read it aloud doesn't necessarily give it any more weight.⁸

Example

Q: Sir, the secured creditor bargained for prime plus seven percent default interest, isn't that correct?

A: I don't know.

Q: Sir, please look at Lender Ex. 15—do you have it there? Fine. Look at page 23 of Ex. 14.

A: What page?

Q: 23.

A: Okay.

Q: Please read the third full paragraph from the top.

[No response as the witness reads to herself.]

Q: No—please read it out loud.

A: Starting from the top of the page?

Q: No, starting 3 lines down, where it says: “Lender shall be paid...”—do you see that?

A: Not on page 23.

[Counsel approaches witness—they search for the reference, etc. At this point, since the document is in evidence, counsel can read from it at closing. Having the witness read from it adds nothing.]⁹

⁸ If the document was authored by the witness who is an adverse party, it may be used as impeachment under the theory of admission by a party-opponent under F.R.E. 801(d)(2).

⁹ What's more, it is objectionable. The witness' testimony would be cumulative, and the document in evidence speaks for itself.

- ***RULE THIRTEEN: THE “GREAT RULE”—NEVER ASK A QUESTION WHOSE ANSWER YOU DON’T KNOW!***

- While many attribute this golden rule to Irving Younger, in fact it has a much more literary pedigree:

Never, never, never, on cross-examination ask a witness a question you don’t already know the answer to was a tenet I absorbed with my baby food. Do it, and you’ll often get an answer you don’t want, an answer that might wreck your case.

Harper Lee
*To Kill A Mockingbird*¹⁰
1960

- Of course, like any self-respecting rule, there are *exceptions*. These should be used sparingly!

- ***Do you really care what the response is?***

- **Example:** You know another adverse witness (such as the opposing parties’ expert) will testify to X, which is a fact helpful to your case (through discovery or otherwise). You ask, on cross, this adverse witness the same question.

- Either: (a) this witness will agree to X, in which case he/she helps support or corroborate the other witness; or (b) this adverse witness will disagree and testify to Y, thereby putting them in conflict with other opposing witnesses.

- ***Desperation!***

- Your case is in a shambles already, and another bad answer can’t hurt you too much more. This is rarely useful, but sometimes it pays off. In the immortal words of fictional detective Harry Callaghan: ***“Do you feel lucky today, punk? Well, do ‘ya?”*** *Dirty Harry* (1977)

¹⁰ Who can forget the prosecutor’s extraordinary blunder in the classic trial of O.J. Simpson when he smugly asked the defendant to “try on the gloves.” Oops! Unfortunately, trial work, unlike golf, has no “Mulligan” rule!

4. **CONCLUSION.**

Effective cross-examination is a great advocacy tool. With experts, it is essential to the American process. As stated by then-Chief Judge of the Fifth Circuit David L. Bazelon in 1973:

Challenging an expert and questioning his expertise is the lifeblood of our legal system—whether it is a psychiatrist discussing mental disturbances, a physicist testifying on the environmental impact of a nuclear power plan, or a General Motor executive insisting on the impossibility of meeting Federal anti-pollution standards by 1975. It is the only way a judge or jury can decide whom to trust.

Dallas Times Herald
May 13, 1973

Do it properly, and you've acquired a great advocacy skill.

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APPENDIX I

“CHEAT SHEET”—COMMON EVIDENTIARY OBJECTIONS (The “Big 8”)

1. “*Lack of Foundation*” [RE 602; 901 (for documents)]

- Question assumes a fact not in evidence (“What color was the light”, but don’t establish that the witness ever saw the light in question.)
- Ask witness a question where you haven’t:
 - Established witnesses’ knowledge of fact (how does he/she know what he/she is testifying about); *or*
 - Try to use a documentary exhibit without establishing proper foundation.

2. “*Irrelevant*” or “*Immaterial*” [RE 402]

- What does this have to do with anything?

3. “*Hearsay*” [RE 802]

Out of Court statement made by person other than the testifying witness, offered to prove the truth of the matter asserted. [RE 801(c)]

- **Witness:** “John told me that the debtor told him that the debtor lied to the bank.”
- **Exceptions:**
 - Prior inconsistent statement under oath (aka “*impeachment*”) [RE 613; 801(d)(1)]
 - Admission by party opponent (Plaintiff: “Debtor told me he lied to the bank.”) [RE 801(d)(2)]

4. “*Cumulative*” or “*Exhibit Speaks For Itself*” [RE 403]

- Lawyer lays proper foundation for documentary exhibit, and then ask witness to testify from document.
- Exhibit (document) is in evidence. To simply now have witness read from the exhibit is cumulative evidence—same evidence twice.

5. “*Leading*” [RE 611(c)]

- On *direct examination*, question suggests the answer.
- **Question:** “On 3/1/08 you received the e-mail, correct?”

6. “*Compound Question*” [RE 403]

- Question asks 2 questions in one.
- **Question:** “On March 1, 2008 did you send the e-mail and called the banker on the phone?”

7. “*Argumentative*” [RE 403]

- Question is not seeking to elicit a fact but rather is argument—usually an issue on cross examination
- **Question:** “You were being obnoxious and threatening when you sent the 3/1/08 email, weren’t you?”

8. “*Calls for Speculation*” [RE 701] [Not applicable to Experts]

- Question asks witness to speculate; answer not based on personal knowledge
 - **Question:** “What do you think the debtor was thinking when he sent those e-mails?”



APPENDIX II
**“CHEAT SHEET”--EVIDENTIARY FOUNDATIONS QUESTION
BY QUESTION**

A. “BUSINESS RECORD POLKA”

· **Problem:** So what if the document came out of someone’s business files from 8 years ago—the person who signed/sent it isn’t around, nor is the person who received it? It’s classic hearsay at that point.

· **Solution:** Do the “Business Record Polka”! *See* FRE 803(6). Ask the following six (6) questions:

· ***QUESTION NO. 1***

Q: “Can you identify Exhibit X?”

A: “It’s a [business record].”

· ***QUESTION NO. 2***

Q: “When was it made?”

A: “It was made at the time of the transaction it recorded.”

· ***QUESTION NO. 3***

Q: “Who made it?”

A: “My Bookkeeper.”

[It was made based on information from a person that had actual knowledge off what was entered.]

· ***QUESTION NO. 4***

Q: “How is this record prepared?”

A: “It’s prepared regularly in the course of our business.”

· **QUESTION NO. 5**

Q: “Who is the person responsible for these records?”

A: “My Bookkeeper and I are.”

· **QUESTION NO. 6**

Q: “Where is the Original?”

A: “At my office.”

Q: “What’s the difference between Exhibit 14 and the original?”

A: “There is no difference.”

B. LETTER/E MAIL SENT/RECEIVED BY WITNESS

A **Hand/Examine**: “I’m *handing* you what has been marked as Exhibit X—can you *examine* Exhibit X please?” (OK)

B. **Identify**: “Can you *identify* Exhibit X for me please?” (E-mail I sent/ received dated 3/1/08)

C. **Establish Foundation**: “Is that a *true and correct copy* of the e-mail you sent/ received on 3/1/08?” (Yes)

D. **OFFER INTO EVIDENCE!** [Don’t Forget—Very Important!]

· “Your Honor, I offer Exhibit X into evidence.”

C. PHOTOGRAPH (Assume Photo Of A Speed Limit Sign)

A. Ms. Witness, were you present at the accident scene on July 8, 2009? (Yes)

B. When did you arrive at the scene? (Approximately 8:29 pm)

C. Are you familiar with the scene as it looked on July 8, 2009? (Yes)

· **Give a copy of Exhibit to opposing counsel**

D. *Your Honor, may I approach the witness? (If required by courtroom protocol)*

E. Ms. Witness, I am handing you a photograph marked Exhibit X, and I ask you to please examine it.

E. Can you identify Exhibit X? (Yes)

F. What is it? (A photograph of the speed limit sign near the intersection where the collision occurred.)

G. **If Witness Took Photo**: Did you take the photograph? (Yes)

No need for witness to actually have taken the photo. If witness did not take the photo, go to **Question J**, below.

H. When did you take it? (Approximately two weeks after the collision.)

I. Where were you standing when you took the photograph marked as Exhibit X?

(Approximately 2 feet away from the sign, facing west.)

J. Does Exhibit X **fairly and accurately depict** the speed limit sign as it appeared on July 8, 2009? *(Yes)*

K. Your Honor, I offer Exhibit X into evidence.

D. DEMONSTRATIVE EXHIBITS (Such as maps, charts, models, reproductions, etc.)

The foundation is essentially the same as that for a photograph (see above). The witness must be familiar with the scene, location, or structure as it appeared at the relevant time, and must testify that the exhibit is a reasonably accurate representation.

I. Example One: Diagram of Concert Hall Layout

A. "Mr. Witness, are you familiar with the concert hall as it appeared on the date of the incident?" [Yes]

B. "How are you familiar with the concert hall?" [e.g. *I've worked there for 10 years; I've been to several concerts; etc.*]

C. "I'm handing you what has been marked as Exhibit X (same protocol as above), and would ask you to examine it please."

D. "Can you identify Exhibit X? (Yes) What is Exhibit X? [*It is a diagram of the concert hall*]

E. "Is Exhibit X a **reasonably accurate representation** of the concert hall as it appeared on the date of the incident?" [Yes]

F. (If desired or necessary for case, more detailed questions can be asked to provide additional foundation such as, "Is the diagram drawn to scale?" and "Is the stage in the correct location in the diagram?")

G. "Your Honor, I offer Exhibit X into evidence."

II. Example Two: Ticket (not real ticket, but a facsimile/reproduction)

A. "Mr. Witness, are you familiar with the tickets that were sold [on the relevant date and/or for the relevant concert]?" [Yes]

B. "How are you familiar with those tickets?" [e.g. *I bought one; I've been selling tickets at the hall for 10 years; I've been attending concerts every Saturday for the past year; etc.*]

C. "I'm handing you what has been marked as Exhibit X, and would ask that you examine it please."

D. "Can you identify Exhibit X? [Yes] What is Exhibit X? [*It looks like a reproduction of a ticket that was sold at the concert hall*]

E. "Is Exhibit X a **reasonably accurate representation** of a ticket that was sold [on the relevant date / at the relevant concert]?" [Yes]

F. "***Your Honor, I offer Exhibit X into evidence.***"