AMERICAN BANKRUPTCY INSTITUTE

Northeast Bankruptcy Conference & Consumer Forum

Consumer Track

Litigation Skills

CONCURRENT SESSION

Daniel L. Cummings
Norman Hanson DeTroy | Portland, Maine

Ann Marie Dirsa
Office of the U.S. Trustee | New York

Hon. Joan N. Feeney (ret.)
JAMS | Boston

Edmond J. Ford
Ford, McDonald & Borden, P.A. | Portsmouth, N.H.

2024

HYPOTHETICAL
As of
7/8/2030

The year is 2030. Allen Williams is, to the shock of everyone, still alive going strong and providing financial consulting services to New Yorkers in need of a particular kind of ethics. His prominence in the community continues to be based on the services he provides to the Acme Organization (now owned by judgment creditors).

Allen and his wife Helena had a stormy relationship during the years up to 2020. They divorced acrimoniously. During the divorce, there were (apparently) bitter disputes over property and alimony. At one point in the divorce, when Allen was being deposed, he testified, "I know how to make sure that neither you nor any other creditor of mine ever gets paid – I simply won't own anything. It is called bullet proof asset protection. I wrote a book. You are never going to collect." They reconciled and remarried sometime in 2024.

In 2025, Allen was sued by the Acme Organization for breaches of fiduciary duty related to the events that resulted in his criminal convictions and his activities assisting Donald Acme breaking various laws. In 2026, a judgment entered against him in the amount of $150,000,000.00 (the "Judgment").

In late 2024, Allen realized that his involvement in the Acme affairs would result in debts that he would never pay and so he created and now works exclusively for an LLC, named Fresh Start, LLC ("FSL"). 100% of the membership interests are owned by his wife and children. While he signs most of the checks, provides all the consulting services, his wife is the president and CEO of FSL and receives a salary from FSL.

In 2024, in between his stays in Rikers, Allen traveled to Scotland where he owned a very expensive home known as "Walford." There he claims that he hand wrote a series of documents (the "Documents") conveying the house under Scottish law to an Isle of Man Trust (the "Trust") of which his wife is trustee and the sole beneficiaries of which are his wife and two sons as a gift. He asserts that he did so for estate planning purposes – after all he was old and a lot of bad people were upset with him. There is a public record of the conveyance in local offices.

The Documents are now lost and Allen claims to be able to find only copies. The copies appear to bear his signature, that of his wife and two sons and an illegible witness signature.

After he was finally released from Rikers, he went back to work, now working for FSL and its remaining client Eric Acme. FSL is well compensated for Allen's services and Helena lives comfortably from the income earned by FSL. She pays all of Allen's expenses. Allen has no bank account, no car, no real estate and no other investments of any kind.

Allen is receiving social security of $3,500 per month and a salary of $4,000 per month from FSL, which amounts are deposited into his wife's bank account.

After he was released, in 2026, Allen and Helena moved to a home she purchased in Falmouth, Massachusetts. Helena purchased the house with money from a final installment of

Allen's severance payment when he was let go from the Acme Organization, which final installment was paid to him in March 2026.

Allen continues to spend summers (sometimes with his wife) in Scotland and when there has the full, unrestricted use and enjoyment of Walford.

On January 1, 2030, tiring of attempting to hold off the collection activities of the now creditor owned Acme Organization, Allen filed a petition under Chapter 7 of Title 11. The case is pending in the United States Bankruptcy Court for the District of Massachusetts, Eastern Division, Judge Joan Feeney presiding. Peter Antonelli was retained as counsel to the Chapter 7 Trustee. The Section 341 meeting was initially scheduled for Tuesday, January 30, 2030.

After a few extensions of the date to object to the debtor's discharge, the United States Trustee filed a complaint objecting to discharge pursuant to 11 U.S.C. Section 727(2)(A) and (a)(4), alleging false statements under oath on the schedules and concealment and continuing concealment of Allen's interest in Walford and the Falmouth Residence.

The Chapter 7 trustee has also sued Allen and his wife to recover property of the estate under section 544 and a resulting or constructive trust theory, under section 544 and under Mass. Ann. Laws ch. 109A,

The two adversary proceedings were consolidated. Discovery has been completed. Witness lists and exhibit lists have been exchanged. The parties have filed various motions in limine and objections which the Court has reviewed and deferred ruling on until trial.

TRIAL ISSUES:

[1]. Deposition Transcripts: The exhibits include a PDF of an unsigned copy of the transcript of Allen's divorce deposition testimony, his deposition testimony taken in the Plaintiff UST's discharge denial adversary proceeding, and Helena's deposition testimony taken by the Plaintiff Trustee in the fraudulent transfer adversary proceeding. The Chapter 7 Trustee seeks to introduce all three depositions, Allen's counsel objects.

a. *Allen's Unsigned Divorce Deposition Testimony – How does the UST get it into evidence, can Allen keep it out?*

b. *Can the UST get Helana's deposition testimony taken by the Chapter 7 Trustee in the fraudulent conveyance action into evidence?*

c. *Mechanically, how does the UST get Allen's deposition testimony into evidence*

[2]. Prior Inconsistent Statements: In his deposition testimony in the discharge proceeding, Allen was shown a financial statement that he had given to a bank (under penalty of perjury) in connection with the resolution of one of his many debts by workout agreement. The financial statement showed debts greater than assets by about $500,000 (a negative net worth). The work out agreement was dated July 4, 2024. At trial, Allen testified that he was solvent at

the time of the transfer of the Walford property he was paying his debts as they came due and the fair value of his remaining assets after the transfer exceeded his just debts.

a. *How does the Chapter 7 Trustee cross-examine Allen and how does he use the deposition or financial statement or both?*

In her deposition testimony, Helena testified that she worked part time at FSL performing various office duties. At trial, in response to the Chapter 7 Trustee counsel's questions to her about her role in FSL duties, she testified that she has always worked full time at FSL, and at all material times is and has been the office manager, scheduler, bookkeeper, accounts payable clerk. The Trustee's counsel offers her deposition transcript and her counsel objects.

b. *Is there any basis for the objection?*

c. *Can Allen give opinion testimony as to the value of his assets in 2024?*

[3]. Best Evidence Rule – FRE 1001 – 1008: Allen's counsel seeks to introduce the Documents to establish that he did not testify falsely in his schedules and statement of affairs and that he did not own Walford. The US Trustee objects for lack of foundation and the failure to produce the original.

a. *What does Allen have to do to get the documents into evidence?*

b. *Can Allen use a copy of the publicly recorded documents?* FRE 1005

[4]. Expert Testimony: Allen's counsel has disclosed as an expert one Professor Wyliee, a professor of law in Scotland who would testify as to the effect under Scottish law and the law of the Isle of Man of the Documents and the conveyance of Walford. The Trustee's counsel objected.

a. *What are the foundation elements that Allen's counsel has to establish to get the expert testimony in – does Daubert play a part?*

b. *Can Allen's counsel put into evidence expert testimony as to the applicable law?*

i. Would the answer change if it was a jury proceeding?

c. *Are there special rules for foreign law?* Fed. R. Civ. P. 44.1; Bankr. R 9017

[5] Prior Bad Acts FRE 404(b): At trial, the US Trustee moved to introduce the book Allen wrote ("Bullet Proof Asset Protection") together with an excerpt from Helena's deposition in the divorce proceeding in which she asserted that he hid assets from her in the divorce.

a. *Is the prior hiding of assets admissible, and if so, why and for what purpose?*

b. *Is the matter of the prior hiding of assets a wasteful rabbit hole and can Allen keep it out under FRE 403?*

[6]. Impeachment by Criminal Conviction FRE 609: At trial, the US Trustee sought to introduce records of Allen's prior convictions for perjury.

a. *Is the conviction admissible if Allen does not testify?* F.R.E. 404(b)

b. *How is the fact of the conviction established by the UST?*

c. *When Allen testifies, may the conviction be used?*

d. *If Eric Acme becomes governor of New York and pardons Allen, may the conviction be used?*

[7]. Writing Used to Refresh Memory FRE 612: At trial, defense counsel asked Helena how much FSL paid Allen back in 2027 to show that he has been getting raises, but she responded that she could not recollect. Counsel had a memorandum from Helena to the bookkeeping department dated January 2, 2027 stating that Allen's salary would be $2,500 per month.

a. *May defense counsel give the document to Helena to review to refresh her recollection?*

b. If so, does counsel have to do anything before handing the document to her to review?

USE OF DEPOSIITION TRANSCRIPTS

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions.

(1) ***In General.*** At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;
(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and
(C) the use is allowed by Rule 32(a)(2) through (8).

(2) ***Impeachment and Other Uses.*** Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) ***Deposition of Party, Agent, or Designee.*** An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(4) ***Unavailable Witness.*** A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:

(A) that the witness is dead;
(B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;
(C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;
(D) that the party offering the deposition could not procure the witness's attendance by subpoena; or
(E) on motion and notice, that exceptional circumstances make it desirable--in the interest of justice and with due regard to the importance of live testimony in open court--to permit the deposition to be used.

(5) ***Limitations on Use.***

(A) *Deposition Taken on Short Notice.* A deposition must not be used against a party who, having received less than 14 days' notice of the deposition, promptly moved for a protective order under Rule 26(c)(1)(B) requesting that it not be taken or be taken at a different time or place--and this motion was still pending when the deposition was taken.

(B) *Unavailable Deponent; Party Could Not Obtain an Attorney.* A deposition taken without leave of court under the unavailability provision of Rule 30(a)(2)(A)(iii) must not be used against a party who shows that, when served with the notice, it could not, despite diligent efforts, obtain an attorney to represent it at the deposition.

(6) ***Using Part of a Deposition.*** If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(7) ***Substituting a Party.*** Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) ***Deposition Taken in an Earlier Action.*** A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) Objections to Admissibility. Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) Form of Presentation. Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise.

(d) Waiver of Objections.

(1) ***To the Notice.*** An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) ***To the Officer's Qualification.*** An objection based on disqualification of the officer before whom a deposition is to be taken is waived if not made:

(A) before the deposition begins; or
(B) promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) ***To the Taking of the Deposition.***

(A) *Objection to Competence, Relevance, or Materiality.* An objection to a deponent's competence--or to the competence, relevance, or materiality of

testimony--is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.
(B) *Objection to an Error or Irregularity.* An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and
(ii) it is not timely made during the deposition.

(C) *Objection to a Written Question.* An objection to the form of a written question under Rule 31 is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) ***To Completing and Returning the Deposition.*** An objection to how the officer transcribed the testimony--or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition--is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.

Fed. R. Civ. P. 32.

PRIOR INCONSISTENT STATEMENTS

Federal Rule of Evidence, Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:
(1) the declarant does not make while testifying at the current trial or hearing; and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(**d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;
(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.
The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Federal Rule of Evidence, Rule 613. Witness's Prior Statement

(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).

SIGNIFICANT DECISIONS

In re Neri Bros. Construction Corp., 593 B.R, 100, 139-140 (Bankr. D. Conn. 2018)(deposition testimony of witness could be used as prior inconsistent statement to impeach credibility, not for truth of the matter asserted).

In re Daniels, 641 B.R. 165 (Bankr. S.D. Ohio 2022) (Trustee's introduction of chapter 7 debtor's statements from court-ordered examination to controvert debtor's claim that he did not understand financial concepts properly impeached debtor with prior inconsistent statement in adversary proceeding brought by trustee to deny discharge to debtor for his failure to satisfy recordkeeping obligation).

BEST EVIDENCE RULE

RULE 1001. Definitions That Apply to This Article
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.

USCS Fed Rules Evid R 1001

RULE 1002. Requirement of the Original
An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

USCS Fed Rules Evid R 1002

RULE 1003. Admissibility of Duplicates
A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

USCS Fed Rules Evid R 1003

RULE 1004. Admissibility of Other Evidence of Content
An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:
(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
(b) an original cannot be obtained by any available judicial process;
(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
(d) the writing, recording, or photograph is not closely related to a controlling issue.

USCS Fed Rules Evid R 1004

RULE 1005. Copies of Public Records to Prove Content
The proponent may use a copy to prove the content of an official record—or of a document that was recorded or filed in a public office as authorized by law—if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance

with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

USCS Fed Rules Evid R 1005

RULE 1006. Summaries to Prove Content
[Text of Rule effective until December 1, 2024, absent contrary Congressional action]:
The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the 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.

[Text of Rule effective December 1, 2024, absent contrary Congressional action]:
(a) Summaries of Voluminous Materials Admissible as Evidence. The court may admit as evidence 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.

USCS Fed Rules Evid R 1006

RULE 1007:
The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

USCS Fed Rules Evid R 1007

RULE 1008:
The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

USCS Fed Rules Evid R 1007

EXPERT TESTIMONY

RULE 702

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's opinion reflects a reliable application of the principles and methods to the facts of the case.

USCS Fed Rules Evid R 702

BANKRUPTCY RULE 9017

The Federal Rules of Evidence and Rules 43, 44 and 44.1 F.R.Civ.P. apply in cases under the Code.

USCS Bankruptcy R 9017

F. R. CIV. P. 44.1

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

USCS Fed Rules Civ Proc R 44.1

CASES ON EXPERT LAW TESTIMONY

Expert testimony on the law is excluded because the trial judge does not need the judgment of witnesses.

United States v. Mazumder, 800 F. App'x 392 (6th Cir. 2020) quoting, United States v. Zipkin, 729 F.2d 384, 387 (6th Cir. 1984)

According to that caselaw, the "interpretation of an insurance contract is a matter of **law** and is generally performed by the court." Kropa v. Gateway Ford, 2009 PA Super 91, 974 A.2d 502, 505 (Pa. Super. Ct. 2009); *accord* Lexington Ins. Co. v. W. Pa. Hosp., 423 F.3d 318, 323 (3d Cir.

2005). As such, **expert testimony** concerning the interpretation of an insurance policy is generally inadmissible.

Manhart v. Lititz Mut. Ins. co. (In re Mitchell), Nos. 19-10167, 20-1001, 2021 Bankr. LEXIS 2015 (Bankr. D. Me. July 29, 2021)

In my view, it is appropriate to allow defendants to call [*6] Wylie to explain the underlying legal requirements for Irish real estate transactions and to explain, for example, how parties may lawfully use trust and/or nominee arrangements, how parties may engage in a practice referred to by the defendants as "resting on the contract," and how Irish law and practice in general recognizes the formal passing or conveyance of legal title.
Such testimony about the legal requisites and practices under Irish law would not usurp or intrude on the jury's ultimate role to decide if the Walford transaction was fraudulent.

Coan v. Dunne, No. 3:15-cv-00050 (JAM), 2019 U.S. Dist. LEXIS 83536 (D. Conn. May 17, 2019)

Rule 702, in its present form, incorporates the reasoning of the Supreme [**21] Court of the United States in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). See Fed. R. Evid. 702 advisory committee's notes to 2000 amendment. There, the Court construed an earlier version of the rule and explained that it assigns a "gatekeeping role for the judge" to determine whether "an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Daubert, 509 U.S. at 597.

As a result, the present version of Rule 702 "affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony." Fed. R. Evid. 702 advisory committee's notes to 2000 amendment. To that end, the present version of the rule establishes that expert testimony may be admitted into evidence only if it is "based on sufficient facts or data," is "the product of reliable principles and methods," and "reflects a reliable application of the principles and methods to the facts of the case." Fed. R. Evid. 702.

Rodriguez v. Hosp. San Cristobal, Inc., 91 F.4th 59 (1st Cir. 2024)

PRIOR BAD ACTS

RULE 402:

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.

USCS Fed Rules Evid R 402

RULE 403

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.

USCS Fed Rules Evid R 403

RULE 404

(a) Character Evidence.

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a Defendant or Victim in a Criminal Case.*

. . . .

(3) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts.

(1) *Prohibited Uses.* Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) Notice in a Criminal *Case.* In a criminal case . . .

USCS Fed Rules Evid R 404

RULE 405

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.
(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

USCS Fed Rules Evid R 405

RULE 608

(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.

USCS Fed Rules Evid R 608

RULE 609

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

USCS Fed Rules Evid R 609

REFRESH MEMORY OF WITNESS

Rule 612. Writing Used to Refresh a Witness's Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or
(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or--if justice so requires--declare a mistrial.

Fed. R. Evid. 612.

Faculty

Daniel L. Cummings is a member of the law firm Norman, Hanson & DeTroy, LLC in Portland, Maine. He has practiced law since 1989 and has litigated cases in Maine courts, as well as in the U.S. Bankruptcy Courts in Maine and Massachusetts, U.S. District Court, U.S. Tax Court, the U.S. Court of Federal Claims and the First Circuit Court of Appeals. Mr. Cummings regularly represents credit union clients, including in a significant chapter 7 case with national implications that established as valid an "all or nothing" reaffirmation policy, *Jamo v. Katahdin Federal Credit Union*, 283 F.3d 392 (1st Cir. 2002). He is a long-time ABI member and is rated AV-Preeminent by Martindale-Hubbell. Mr. Cummings received his B.S. *summa cum laude* in 1982 from the University of Maine, and his J.D. in 1989 *summa cum laude* from the University of Maine School of Law.

Anne Marie Dirsa is the Assistant U.S. Trustee for the District of New Hampshire in Concord. Prior to joining the U.S. Trustee Program, she practiced with law firms in Massachusetts and New Hampshire, primarily in the areas of business and commercial litigation. Ms. Dirsa is a member of the Massachusetts and New Hampshire Bar Associations. She received her undergraduate degree from Harvard University and her J.D. from Cornell Law School.

Hon. Joan N. Feeney is a mediator, arbitrator and referee/special master for JAMS in Boston, where she provides mediation, arbitration and neutral analysis services in complex disputes worldwide. She previously spent nearly 27 years on the bench of the U.S. Bankruptcy Court for the District of Massachusetts and 23 years as a member of the U.S. Bankruptcy Appellate Panel for the First Circuit. Judge Feeney presided over a full range of cases, including complex commercial cases with multiple parties and conflicting interests. While on the bench, she wrote over 500 opinions in many different areas of the law. Judge Feeney is a Fellow, vice president and a member of the board of directors of the American College of Bankruptcy and served for three years on its Board of Regents. She is a co-author of the *Bankruptcy Law Manual*, a two-volume treatise published by Thomson Reuters, and a co-author of a book for consumers, *The Road Out of Debt*, published by John Wiley & Sons. Judge Feeney was the president of the National Conference of Bankruptcy Judges in 2011 and 2012 and has served that organization in numerous capacities, including on its Board of Governors,as chair of its Newsletter Committee, as editor in chief and reporter for *Conference News*, and on special projects. Judge Feeney was the business manager of the *American Bankruptcy Law Journal* from 2016-18, and was an associate editor from 2013-16. She is a founder and co-chair of the M. Ellen Carpenter Financial Literacy Project, a joint venture of the U.S. Bankruptcy Court for the District of Massachusetts and the Boston Bar Association. She was a member of the International Judicial Relations Committee of the Judicial Conference of the United States from 2006-12 and hosted many delegations of foreign judges in the U.S., as well as traveled to foreign countries on behalf of the federal judiciary. Judge Feeney co-chaired the Massachusetts Local Rules Committee for many years. She is a member of ABI and sat on its Board of Directors, and she has been judicial chair of several regional ABI educational programs and is a frequent ABI panelist. Prior to her appointment, Judge Feeney was an associate and partner in the Boston law firm Hanify & King, P.C., was a career law clerk to Hon. James N. Gabriel, U.S. Bankruptcy Judge for the District of Massachusetts, and a partner in the Boston law firm Feeney & Freeley, where her practice included service as a trustee on the U.S. Trustee's private panel of trustees. In 2005, she received the Boston Bar Association's Haskell Cohn Award for Distinguished Judicial Service, and in 2009 the American College of Bankruptcy First Circuit Fellows recognized her for contribution to bank-

ruptcy jurisprudence and practice. She also was the 2018 recipient of the Charles P. Normandin Lifetime Achievement Award from the Boston Bar Association and the National Conference of Bankruptcy Judges Excellence in Education Award, and she received the American Inns of Court Bankruptcy Distinguished Service Award in 2019. Judge Feeney received her B.A. with distinction in 1975 in French and government from Connecticut College, and her J.D. in 1978 from Suffolk University Law School.

Edmond J. Ford is a shareholder in the firm of Ford, McDonald & Borden, P.A. in Portsmouth, N.H. He was admitted to the Bar in New Hampshire in 1982 and has been with his current firm or its predecessors since 1991. In addition to New Hampshire, Mr. Ford is a member in good standing of the bars of Massachusetts and Maine. He has been on the panel of chapter 7 trustees for the state of New Hampshire since 1998. Mr. Ford has published numerous articles on bankruptcy-related matters and has presented at multiple Continuing Legal Education seminars. He is a member of ABI and the National Association of Bankruptcy Trustees. He also is a member of the New Hampshire Board of Bar Examiners and the New Hampshire Bar Association's CLE Committee. Mr. Ford graduated *magna cum laude* from Dartmouth College in 1978 with a degree in economics and received his J.D. *cum laude* from the University of Pennsylvania Law School in 1982.