



AMERICAN
BANKRUPTCY
INSTITUTE

2021 Virtual Annual Spring Meeting

Evidence and Trial Skills in Bankruptcy

Hon. Hannah L. Blumenstiel

U.S. Bankruptcy Court (N.D. Cal.); San Francisco

Brian J. Koenig

Koley Jessen; Omaha, Neb.

Jennifer M. McLemore

Williams Mullen; Richmond, Va.

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Grayson Williams

U.S. Bankruptcy Court (N.D. Tex.); Dallas



VIRTUAL ANNUAL SPRING MEETING

APRIL 12-22, 2021

Evidence and Trial Skills in Bankruptcy

Presenters



Jennifer Mclemore
Williams Mullen



Stewart Spielman
Hinshaw & Culbertson LLP



Brian J. Koenig
Koley Jessen PC



**Hon. Hannah L.
Blumenstiel**
Bankr. N.D. Cal.



Grayson Williams
Law Clerk – Bankr. N.D. Tex.

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How to use poll.abi.org

- Take out your preferred device (phone, iPad, desktop)
- Open up your web browser and type in poll.abi.org
- Click on the 'ASM21: Evidence and Trial Skills in Bankruptcy' Session
- When prompted by the moderator, open up each poll question and vote

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Areas of Coverage

- (1) Best Practices for Witness Preparation
- (2) Expert Reports/Testimony
- (3) Managing a Witness' Prior Statements
- (4) Judicial Notice – What, When, How Far

Background

- Marlowe owns a two-story building in San Francisco. On the ground floor, he owns and operates a restaurant as a sole proprietorship. There are two apartments on the second floor. Marlowe lives in one unit and rents the other to a long-term tenant who pays below-market rent, due to rent-control laws.
- Marlowe bought the Building about 3 years ago for \$500K. He borrowed the entire purchase price from Magnolia Bank, which holds a first lien.

Background

- The COVID-19 pandemic hit Marlowe hard. He was forced to close his restaurant, and his tenant (who lost his job) has stopped paying rent.
- For several months, Marlowe had no income from any source.
- Marlowe has not paid Magnolia Bank for nearly a year.

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Background

- Marlowe has filed an individual petition for relief under Ch. 11.
- Marlowe scheduled the value of the Building at \$530K.
- His schedules also reflect pre-petition arrears to Magnolia of approximately \$26,000 and unpaid property taxes totaling \$3,400.

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Question 1: Witness Prep: How do you prepare a nervous witness for testimony?

- 1) Keep preparation short and sweet; hit the highlights (i.e., answer the question answered, wait a second after the question to allow time for objections)
- 2) Prepare witness over a number of phone calls, slowly over time
- 3) Go over all of the potential pitfalls and risks in detail to protect your interests as counsel
- 4) Cover highpoints over the phone, but also send a more detailed guide to deposition preparation via email

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Witness Preparation

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Witness Preparation

- Decorum – timeliness; appropriate dress; respect
- Truthfulness
- Listen – Ask – Answer
- No Speeches; No Guessing; No Absolutes
- Read Documents Carefully
- OK to Correct Mistakes

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341 Meeting

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Motion for Relief from Stay

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Magnolia Motion for Relief from Stay

- **Cause exists. Not making payments. Not paying real estate taxes.**
 - Not adequately protected because:
 - No payments being made; interest accruing
 - Real estate taxes not being paid
 - Any equity cushion is being eroded
- **No equity in Property; and**
- **Property not necessary because no successful reorganization is likely.**
 - No equity cushion based on current valuation
 - Little prospect for a successful reorganization

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Marlowe Objects to MFRS

➤ Needs Property to reorganize. Critical to his success.

- COVID restrictions are easing—Restaurant doing better, Revenues up 23% over prior month. Just needs a few more months to stabilize.
- Tenant got another job and has agreed to start paying 65% rent beginning next month.
- Marlowe will also start making rent payments in three months (assumes restaurant revenue continues to increase/stabilize).
- Once stabilized, restaurant revenues will allow him to successfully reorganize.

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Marlowe Objects to MFRS

➤ Bank is Adequately Protected

Real Estate Taxes

- Working on plan to pay real estate taxes in full.

Insurance

- Renewed Insurance. Evidence of Coverage Provided.

Valuation/Protection

- Building needed updating; made repairs himself; Never looked better; Value much higher than scheduled.
- Willing to also discuss making adequate protection payments.

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Question 2: Is Magnolia Bank's expert report admissible on this record?

- 1) Yes, it is either a recorded recollection or a record of a regularly conducted activity
- 2) No, it is hearsay, plain and simple
- 3) Who cares? Appraisals are voodoo anyway
- 4) Yes, so long as the expert is qualified, her report is admissible

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Prior Statements – Admissibility

- Prior Statements (written or oral) are generally inadmissible at trial, as hearsay
 - FRE 801 and 802
- Can come in only if they qualify as an exception to hearsay (FRE 803, 804, 807) or are excepted from the definition of hearsay (FRE 801(d))

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Prior Statements – Admissibility

- Appraisal Report
 - Inadmissible unless it falls within a hearsay exception – Not Likely
 - FRE 702 and 703 do not make appraisal report admissible; pertain only to testimony
 - Generally, appraiser must testify

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Prior Statements – Admissibility

- BUT – parties can stipulate or courts can order that expert “testimony” can take the form of the expert’s report
 - Expert will be subject to cross-examination on the report’s subject and conclusions, as well as underlying data
 - May or may not need to qualify expert under FRE 702

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Question 3: Are Marlowe's statements during his § 341 meeting admissible?

- 1) Heck no – they're out of court statements offered for their truth – that's hearsay
- 2) Nope – the Bank's lawyer hasn't shown that Marlowe couldn't remember his § 341 meeting testimony, so hasn't established grounds to invoke an exception to hearsay
- 3) Who cares? Marlowe will say anything to keep the automatic stay in place.
- 4) Yes – a party's prior statement is not hearsay under FRE 801(d)(2).

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Prior Statements – Admissibility

- Prior Statement of a Party (Marlowe)
 - Statement of value of Building at 341 Mtg
 - Not hearsay – FRE 801(d)(2)
 - Made by Marlowe in individual capacity
 - Offered against him
 - Need not be inconsistent

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Prior Statements – Admissibility

- Prior Statement of a Party (Marlowe)
 - Not Hearsay under FRE 801(d)(1)
 - Testifying about prior statement
 - Subject to cross-examination
 - Statement inconsistent with current testimony and given under penalty of perjury

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Question 4:

Can the court take judicial notice of Marlowe's Amended Schedule A/B?

- 1) Yes, but why would it, given that it's so clearly meant to bolster Marlowe's opinion of the Property's value
- 2) Yes, it's a court record, which is properly subject to judicial notice
- 3) Yes, FRE 201 permits courts to take judicial notice of adjudicative facts such as those set forth in Marlowe's Amended Schedule A/B
- 4) No, the information concerning the Property's value in Marlowe's Amended Schedule A/B is not generally known and not subject to judicial notice

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Judicial Notice – FRE 201

- Often the simplest and most efficient way to establish facts that are essential to your case.
- However, overuse of judicial notice (and incorporation by reference) can lead to harmful results.
- Remember, the rule expressly applies only to “adjudicative,” not “legislative” facts.
 - Adjudicative facts are those that relate to the issues to be decided in the case.
 - Legislative facts relate to matters of public policy, social custom, and the like.
- Scrutinize any request for judicial notice.
- If requesting judicial notice, be sure to pinpoint specific facts contained in the documents you ask the court to consider.

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Virtual Hearing Etiquette

- Prepare as if you are in person.
- Appearance matters (camera, lighting, etc.)
- Tighten audio (muting and unmuting, adjusting microphone volume.)
- Mind your record. Be patient with the transcript. Allow time for audio delays.
- Understand your platform.
- Remember to move exhibits into evidence.

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Faculty

Hon. Hannah L. Blumenstiel is a U.S. Bankruptcy Judge for the Northern District of California in San Francisco. Prior to her appointment on Feb. 11, 2013, Judge Blumenstiel was an associate (2003-08) and then a partner (2008-12) with Winston & Strawn LLP, where she focused her practice on creditors' rights litigation in state and federal court, including bankruptcy court. From 2001 to 2003, Judge Blumenstiel was an associate with Murphy Sheneman Julian & Rogers LLP, where she represented debtors, creditors and trustees in bankruptcy cases and adversary proceedings. She served as a law clerk to Hon. Charles M. Caldwell of the U.S. Bankruptcy Court for the Southern District of Ohio (Eastern Division) from 1998 to 2001, and from 1997-98, she represented the State of Ohio's interests in bankruptcy cases as an assistant attorney general with the Revenue Recovery Section of the Ohio Attorney General's Office. Judge Blumenstiel sits on ABI's Board of Directors. She received her J.D. from Capital University Law School in 1997 while working full-time for the Columbus Bar Association as director of its *pro bono* initiative, "Lawyers for Justice," and her B.A. from Ohio State University in 1992.

Brian J. Koenig is a shareholder with Koley Jessen in Omaha, Neb., where he leads its bankruptcy and creditors' rights practice and is vice chair of its Litigation Department. He has experience in complex commercial bankruptcy, litigation and trust matters, and has been bankruptcy and litigation counsel in proceedings throughout the country for multiple publicly traded companies, private-equity firms, privately held businesses and prominent individuals. In his commercial bankruptcy and financially-distressed transactions practice, Mr. Koenig counsels a variety of clients, including creditors, debtors, bankruptcy trustees, creditor committees and post-bankruptcy investors to help them evaluate risks, minimize their exposure, maximize their recoveries, structure transactions, and cost-effectively resolve issues. He is a 2018 ABI "40 Under 40" honoree and has been recognized as a "Rising Star" by Thomson Reuters and in *The Best Lawyers in America* for commercial litigation and litigation - bankruptcy. In his appellate practice, Mr. Koenig has argued cases before the Nebraska Supreme Court, the Eighth and Ninth Circuit Courts of Appeals, and the Bankruptcy Appellate Panel for the Eighth Circuit, in addition to participating on the briefs in cases before the Iowa Supreme Court. Prior to joining Koley Jessen, he clerked for the Nebraska Supreme Court. He is a frequent author and lecturer on bankruptcy and litigation topics, having presented nationally through Strafford and the TMA and locally at the Omaha Commercial Real Estate Summit. He also has written numerous articles that have been published in *The Nebraska Lawyer*, among other publications. Mr. Koenig received his B.A. in 2003 in political science and history from Simpson College and his J.D. cum laude in 2007 from Creighton University, where he was editor-in-chief of the *Creighton Law Review*.

Jennifer M. McLemore is a partner at Williams Mullen in Richmond, Va., where she advises commercial creditors, business creditors, banks and credit unions in bankruptcy and bankruptcy litigation matters. She frequently represents clients in matters involving debtor-in-possession financing arrangements and asset-identification and recovery matters. She also represents clients in bankruptcy litigation situations involving avoidance actions, claim-objection disputes and discharge/dischargeability claims. Ms. McLemore has handled bankruptcy cases for numerous clients, including business owners, corporate entities and contract counterparties; commercial and retail landlords; banks and other lenders; unsecured creditors' committees, chapter 7 and 11 trustees, and debtors. She is listed

in *The Best Lawyers in America* for Bankruptcy & Creditor/Debtor Rights/Insolvency & Reorganization Law (2013-present) and in *Virginia Super Lawyers* for Bankruptcy Law (2014-present), and has been named among Virginia's "Legal Elite" by *Virginia Business* for Bankruptcy/Creditors' Rights (2011-2017). Ms. McLemore is a past chair of the International Women's Insolvency & Restructuring Confederation (IWIRC). She founded IWIRC's Virginia network in 2006, and in 2012, she received the IWIRC's Melnik Award, which is awarded to a member who has made an exceptional contribution to IWIRC, either through efforts over the past year or for the culmination of efforts over a period of years. Ms. McLemore currently serves on ABI's Board of Directors and co-chairs ABI's South-eastern Bankruptcy Workshop Advisory Board. In addition, she was a member of Leadership Metro Richmond's Class of 2016 and is a sustainer for the Junior League of Richmond. Ms. McLemore received her B.A. from Miami University (Oxford, Ohio) and her J.D. from the University of Richmond School of Law.

E. Stewart Spielman is a partner with Hinshaw & Culbertson LLP in New Orleans and handles complex commercial loan workouts, restructurings, modifications and enforcement matters on behalf of institutional lenders, nontraditional investors and equity funds. With wide-ranging experience in the credit arena, he routinely negotiates forbearances, amendments, extensions, waivers and recapitalizations of distressed commercial financing relationships secured by many types of collateral. He also advises creditors on a variety of issues pertaining to their real estate loans, vessel loans, agented and syndicated loans, commercial and industrial loans, SBA/USDA-guaranteed loans, asset-based loans, and related products most often in the middle market. His practice also encompasses wholesale automotive and equipment floorplan financing. Mr. Spielman is certified as a Business Bankruptcy Specialist by both the American Board of Certification and the Louisiana Board of Legal Specialization. He received his B.S. in psychology in 2000 from Louisiana State University and his J.D. and Maritime Law Certificate from Tulane University Law School in 2003.

Grayson Williams is a clerk with the U.S. Bankruptcy Court for the Northern District of Texas in Dallas. He previously was an articles editor for the International Law Review Association. Mr. Williams received his B.A. in philosophy from Texas A&M University in 2017 and his J.D. in 2020 from Southern Methodist University.