AMERICAN BANKRUPTCY INSTITUTE

Southeast Bankruptcy Workshop

Skills Session

Contested Confirmations

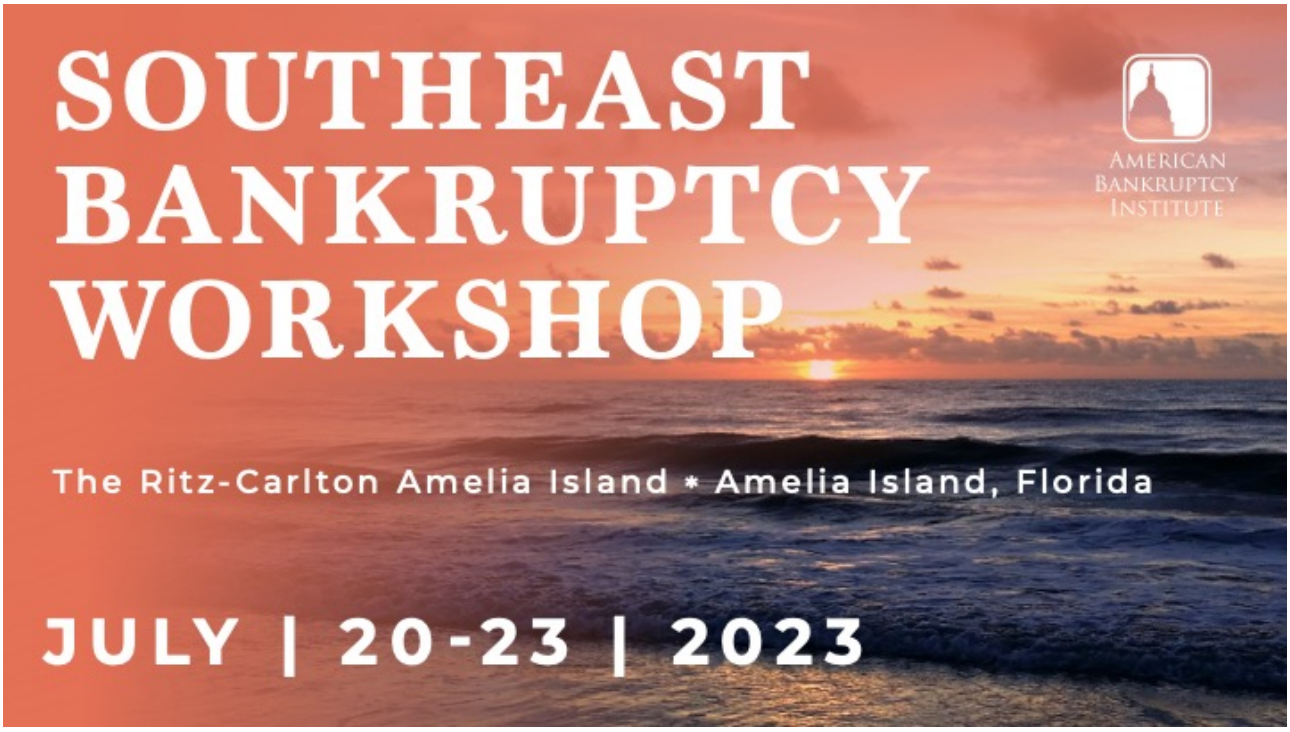
Hon. Jeffery W. Cavender
U.S. Bankruptcy Court (N.D. Ga.) | Atlanta

Richard R. Gleissner
Gleissner Law Firm, LLC | Columbia, S.C.

J. Ellsworth Summers, Jr.
Burr & Forman LLP | Jacksonville, Fla.

Nicolette Corso Vilmos
Berger Singerman LLP | Orlando, Fla.

Rory D. Whelehan
Whelehan Law Firm, LLC | Greenville, S.C.



Skills Session: Contested Confirmations

Format

- This presentation will highlight the evidentiary portion of a contested Chapter 11 confirmation hearing where objections to confirmation have been raised challenging the feasibility of the Debtor's plan under § 1129(a)(11) and whether the plan is proposed in good faith under § 1129(a)(3).
- Opening and Closing Arguments have been omitted for sake of brevity
- We will break between witnesses to have an open discussion of the issues raised.

Disclaimers:

- The scenario that follows is fictional and does not depict any actual person or event.
- All players are acting their parts. While these are actual lawyers and this is an actual judge, all panelists are performing for demonstrative purposes only.
- Judge Cavender's rulings on evidentiary and trial issues are not indicative of how he might rule on an actual matter presented to him.

Cast & Characters

- **Debtor's Counsel:** *Richard R. Gleissner, Gleissner Law Firm, LLC*
- **Debtor Rep. Bob Hasyourmoney:** *J. Ellsworth Summers, Jr. , Burr & Forman LLP*
- **Debtor Expert Dr. Financial Expert:** *Rory Whelehan, Whelehan Law Firm, LLC*
- **Creditor's Counsel:** *Nicolette Corso Vilmos, Berger Singerman LLP*
- **Panelist Judge:** *The Honorable Jeffery W. Cavender, U.S.B.C. N.D.GA.*

Background Facts

- Debtor Angels on the Head of a Pin, LLC operates a cryptocurrency exchange and mining facility.
- Its primary source of revenue is through the sale of "Angels," which like Bitcoin are not backed by anything.
- Angels originally began selling for $1 but after some celebrity endorsements, the price for Angels increased dramatically. Sales have dropped during the bankruptcy, but recent sales have been for $20,000 per Angel.
- Debtor's primary secured lender – Crypto Investments LLC – has a secured claim of $1.8 million secured by a lien against its warehouse mining facility and its cryptocurrency assets
- Debtor's Chapter 11 plan proposes to pay off the secured debt by transferring 120 Angels to Crypto in full satisfaction of the debt.
- The plan also proposes to employ additional celebrity endorsers to increase sales and the value of Angels. Through the sale of new Angels, the Debtor hopes to pay back unsecured creditors in full with interest within one year.

We join the Confirmation Hearing already in progress

Discussion Topics First Break

- Sequestration – FRE 615(c)
- Self Authentication – FRE 902(11)
- Business Records – FRE 803(6)
- Leading/Argumentative Questioning – FRE 611
- Hearsay – FRE 801(d)(2)
- Scope of Direct Examination – FRE 611(b)

Discussion Topics Second Break

- Authentication – FRE 901(b)(9), 902(13) and 703
- Credibility/Weight of Evidence – FRE 104(e), 401, and 402
- Admissibility of Expert Report – FRE 807
- Relevance/Good Faith/Bias – FRE 401
- Leading questions – FRE 611(c)

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EVIDENTIARY OBJECTIONS IN CONTESTED CONFIRMATION HEARINGS

Evidence in Document Form

Long gone are the days of presenting an exhibit to the clerk, asking the clerk to mark the exhibit, showing the exhibit to opposing counsel, getting permission to approach the witness and handing the exhibit to the witness. You might be able to get away with this procedure when the document relates to impeachment or under extraordinary circumstances, but do not count on this method for evidence in support of your position before the court. In bankruptcy court, such activity will be highly frowned upon.

Bankruptcy Judges generally have chamber guidelines stating the required procedure associated with presentation of documents. Generally, these guidelines may require joint statements of disputes ("JSOD") or some similar pleading to be filed prior to a hearing that disclose witnesses, exhibits, legal authority, etc. Chamber guidelines may also require a certain number of copies of each exhibit to be provided to the clerk prior to the hearing. If you are using electronic documents, you likely need to coordinate with the courtroom clerk before the hearing and submit the electronic versions to the courtroom clerk, again prior to the hearing. If you do not follow the chamber guidelines, in some cases, the guidelines indicate that such failure may result in the dismissal or denial of the party's position, pleading or plan ... and may result in other sanctions.

Objections to Documents.

Some attorneys refer to introduction of documentary evidence using the "IAOU Rule". Simply, a witness should **identify** the document, **authenticate** the document, you should **offer** the document and then you can **use** the document. If one of these steps is skipped, opposing party may object to the use of the document.

IDENTIFICATION.

Identification requires that the witness have personal knowledge of the matter. *See* Rule 602, Federal Rules of Evidence. For documents, the witness must provide evidence to show that the document is what it is claimed to be. Rule 901 FRE, *see also United States v. Caldwell*, 776 F.2d 989, 1001-02 (11th Cir. 1985).

AUTHENTICATION.

Authentication of documents is often misunderstood. The authentication burden can be sometimes referred to as a "light" burden. *See Curtis v. Perkins (In re: Internnational Management Assoc. LLC)*, 781 F.3d 1262, 1268 (11th Cir. 2015). But, the "mere fact that [affiant] reviewed documents she believes were associated with [agreement] does not sufficiently authenticate those documents." *Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments*, LLC, 825 F. Supp. 2d 1072, 1076 (D. Colo. 2011).

Further, as delineated in FRE 902, some documents are self-authenticating. The fourteen types of documents that are self-authenticating are:

1. Domestic public documents under seal (FRE 902(1)). Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

2. Domestic public documents not under seal (FRE 902(2))

Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal — or its equivalent — that the signer has the official capacity and that the signature is genuine.

3. Foreign public documents (FRE 902(3))

A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester — or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular

official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

4. Certified copies of Public Records (FRE 902(4))

A copy of an official record — or a copy of a document that was recorded or filed in a public office as authorized by law — if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

5. Official publications (FRE 902(5)). A book, pamphlet, or other publication purporting to be issued by a public authority. (e.g., Dept. of Agriculture Bulletin)

6. Newspapers and periodicals (FRE 902(6)). Printed material purporting to be a newspaper or periodical.

7. Trade inscriptions (FRE 902(7)). An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control. (e.g., "made by XYZ Co.").

8. Acknowledged documents (FRE 902(8)). A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

9. Commercial paper and related documents (FRE 902(9)). Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

10. Presumptions under a Federal Statute (FRE 902(10)). A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

11. Certified domestic records of regularly conducted activity (FRE 902(11)). The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them. (e.g. certified business records exception documents)

12. Certified foreign records of regularly conducted activity (FRE 902(12)). In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

13. Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of

Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

14. Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Even if the document is not self-authenticating, it may be authenticated based upon its "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Rule 901(b)(4) FRE.

OFFER.

Once you have the document identified and authenticated, the attorney offers the document into evidence. This is where the trouble may start. The determination of the admission of a document begins with whether the document is relevant. Rule 401, FRE. Relevance is simply whether the document has an impact on the decision to be made by the Court. As stated in the Advisory Committee's Comments to Rule 401,

> The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would

> invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission.

Rule 401, Comments.

As suggested by the comments, even relevant evidence can be held to be inadmissible if it creates a danger of unfair prejudice, is confusing, is misleading, creates a delay or waste of time, or is cumulative. See Rule 403, FRE. As provided for in the comments to this rule, "Unfair prejudice" within its context means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Some states include unfair surprise in this context as unfair prejudice. *See* Kansas Code of Civil Procedure 60-445. The FRE do not explicitly include unfair surprise.

Documents May Contain Hearsay.

Further, relevant evidence can be excluded if it contains hearsay information. Rule 802, FRE. Hearsay is a statement by a non-party, non-witness, that is being offered to prove the matter asserted. Rule 801, FRE. Documents can contain hearsay, especially if the person testifying is not the person that wrote the statement.

Objections to Testimony

Like documents, the testimony of witnesses may also contain hearsay, if the witness is relying upon what they have been told to provide testimony. This can be important when dealing with questions of valuation. When a witness expresses an opinion as to the value of a particular item, what is the source of the witness's knowledge? If that knowledge comes from something he was told, then the testimony could be statement of a non-party, non-witness, that is being offered to prove the value, thus, hearsay. If this happens, move to strike the testimony as to value.

The exceptions that allow hearsay to be admitted are broken into two categories – where the declarant is available to testify and where the declarant is not available to testify.

The following are exceptions where the declarant may be available:

1. Present sense impression made while or immediately after the declarant perceived it. FRE 803(1). FRE 803(1) Comment ("The underlying theory of Exception [paragraph] (1) is that substantial contemporaneity of event and statement negate the likelihood of deliberate of conscious misrepresentation.")
2. Excited utterance relating to a startling event made while under the stress of excitement. The OMG exception. FRE 803(2). FRE 803(2) Comment ("The theory of Exception [paragraph] (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.")
3. Existing mental emotional or physical condition. FRE 803(3). This exception relates to the declarant's then existing state of mind to provide evidence of motive, intent or plan. FRE (803)(3). FRE (803) (3) Comment ("The exclusion of statements of memory or belief to prove the fact remembered or believed is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind"). *Shepard v. United States*, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933); *Maguire, The Hillmon CaseCThirty-three Years After*, 38 Harv.L.Rev. 709, 719B731 (1925); *Hinton, States of Mind and the Hearsay Rule*, 1 U.Chi.L.Rev. 394, 421B423 (1934). The rule of *Mutual Life Ins. Co. v. Hillman*,

145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892), allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed.)

4. Statement made for purposes of medical diagnosis/treatment. FRE 803(4). The statement has to be relevant to the diagnosis or treatment or describes medical history. FRE 803(4). FRE (803)(4) Comment ("if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful.")

5. Recorded recollection when the witness is shown his own notes from prior time when notes were made when events were fresh in witness mind. FRE 803(5). FRE (803)(5) Comment (The authorities are divided "upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed.")

6. Records of regularly conducted activity (written report kept in ordinary course of business) FRE 803(6). The record needs to be made at or near the time by someone with personal knowledge, kept in the regularly conducted activity, as part of the regular practice, and established by the testimony of a custodian or qualified witness. FRE 803(6). Be careful of hearsay within hearsay. Just because someone typed it into the records does not mean it was from personal knowledge. FRE 803(6) Comment ("The[re] are problems of the source of the recorded information, of entries in opinion form, of motivation, and of involvement as participant in the matters recorded.").

7. Absence of entry in records kept in regularly conducted activity. FRE 803(7). This rule relates to trying to prove a negative. You are trying to prove something

did not occur or does not exist. While technically not hearsay under Rule 801, some cases prior to the adoption of this exception, treated the evidence as hearsay. *See* FRE (803)(7) Comment.

8. Public records/reports (police or other public agency records, reports, etc.) FRE 803(8). FRE 803(8) Comment ("Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record". *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir. 1952)).

9. Records of vital statistics (birth or death certificates, etc.) FRE 803(9).

10. Absence of public record or entry (prove through testimony that appropriate person searched and could not find the public record) FRE 803(10). Again, the idea is if you need to prove a negative. You would show that a diligent search failed to disclose a public record.

11. Records of religious organizations (marriage certificates, etc.) FRE 803 (11). Similar to the business records exception, this exception would "require that the person furnishing the information be one in the business or activity." FRE 803(11) Comment.

12. Marriage, baptismal and similar certificates. FRE 803(12).

13. Family records (family genealogies, engravings on family, jewelry, etc) FRE 803(13). In the old days, people would keep a family history in the family bible. The bible could be admitted to show the family history.

14. Public records of documents affecting an interest in property (deeds, bill of sale, etc). FRE 803(14). FRE Comment 803(14) ("When, however, the record is

offered for the further purpose of proving execution and delivery, a problem of lack of first-hand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered.").

15. Statements in documents affecting an interest in property. FRE 803(15). If later statements are inconsistent with the statement in the document, you may be able to get the document excluded. For example, "a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner, [u]nder the rule, these recitals are exempted from the hearsay rule". FRE 803(15) Comment.

16. Statements in ancient documents (whose authenticity is not in dispute) FRE 803(16). "Ancient" is defined as before January 1, 1998.

17. Market reports, commercial publications (directories, market quotations generally used and relied upon by public or persons in particular occupations) FRE 803(17). FRE (803)(17) Comment ("The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.").

18. Learned treatises (if used by expert witness in direct examination) FRE 803(18).

19. Reputation concerning personal or family history (regarding a person's birth, marriage, death, blood relationships) FRE 803(19). FRE (803)(19) Comment Exceptions (19), (20), and (21). Trustworthiness in reputation evidence is found

"when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 Wigmore 1580, p. 444, and *see also* 1583).

20. Reputation concerning boundaries or general history (regarding reputation in general community established before dispute arose) FRE 803(20).
21. Reputation as to character (among associates or in community) FRE 803(21).
22. Judgment of previous conviction (for felonies, not including nolo contendore pleas even if on appeal) FRE 803(22).
23. Judgments involving personal, family or general history or a boundary. FRE 803(23).

Some of the exceptions only apply when the declarant is not available. FRE 804. For these exceptions to apply, the unavailability must be the result 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). If one can show the declarant is unavailable, one can use the following exceptions:

1. Former testimony (under oath at trial, hearing or deposition) FRE 804(b)(1).
2. Statement under belief of impending death. FRE 804(b)(2).
3. Statement against interest. FRE 804(b(3) (see also FRE 801).
4. Statement of personal or family history FRE 804 (b)(4).
5. Statement offered against a party that wrongfully caused the declarant=s unavailability. FRE 804(b)(6).

Lastly, as it relates to hearsay, there is a residual exception found in Rule 807, FRE. It allows hearsay when there is sufficient guarantees of trustworthiness, offered as evidence of a material fact, more probative than other evidence, and admitting the statement will best serve the purposes of these rules and the interests of justice. Prior to the 2019 amendment, Rule 807 FRE required "equivalent circumstantial guarantees of trustworthiness", but the "equivalent" requirement proved to be less than useful. FRE (807) Comment.

While relevance and hearsay are some of the most common objections to evidence being presented, Rule 403 and Rule 611 provides the Court with the ability to control the process. Rule 403 provides:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Specifically, Rule 611 provides:

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
    (1) make those procedures effective for determining the truth;
    (2) avoid wasting time; and
    (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness=s credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness=s testimony. Ordinarily, the court should allow leading questions:
    (1) on cross-examination; and
    (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

From this simple statement, one can object to the form of the question or the type of question being asked. For example, objections to the form of the question would be when the question is:

1. Ambiguous. FRE 611(a)(1)

2. Argumentative FRE 611(a)(3)

3. Asked and Answerd FRE 403, 611(a)(2)

4. Assumes facts not in Evidence FRE 611(a)(3); 611(c)

5. Badgering FRE 611(a)(3)

6. Overly Broad FRE 403, 611(a)(2)

7. Compound FRE 611(a)(2)

8. Relates to an Offer or Compromise FRE 408

Rule 408 States:

(a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
   (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
   (2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

9. Calls for a Legal Conclusion FRE 602, 701

Rule 602 provides: A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.
Rule 701 provides: If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
(a) rationally based on the witness's perception;
(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

10. Confusing FRE 403, 611(a)(2)

11. Exceeds the Scope of Direct FRE 611(b)

12. Harassing the Witness FRE 611(a)(3)

13. Hearsay FRE 802

14. Improper Hypothetical FRE 611(a)(2), 703

Rule 703 provides: 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.

15. Improper Cross FRE 608, 611(b)

Rule 608 relates to the use of reputation. Rule 608 provides:

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
    (1) the witness; or
    (2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

16. Leading FRE 611(c)

17. Misleading FRE 403, 611(a)(2)

18. Misquoting FRE 403, 611(a)(3)

19. Misstating Facts FRE 403, 611(a)(1)

20. Invites a Narrative Answer FRE 403, 611(a)(2)

21. Repetitious FRE 403, 611(a)(2)

22. Speculative FRE 403, 611(a)(1)

23. Unfairly Prejudicial FRE 403

24. Unintelligible/Vague FRE 611(a)(2)

Similarly, objections to the type of the question may include:

1. Not the Best Evidence FRE 1001, 1002

Rule 1001 provides the following definitions:

In this article:

(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) A "photograph" means a photographic image or its equivalent stored in any form.

(d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Rule 1002 provides: An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

2. Improper Bolstering FRE 403, 608

3. Confuses the issues FRE 403

4. Cumulative FRE 403

5. Hypothetical FRE 703

6. Improper Impeachment FRE 607-610, 613.

Rule 607 states: Any party, including the party that called the witness, may attack the witness's credibility.

Rule 608 is discussed above under reputation and evidence of character.

Rule 609 discusses impeachment by evidence of a criminal conviction.

Rule 610 states that Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Rule 613 provides for the use of prior statements and states:

(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 Rule 801(d)(2).

7. Character Evidence FRE 404, 405, 608

8. Irrelevant FRE 402

9. Misleading FRE 403

10. Opinion Testimony FRE 601

11. Parol Evidence UCC 2-202

12. Inconsistent with the Pleadings - Fed. R. Civ. P. 8, 15

13. Seeks to disclose privileged information FRE 501

Rule 501 provides that:

> The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:
>
> the United States Constitution;
> a federal statute; or
> rules prescribed by the Supreme Court.
>
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

These are the most common and not so common objections to evidence. If you can get past these objections, you should be able to use the evidence in the Courtroom.

Evidentiary Objections Related to Cryptocurrency & Blockchain

The two main evidentiary hurdles for introducing cryptocurrency and blockchain as evidence are authentication and hearsay.1

Cases that Specifically Address Evidentiary Objections to Cryptocurrency and Blockchain as Evidence:

***Kleiman v. Wright*, 2020 WL 6729362, at 30 (S.D. Fla. Nov. 16, 2020):**

Defendant challenged the expert witness's reliance on Bitcoin address lists and Bitcoin messages. Specifically, the defendant argues that the Bitcoin address lists cannot be authenticated and that the Bitcoin messages are inadmissible hearsay and a backdoor attempt to attack the defendant's character. The court is unpersuaded that the Bitcoin address lists cannot be authenticated and held that the defendant failed to demonstrate why the expert cannot rely on this type of evidence in forming his opinions under Fed. R. Evid. 703. However, regarding the Bitcoin messages, the court holds that the plaintiffs failed to show how the message was "kept in the course of regularly conducted activity of a business, organization, occupation, or calling." Therefore, the court held that the blockchain message is inadmissible hearsay.

Cases & Scholarly Articles Discussing Computer and Technology-Generated Information as Evidence:

***United States v. Lizarraga-Tirado*, 789 F.3d 1107 (9th Cir. 2015):**

In this case, the court addressed the issue of authenticating a screenshot of a thumbtack position on a Google Earth satellite image. First, the court held that the Google Earth satellite image itself, absent any thumbtacks or markers, is not hearsay because a satellite image is similar to a photograph in that it makes no assertion. Next, the court held that a thumbtack placed by the Google Earth program and automatically labeled with the corresponding GPS coordinates is not hearsay. The court focused on the fact that the assertion was made by the Google Earth program, not a person. Therefore, the court found the hearsay rule inapplicable to the assertion made by the thumbtack positioning. The court noted that its holding does not go as far as suggesting that machine statements do not present evidentiary concerns. However, concerns about reliability are addressed by the rules of authentication, not hearsay.

The Hurdle of Inadmissible Hearsay:

The applicability of the Ninth Circuit's analysis of digitally generated evidence has not specifically been addressed in the context of cryptocurrency but is likely relevant and potentially influential.2 Because humans do not generate receipts on the blockchain, courts could possibly

1 *See* Angela Guo, *Blockchain Receipts: Patentability and Admissibility in Court*, 16 CHI. KENT J. INTELL. PROP. 440, 447 (2017).
2 *Id.* at 46.

follow the Ninth Circuit's lead and classify distributed ledger receipts as computer-generated evidence and therefore not hearsay.3 On the other hand, courts could find a substantial difference between a Google Earth satellite image and a blockchain, and hold that blockchain is closer to human assertion and not a picture.4 Further, it could be argued that blockchain merely stores information that is input by users, so the declarant is not the blockchain itself but rather the person inputting the data into the blockchain.5 Even if blockchain evidence is found not to be inadmissible hearsay, it will still have to overcome the hurdle of authentication.

The Hurdle of Authentication:

Under Fed. R. Evid. 901, authentication of evidence requires the proponent to produce evidence sufficient to support a finding that the item is what the proponent claims it to be. If a litigant offers self-authenticating evidence under Fed. R. Evid. 902, then the litigant does not need to establish authentication under Fed. R. Evid. 901. Self-authenticating evidence refers to evidence that does not need to be authenticated prior to being admitted.

There are several methodologies through which a proponent may attempt to authenticate cryptocurrency or blockchain evidence. First, a proponent may argue that the digital signatures associated with a blockchain transaction establish accuracy under Fed. R. Evid. 901(b)(9) in that it creates an identifier unique to each individual transaction.6 In addition, a proponent may argue that the hash values included in the blockchain prove the accuracy and authenticity of the digital data.7 Moreover, under Fed. R. Evid. 902(13), machine-generated data that is certified by a qualified expert is considered self-authenticating.

It is important to note that blockchain does not account for human error.8 Blockchains do not consider the accuracy of the data input by humans into the system.9 Therefore, a judge could find that while the blockchain system itself produces reliable and accurate results, there is no guarantee that the information entered into the system is reliable or accurate.10

State Statutes and Evidentiary Rules:

A. Vermont:

The Vermont Legislature enacted VT. STAT. ANN. tit. 12, § 1913(2023) which specifically addresses the admissibility of blockchain as evidence. "A digital record electronically

3 *Id.* at 47.
4 *Id.*
5 J. Collin Spring, *The Blockchain Paradox: Almost Always Reliable, Almost Never Admissible,* 72 SMU L. REV. 926, 936 (2019).
6 Emily Knight, *Blockchain Jenga: The Challenges of Blockchain Discovery and Admissibility Under the Federal Rules*, 48 HOFSTRA L. REV. 519, 550 (2019).
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*

registered in a blockchain shall be self-authenticating pursuant to Vermont Rule of Evidence 902, if it is accompanied by a written declaration of a qualified person…" that meets requirements expressly laid out in the statute. VT. STAT. ANN. tit. 12, § 1913(b) (2023).

B. Illinois:

In 2018, Illinois adopted Illinois Rule of Evidence (IRE) 902(12) which allows for self-authentication of digital data under express circumstances. IRE 902(12) requires an expert to certify the evidence generated or copied by an electronic process or system. This rule is directly applicable to the admissibility of blockchain and cryptocurrency evidence. Thus, under this rule, a digital record from blockchain is self-authenticating when it is certified by a written declaration of a qualified person as outlined by IRE 902(11).

Faculty

Hon. Jeffery W. Cavender is a U.S. Bankruptcy Judge for the Northern District of Georgia in Atlanta, sworn in on March 2, 2018. Prior to his appointment to the bench, he was a partner in the financial restructuring practice of Troutman Sanders LLP, where he primarily represented corporate debtors and secured lenders in chapter 11 cases and mortgage servicers in consumer-related litigation and bankruptcy matters. Judge Cavender previously was a partner in the bankruptcy group of McKenna Long & Aldridge LLP (n/k/a Dentons LLP) and served as the general counsel for a national mortgage company. He chaired the Bankruptcy Section for the Atlanta Bar Association from 2017-18 and was a member of its board of directors from 2012-18. During Judge Cavender's tenure as chair, the Atlanta Bar Bankruptcy Section was named the national CARE chapter of the year and received the *Pro Bono* Award for Excellence and the Small Section of the Year Award from the Atlanta Bar. He is an active member of the National Conference of Bankruptcy Judges, the Turnaround Management Association and ABI, having previously served on the advisory board for ABI's Southeast Bankruptcy Workshop. Judge Cavender received his undergraduate degree in history *summa cum laude* in 1990 from Berry College, and his J.D. *cum laude* from the University of Georgia School of Law in 1993, where he was a member of the *Georgia Law Review* and was inducted into the Order of the Coif.

Richard R. Gleissner is a practitioner with Gleissner Law Firm, LLC in Columbia, S.C., which he founded in 2007. He was admitted to the South Carolina Bar in 1990, the U.S. District Court for the District of South Carolina and the U.S. Court of Appeals for the Fourth Circuit in 1991. In 1998, the State of South Carolina's Supreme Court certified him as specialist in Bankruptcy and Debtor-Creditor Law, and he continues to be certified in this area of specialization. Mr. Gleissner is a member of the American Bar Association, the South Carolina Bar Association, ABI and the South Carolina Bankruptcy Law Association. In 2007, he taught commercial law and bankruptcy at the Charleston School of Law. Mr. Gleissner regularly lectures and gives seminars on various aspects of commercial and bankruptcy law for the South Carolina Bankruptcy Law Association, the South Carolina Bar, the National Judicial College, Lorman Educational Services and Strafford Educational Services. He received his undergraduate degree *magna cum laude* from the University of South Carolina in 1978, his Masters in Public Administration in 1981 and his J.D. *cum laude* in 1990, and during law school he was awarded membership in the Order of Wig and Robe and the Order of the Coif.

J. Ellsworth Summers, Jr. is a partner with Burr & Forman LLP in Jacksonville, Fla., where he practices in the firm's Creditor's Rights and Bankruptcy Practice Group. His practice focuses on assisting lenders in commercial loan litigation in bankruptcy, federal and state courts. Mr. Summers has experience with workouts, business reorganizations and liquidations, distressed-asset acquisitions, special counsel assignments and adversary proceedings. He has represented secured lenders, creditors' committees, local governments, trustees, trade creditors, landlords, unsecured creditors, bondholders, homeowners' associations, § 363 asset purchasers and other stakeholders in a variety of business chapter 11 cases. Mr. Summers has trial experience in federal and state court as a commercial litigator. He represents clients in complex commercial litigation, shareholder and partnership disputes, homeowner association disputes, tax disputes, contract litigation, receiverships, lender liability, commercial evictions, and other real estate-related litigation. In his business practice, Mr. Summers assists clients with purchasing and selling assets, and regularly advises on the impact of

insolvency on complex financial transactions. He has appeared before state and federal courts in 13 states, the Fourth Circuit Court of Appeals and the Supreme Court of Virginia. Mr. Summers is AV-rated by Martindale-Hubbell and has routinely been named in *Florida Super Lawyers*, *Florida Legal Elite* and *Florida Best Lawyers*. Prior to private practice, he clerked for Hon. Stephen C. St. John, Chief U.S. Bankruptcy Judge for the Eastern District of Virginia. Ms. Summers received his B.A. *cum laude* from Hampden-Sydney College and his J.D. *cum laude* from Stetson University College of Law, where he was a member of the *Stetson Law Review*.

Nicolette C. Vilmos is a partner in the Orlando and Tampa, Fla., offices of Berger Singerman LLP in the firm's Dispute Resolution and Business Regulatory Teams. She focuses her practice in the areas of complex business litigation, including bankruptcy, intellectual property, banking law, lender liability, shareholder and business disputes, real estate workouts, noncompete litigation and landlord/tenant matters. Ms. Vilmos's bankruptcy and creditors' rights practice includes the representation of secured lenders, purchasers of assets from troubled companies, fiduciaries, creditors' committees, and other stakeholders in multi-party disputes and reorganizations. In the area of intellectual property, she has litigation experience in state and federal courts and has represented clients in cases relating to patent infringement, trademark infringement, trade dress infringement, copyright infringement, anti-cybersquatting, theft of trade secrets, unfair competition, the Computer Fraud and Abuse Act, deceptive and unfair trade practices, tortious interference, breach of contract and/or breach of restrictive covenants, and other related claims. Ms. Vilmos counsels clients on various privacy and data-security issues, from systemwide network intrusions and ransomware attacks to cyber extortion, fraudulent wire transfers, email account compromises, stolen computer hardware and employee misconduct. She is president of the International Women's Insolvency & Restructuring Confederation and a member of ABI's Southeast Bankruptcy Workshop Advisory Board, the American Intellectual Property Law Association and the Federal Bar Association in Orlando. In addition, she is a graduate of Leadership Orlando, a member and mentor of the Central Florida Inns of Court, a visiting bankruptcy law professor at the FAMU School of Law and a real property adjunct professor at Valencia Community College. Ms. Vilmos has been listed in *Lawdragon*'s 500 Leading U.S. Bankruptcy and Restructuring Lawyers from 2022-23, as a *National Law Review* Go-To Thought Leader in 2022, among America's Most Honored Lawyers in 2022, as one of Florida's Legal Elite by *Florida Trend Magazine* from 2021-22, in *Chambers USA: America's Leading Lawyers for Business* for Bankruptcy, and in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law in 2023. She is rated AV-Preeminent by Martindale-Hubbell and received the Women of Achievement Award from the Women's Executive Council of Orlando. Ms. Vilmos received her B.A. *cum laude* in 1998 from Stetson University and her J.D. *cum laude* in 2000 from Stetson University College of Law.

Rory D. Whelehan is the owner of Whelehan Law Firm, LLC in Greenville, S.C., where he focuses on all aspects of civil litigation, creditors' rights, debt restructuring, foreclosure, bankruptcy and insolvency. He is certified by the South Carolina Supreme Court commission on CLE and Specialization as a specialist in bankruptcy and debtor-creditor law. He also is also certified by the North Carolina State Board of Legal Specialization as a business bankruptcy law specialist and a consumer bankruptcy law specialist. Mr. Whelehan has spent his entire career focused in the bankruptcy, insolvency and creditors rights arena. He regularly appears in state, bankruptcy and federal courts in South Carolina and North Carolina, and has represented all constituents in chapter 7, chapter 11, chapter 12 and chapter 13 cases, including secured creditors, unsecured trade creditors, creditors' committees and debtors. Mr. Whelehan's representative clients include financial institutions, life insurance com-

panies, trade creditors, landlords, bankruptcy trustees, and individual creditors and debtors. He also has represented litigants in bankruptcy appeals both at the federal district court level in North Carolina and has appeared at the Fourth Circuit in Richmond, Va. Moreover, he has experience in all facets of related insolvency litigation, including commercial collections, guaranty lawsuits, preference and fraudulent transfer defense, and state law foreclosure and receiverships. In addition, he is certified by the South Carolina Supreme Court Board of Arbitrator and Mediator Certification as a mediator and arbitrator, and he completed the mediation training course sponsored by ABI and St. John's University School of Law. Over the course of almost 30 years, Mr. Whelehan's insolvency experience has involved numerous financially distressed industries, including aviation, textile, asbestos, big-box retail and petroleum/convenience stores. In addition to his litigation work, he has provided advice and assistance in workouts and debt restructurings for various financial institutions and life insurance companies. He also has provided bankruptcy legal opinions in connection with various sophisticated financial transactions, including nonconsolidation, fraudulent transfer and automatic stay opinions. Mr. Whelehan's practice includes commercial debt collection and ancillary remedies, such as attachments, garnishments and the appointment of receivers. He received his B.A. and B.S. in 1986 *magna cum laude* with honors and Phi Beta Kappa from the University of South Carolina, and his J.D. in 1989 from the University of South Carolina School of Law.