
THE BENCH AND BAR COMMITTEE
FOR THE U.S. BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF GEORGIA PRESENTS

ADMITTED: AN INTRODUCTION TO EFFECTIVELY PRESENTING EVIDENCE (PART I)

The Honorable Jeffery W. Cavender

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ADMITTED: AN INTRODUCTION TO EFFECTIVELY PRESENTING EVIDENCE

When do The
Rules of
Evidence Apply?

Mass Calendars

Judges'
Procedures

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Evidence
Regularly Seen

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without Experts

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Best Evidence
Rule

WHEN DO THE RULES OF EVIDENCE APPLY?

Bankruptcy Rule 9017: “The Federal Rules of Evidence and Rules 43 [taking testimony], 44 [proving an official record] and 44.1 [determining foreign law] F.R.Civ.P. apply in cases under the Code.”

- Includes cases under all chapters
- Includes contested matters under Rule 9014
- Includes adversary proceedings

MASS CALENDARS

What should you do if you think evidence is going to be needed on a matter scheduled for a mass calendar?

Most Important Rule: Know What Your Judge Expects and Wants

- If your judge has indicated their preferred procedures, follow their procedures!
- Every judge in this district has a Judge's Information webpage on the Court's website.



UNITED STATES BANKRUPTCY COURT
Northern District of Georgia
Honorable Barbara Ellis-Monro, Chief Judge · M. Regina Thomas, Clerk of Court

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Judge Paul W. Bonapfel

Judge Jeffery W. Cavender

Judge Wendy L. Hagenau

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Judge James R. Sacca

Judge Sage M. Sigler

Judge TJ23

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Honorable Jeffery W. Cavender

	Chambers e-mail: JWCChambers@ganb.uscourts.gov *
	Virtual Hearing Room
	Toll Free Number 833-568-8864 Meeting ID 160 459 5648

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REVIEW YOUR JUDGE'S INFORMATION, PREFERENCES, AND PROCEDURES

DOES YOUR JUDGE HAVE A PROCEDURE FOR EVIDENTIARY MATTERS?

In-Person, Virtual and Telephonic Appearances in Judge Cavender's Courtroom

Beginning June 24, 2021, Judge Cavender will permit in-person, virtual or telephonic appearances as set forth below.

Chapter 13: The calendar call will be in the courtroom and on Judge Cavender's Virtual Hearing Room (zoom) at the following link:

<https://www.zoomgov.com/j/1604595648?pwd=ME1vQWt5WTZmQjhKdXJqWG55TWl3Zz09>

Matters marked ready will be heard immediately after the calendar call. The attorney or party for the ready matters may appear in person or via Judge Cavender's Virtual Hearing Room (zoom), at the option of the person appearing. If a party opts to appear in person, the party may also appear at the calendar call in person. Parties unable to participate in person or via zoom may participate in the hearing telephonically at the following number: 833-568-8864 US Toll-free Meeting ID: 160 459 5648. Parties are encouraged to use the Voluntary Notice Procedure set out in General Order 24-2018 and to allow sufficient time between the objection deadline and the hearing date to plan accordingly. Evidentiary hearings will be in person unless otherwise ordered by the Court.

SPECIAL SET HEARINGS

SPECIAL SET HEARINGS

Special Set hearings are hearings which will take longer than the allowed 20 minutes on the regular mass calendars (Available Open Calendar Dates). Attorneys should be sensitive to the time constraints imposed by the volume of motions set for hearing. These motions will be scheduled outside the normal noticing requirements.

A party seeking to special set a hearing should call chambers at **404-215-1004** for a date. (Chambers will ask the estimated time needed **for both sides**.) The moving party must then prepare a notice of hearing and file a certificate of service as in the normal course of business.



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• [Submission of Exhibits](#)

EXHIBITS IN THE ELECTRONIC ERA

Submission of Exhibits for Evidentiary Hearings

Unless otherwise ordered by the Court, in advance of any evidentiary hearing:

1. Counsel shall exchange documents, including any exhibits parties intend to use at the hearing no later than **7 days** prior to the hearing.
2. Counsel shall mark all exhibits and file on the docket a cover page listing each exhibit, with each exhibit as a separate attachment thereto (e.g., if the cover page is docket no. 50, Exhibit 1 will be 50-1, Exhibit 2 will be 50-2, etc.) no later than **3 business days** prior to the hearing.
3. Counsel shall create a PDF containing all “file stamped” exhibits, with each exhibit separately bookmarked, and shall email this PDF to chambers (jwcchambers@ganb.uscourts.gov), copying opposing counsel and any other party participating in the hearing, no later than **3 business days** prior to the hearing. If the PDF file size exceeds 250MB, it should be broken down into separate files not exceeding 250MB and each file should be emailed separately.
4. No hard copies of exhibits should be exchanged unless agreed by the parties or directed by the Court. No hard copies of exhibits should be delivered to chambers unless specifically requested by the Court; provided, however, that if the hearing is scheduled to take place in

EXHIBITS IN THE ELECTRONIC ERA

TYPES OF EVIDENCE REGULARLY SEEN

Stay Relief Motions

- Valuation Evidence
 - Tax valuation records
 - Appraisal evidence
 - Website/3d Party Valuation Tools

Objections to Claims

- Tax Returns
- Business records

Confirmation or other contested matters

- Testimonial Proffers
- Requests to take Judicial Notice
- Live testimony

Adversary Proceedings

- Business records
- Medical records
- Text messages and social media pages
- Prior court proceedings
- Live testimony

EVIDENCE ON A BUDGET

PROFFERED EVIDENCE,
JUDICIAL NOTICE, AND
EVIDENCE WITHOUT EXPERTS

PROFFERED EVIDENCE

What is a proffer?

- Offer of proof given to the Judge explaining what evidence would be presented
- “If put on the stand, my client would testify...”

Why?

- Determine admissibility, which rests on preliminary questions or facts to ensure trustworthiness. See FRE 103 & 104.
- Avoid jury hearing inadmissible evidence

Bankruptcy Purpose?

- Efficiency. Court may accept proffer absent objection without formal testimony
- Examples: confirmation requirements, objections to claims, motions for relief from stay

Practice Pointer – have client or witness on the call

JUDICIAL NOTICE

-
- FRE 201. Judge, on their own or upon request, can take notice of a fact that is generally known or readily determined from an accurate source. Fact deemed proved.
 - Examples: Widespread conditions (economic recession, disasters, pandemic), court records and docket, government data, prime interest rate

EVIDENCE WITHOUT EXPERTS – LAY WITNESS OPINION

FRE 701. Lay witness may testify their opinion if:

- Rationally based on the witness's perception;
- Helpful to understand other testimony or determine a fact; and
- Not scientific or technical under FRE 702

No appraisal, no problem?

- Maybe.
 - “An owner of property is competent to testify regarding its value” *Neff v. Kehoe*, 708 F.2d 639, 644 (11th Cir. 1983)
- Maybe not.
 - Owner's lay opinion of value may be generally admissible, but its weight is highly variable. *In re Hixson*, 2011 WL 4625374 (Bankr. N.D.W.Va. 2011).
- *Daubert* your debtor?

EVIDENCE WITHOUT EXPERTS – OTHER OPTIONS

Market reports, commercial publications, periodicals.

- Hearsay? FRE 803(8) & (17)
- Authentic? Try FRE 901(b)(1) or (4)

Tax Assessor Records.

- FRE 803(8) & 902(4)

Affidavits?

- Don't forget about FRCP 43(c), applicable in bankruptcy under FRBP 9017, allowing evidence on motions via affidavits

What about NADA, bankrate.com, and Zillow?

- NADA and bankrate generally considered reliable
- Zillow... not so much

RELEVANCE - GENERAL RULE

Rule 402 – General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- **these rules**; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

RELEVANCE - TEST

Evidence is relevant if:

- **(a)** it has any tendency to make a **fact more or less probable** than it would be without the evidence; and
- **(b)** the **fact is of consequence** in determining the action.

Common examples of irrelevant evidence in bankruptcy:

- Good faith of someone other than the debtor in confirmation
- Debtor's need to keep property in chapter 7 stay relief

RELEVANCE

In order to be admitted, evidence must be

- Relevant, and
- Not excluded by another rule

When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. FRE 104(b).

Example: creditor mailed collection letter. Had debtor received it before he deeded his house?

- This is a **preliminary question** – the Court decides preliminary questions and is not bound by evidence rules, except those on privilege. FRE 104(a).

The court may admit the proposed evidence on the condition that the proof be introduced later.

RELEVANCE – FRE 403

Relevant Evidence Is Admissible, Unless...



RELEVANCE – OTHER RULES TO KEEP IN MIND



FRE 404 – Character

Ex. §523(a)(2) - “Debtor didn’t pay – they never intended to pay!”



FRE 407 – Remedial Measures



FRE 408 – Settlement Discussions

Mediation orders



FRE 409 – Offers to Pay Medical Expenses

AUTHENTICITY

– GENERAL

RULE

Rule 901. Authenticating or Identifying Evidence

- **(a) In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Is this evidence real or a fake?

AUTHENTICITY

Low bar:

- A “district court must first make a preliminary assessment of authenticity ..., which requires a proponent to make out a **prima facie case that the proffered evidence is what it purports to be.**”

PDVSA US Litig.Tr. v. Lukoil Pan Americas, LLC, 991 F.3d 1187, 1191 (11th Cir.), cert. denied, 211 L. Ed. 2d 283, 142 S. Ct. 466 (2021) (quoting *United States v. Maritime Life Caribbean Ltd.*, 913 F.3d 1027, 1033 (11th Cir. 2019))
- Bankruptcy Judge can admit the evidence subject to a later factual determination as to its authenticity (in jury trial it a jury issue).

SELF AUTHENTICITY

Some pieces of evidence are admissible without proving authenticity – FRE 902

- Certified copies of court records or government records
- Business record accompanied by custodial certification
- Signed promissory notes
- Newspapers

AUTHENTICITY (IF NOT SELF- AUTHENTICATING)

FRE 901 has non-exclusive list of ways you can establish:

- Testimony that it is what proponent says it is;
- Nonexpert testimony about handwriting or voice;
- The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances
 - The Court can look to the evidence itself combined with circumstances even if not “self authenticating”
 - **Facts supporting authenticity need not be admitted or even admissible – FRE 104(a)**

DOCUMENTARY EVIDENCE



- Hearsay
 - Documents and their contents typically are out-of-court statements offered for the truth of the matter asserted therein
- Therefore, they are inadmissible unless they qualify under a hearsay exception
 - Documents are routinely admitted, provided that proper foundation is laid by a competent witness (i.e., a witness with appropriate knowledge)
 - must be authentic (what it purports to be)
 - must be relevant
 - business records

IN-PERSON EVIDENTIARY HEARINGS

- Presenting your exhibit
 - Mark physical exhibit for identification purposes
 - Provide copy to opposing counsel
 - Request permission to approach the witness
 - Hand exhibit to the witness
 - Hand two copies to the Clerk
- Establish foundation by showing:
 - Witness is **competent** / Exhibit is **authentic** / Exhibit is **relevant**
 - Do you recognize this document?
 - What is it?
 - How do you know what it is?
- Move for admission
 - Be prepared to make a proffer of what the evidence will show and why it is relevant.
 - This document is X. This document establishes Y. That is relevant because Z.
- **PRACTICE POINTER**
 - use notebooks with tabs, provide to Court

VIRTUAL EVIDENTIARY HEARINGS

-
- Proposed exhibits will have been uploaded to the Court and circulated to parties in interest
 - Refer all persons at hearing to document number from exhibit list
 - Lay foundation, same as in-person hearing
 - Move for admission
 - **PRACTICE POINTER**
 - impeachment evidence, file under seal?

BUSINESS RECORDS

Easier to admit

- Business records are considered more reliable than other types of documents

Focus is on:

- when the documents were created,
- their trustworthiness, and
- whether they were created in the course of regularly conducted business.

BUSINESS RECORDS, WITNESS

- Movant must lay a foundation through testimony of a “custodian or other qualified witness” that the document:
 - was made at or near the time of the event,
 - by someone with knowledge, or from information sent by a person with knowledge,
 - was kept in the course of a regularly conducted activity, and
 - making the record was a regular practice of that activity.
- Witness must be a person who is in a position to attest to the document’s authenticity and describe the record-keeping process.
 - But witness does not have to have personal knowledge of the contents, and
 - witness is not required to have been the custodian at the time the record was made
- Witness just needs knowledge of the procedures under which the records were made and maintained

BEST EVIDENCE RULE

- The original writing, recording, or photograph is required in order to prove its content, except as otherwise provided by the rules or a federal statute.
- A duplicate is admissible to the same extent as an original, unless there's a “genuine” question as to whether the copy is authentic, or under the circumstances it would be “unfair” to admit the copy instead of the original.
- The Best Evidence Rule focuses primarily on fraud, forgeries, and altered documents.



THANK YOU!

Please visit <https://www.ganb.uscourts.gov/bench-and-bar-committee> for the materials and program recording.