

Revisiting Evidence in Bankruptcy

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ABI'S QUICK

evidence handbook
[SECOND EDITION]

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Federal Rules of Evidence

Amendments

Effective December 1, 2023

Rule 702: Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the ~~expert has reasonably applied~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Rule 615: Excluding Witnesses from the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony

(a) Excluding Witnesses. At a party's request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (1) a party who is a natural person;
- (2) ~~an~~ one officer or employee of a party that is not a natural person ~~after being~~ if that officer or employee has been designated as the party's representative by its attorney;
- (3) ~~a~~ any person whose presence a party shows to be essential to presenting the party's claim or defense; or
- (4) a person authorized by statute to be present.

Rule 615: Excluding Witnesses from the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony

(b) Additional Orders to Prevent Disclosing and Accessing Testimony. An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:

(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and

(2) prohibit excluded witnesses from accessing trial testimony.

Rule 106: Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may require the introduction, at that time, of any other part—or any other ~~writing or recorded~~ statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

Federal Rules of Evidence

Proposed Amendments for December 1, 2024

Rule 801: Definitions That Apply to This Article;

Exclusions from Hearsay

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

* * * * *

(2) An Opposing Party's Statement.

* * * * *

If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

Rule 107: Illustrative Aids

- (a) Permitted Uses.** The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.
- (b) Use in Jury Deliberations.** An illustrative aid is not evidence and must not be provided to the jury during deliberations unless: (1) all parties consent; or (2) the court, for good cause, orders otherwise.
- (c) Record.** When practicable, an illustrative aid used at trial must be entered into the record.
- (d) Summaries of Voluminous Materials Admitted as Evidence.** A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

Rule 1006: Summaries to Prove Content

(a) Summaries of Voluminous Materials Admissible as Evidence. The ~~proponent~~ court may admit as evidence ~~use~~ a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) Procedures. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.

Evidence and Technology

Subpoenas in the Age of Zoom

Rule 45

(c) **Place of Compliance.**

(1) **For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within **100 miles** of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

Subpoenas in the Age of Zoom

Rule 43

(a) **In Open Court.** At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. **For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.**

Subpoenas in the Age of Zoom

***In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023)**

Using Technology to Present Evidence

- Exhibit binders
- Electronic presentation

Authenticating Social Media Evidence

- Rule 901(a) requires proof “sufficient to show the item is what the proponent claims it is.”
- Potential ways to satisfy Rule 901(a):
 - Testimony by witness with knowledge?
 - Business records affidavit from social media provider?
 - Circumstantial evidence?
- Types of circumstantial evidence under Rule 901(b)(4):
 - Linked to the party’s IP address
 - Linked to evidence on the party’s hard drive
 - Linked to other known posts by the party
 - Linked to non-public or personal details of the party

Artificial Intelligence as Evidence

- What is AI and how does it work?
 - Computer and data science
- Computer-stored vs. computer-generated evidence
- Admissibility of AI
 - Relevance (Rules 401-403)
 - Authenticity (Rule 901, *Daubert* factors)
 - Hearsay (Rule 801)
- Cwik, C., Grimm, P., Grossman, M. and Walsh, T., “Artificial Intelligence, Trustworthiness, and Litigation.” *Artificial Intelligence and the Courts: Materials for Judges*. American Association for the Advancement of Science (2022).

Faculty: Revisiting Evidence in Bankruptcy with the Authors of ABI's Quick Evidence Handbook

Todd H. Bartels is a shareholder with Polsinelli PC in Kansas City, Mo. He has experience in complex litigation, including breach of contract, commercial fraud and shareholder disputes. He also focuses his practice on bankruptcy and distressed business litigation, mergers and acquisitions litigation, intellectual property and technology litigation and appeals litigation in the wireless and broadband, transportation and multi-level marketing industries. Mr. Bartels is admitted to practice in Kansas and Missouri, and he is a member of ABI and the American, Kansas City Metropolitan, St. Joseph and Missouri Bar Associations. He also is a treasurer and board member of the Research Foundation. Mr. Bartels is a co-author of *ABI's The Zone of (In)solvency: Fiduciary Duties and Standards of Review for Corporations and Limited Liability Companies*, and he was awarded "Top Plaintiffs' Win" in 2019 by *Missouri Lawyers Weekly* for a \$93.5 million jury verdict as lead counsel for the chapter 7 bankruptcy trustee. In addition, he was named a "Local Litigation Star" every year since 2013 by *Benchmark Litigation*, which named him a General Commercial and Intellectual Property Star in 2019, and he was listed in *Missouri Super Lawyers for Business Litigation* from 2015-16. Mr. Bartels received his B.A. in accountancy in 1992 from the University of Missouri-Columbia and his J.D. in 1996 from the University of Missouri-Columbia School of Law.

Christopher M. Candon is a shareholder at Sheehan Phinney Bass & Green PA in Manchester, N.H., and Boston, and is a member of the firm's Management Committee and chairs its Corporate Department. He focuses his practice on the problems of financially distressed companies, assisting clients with transactional and litigation matters involving commercial law and insolvency issues. Mr. Candon frequently represents debtors, creditors, committees, purchasers, landlords and trustees in workouts, out-of-court restructurings, chapter 11 reorganizations and sales, and chapter 7 liquidations. He also has experience in the negotiation and documentation of key business contracts and complex commercial transactions,

including asset-purchase agreements, secured and unsecured financings, letters of credit, DIP and exit financing transactions, and real estate transactions. Mr. Candon maintains a business litigation practice that involves all aspects of insolvency law, representing both creditors and debtors in bankruptcy, workouts, foreclosures and creditors' rights matters. He regularly represents parties in claim and plan negotiation and litigation, relief from stay, valuation, cash collateral and DIP financing, fraudulent transfer and preference litigation. He has experience in handling bankruptcy appellate matters in New England and across the country. In addition to his insolvency practice, Mr. Candon advises clients on various real estate matters, including representing landlords and tenants in commercial lease preparation and negotiation. He also completed the ABI/St. John's University bankruptcy mediator training program and serves as a mediator in state and federal civil commercial litigation, and he provides mediation services in bankruptcy cases. Mr. Candon frequently lectures and authors articles and program materials for ABI, the Boston Bar Association and other associations on various bankruptcy and insolvency topics. He received his B.S. from St. Lawrence University and his J.D. cum laude from The Catholic University of America Columbus School of Law.

Jeremy R. Fischer is Drummond Woodsum's Bankruptcy & Restructuring Practice Group Leader in the firm's Portland, Maine, and Manchester, N.H. offices. He specializes in litigation and transactions involving distressed commercial matters, where he helps clients from the first sign of trouble through the most complex financial restructuring or chapter 11 case. Mr. Fischer advises major constituencies in high-stakes chapter 11 cases, including financial institutions, bondholders, official and ad hoc creditors' committees, asset-purchasers, trustees, DIP lenders, directors/officers and debtors. He also represents parties in out-of-court debt restructurings, receiverships, and asset and loan sale transactions, with particular expertise in the health care and long-term-care sectors. Mr. Fischer has been recognized as one of the top practitioners in the region by *Chambers USA* and *The Best Lawyers in America*. He regularly represents indigent individuals in bankruptcy cases on a pro bono basis, and he has taught at the University of Maine School of Law. He also serves on ABI's Board of Directors. Mr. Fischer is a member of ABI's inaugural 2017 class of "40 Under 40," and in 2018 he co-authored and co-edited the second edition of *ABI's Quick*

Evidence Handbook. Before entering the practice of law, he served three terms in the Maine Legislature, where he was House Chairman of the Appropriations Committee. Mr. Fischer received his B.A. summa cum laude from the University of Michigan and his J.D. summa cum laude from the University of Maine School of Law.

Isley M. Gostin is a counsel at WilmerHale in Washington, D.C., where she represents clients in all stages of complex litigation and bankruptcy proceedings, including discovery, motions, mediation, trial and appeals. She has also represented clients in a wide range of pro bono matters, including representing a criminal defendant sentenced to life without the possibility of parole in a multi-day trial seeking post-conviction relief, representing judgment creditors in bankruptcy proceedings, advising the board of directors of a nonprofit organization in financial distress on governance issues, and representing amici in the U.S. Supreme Court and courts of appeals on constitutional and bankruptcy law issues. Ms. Gostin was honored in 2020 as one of ABI's "40 Under 40." Before joining WilmerHale in 2011, she clerked for Hon. Robert E. Gerber of the U.S. Bankruptcy Court for the Southern District of New York. Ms. Gostin received her B.A. cum laude from Harvard College and her J.D. cum laude from Harvard Law School.

Eric D. Madden is a partner with Reid Collins & Tsai LLP in Dallas, where his practice focuses on complex business and insolvency-related litigation. He has represented trustees, receivers, creditor and bondholder committees, and defrauded investors in a number of major cases throughout the country. These cases often involve breaches of fiduciary duty, professional malpractice, and/or significant fraudulent transfers. Mr. Madden has been listed in The Best Lawyers in America for bankruptcy litigation, is AV-rated by Martindale-Hubbell, and has been named a Texas Super Lawyer in business litigation. He is a former co-chair of ABI's Bankruptcy Litigation Committee and is a current co-chair of ABI's Bankruptcy Taxation Committee. Mr. Madden received both his B.A. and J.D. from the University of Kansas, where he was a member of Phi Beta Kappa and the Order of the Coif, and served as editor-in-chief of the *Kansas Law Review*.