




# EVIDENCE IN BANKRUPTCY

Vermont Bankruptcy Section Bench/Bar July 22, 2025

# CHAPTER 13 HYPOTHETICAL

On April 5, 2025, Ben Miller filed a Chapter 13 case. Ben earns \$50,000 a year as a post-doctoral student. On February 15, 2021, he purchased a new Honda Accord from Mountain View Honda and granted Mountain View a purchase money lien to secure the loan. The loan balance is \$30,000.

In January 2022, Ben decided to build a new house. To obtain financing, Ben submitted a written financial statement to First National Bank of Second City (Bank). The financial statement purported to include a complete list of his assets and liabilities but did not disclose a \$100,000 loan from his brother. Ben also told the Bank he received monthly bonus checks worth “thousands” and that he had a good deal of “family money,” neither of which was true. The Bank agreed to loan Ben \$400,000.



Throughout the spring of 2022, Ben called the Bank to obtain loan advances for construction materials and labor. Instead of purchasing the materials and labor, he used the money to gamble. By June 2022, Ben had lost most of the loan proceeds at the casino, but the house was only 25% complete. The Bank obtained a state court judgment against Ben for \$300,000.

Ben wants to keep the vehicle and discharge the Bank's judgment debt. Ben filed a motion to value the Honda Accord. The Bank filed a nondischargeability action against Ben under §§ 523(a)(2)(A) and (a)(2)(B).

# EVIDENCE ISSUE #1

Ben testifies his car is worth around \$18,000. Mountain View objects on the grounds that Ben is not qualified as an expert.

Should the objection be sustained?

If Ben is allowed to opine about his car's value, should he be permitted to testify that his opinion is based on a number of *craigslist* ads he read?

# FED. R. EVID. 701

Lay Testimony. 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.



# COMMON ISSUES

- A debtor may opine about the value of something he or she owns, including a business. However, a debtor may not testify about the basis for the opinion if it is based on inadmissible hearsay.
- Lay testimony must be based on personal knowledge. Resist the urge to ask questions that call for speculation.

# ARE LISTINGS HEARSAY?

- DEFINITION: An out of court statement offered to prove the truth of the matter asserted.
- Fed.R.Evid 801/803: Statements That Are Not Hearsay.
  - Declarant-Witness's Prior Statement?
  - An Opposing Party Statement?
  - Recorded recollection?
  - Records of a Regularly Conducted Activity?
  - Public Records?
  - Records of Documents That Affect an Interest in Property?
  - Statements in Documents that Affect an Interest in Property?
  - Market Reports and Similar Commercial Publications?



## EVIDENCE ISSUE #2

Ben offers in evidence a printout he obtained from the official website of Kelley Blue Book to show that the private party value of a 2021 Honda Accord in excellent condition is \$17,946. Mountain View objects on the grounds of hearsay.

Should the objection be sustained?

Would it make a difference if Ben's mother, who is not present in the courtroom, obtained the printout?



# FED.R.EVID. 803

- Rule 803(17) - Market Reports and Similar Commercial Publications = exception to hearsay. Market quotations, directories, and other compilations that are generally relied upon by the public or by persons in particular occupations.
- Courts are split on whether they are admissible. Must be authenticated and relevant as a gatekeeper.
  - Remember: Lay witness must have personal knowledge.
- Our local rule addresses the issue.
- Mom = not okay unless Ben was involved and can authenticate the information provided.

## EVIDENCE ISSUE #3

Before he arrived at the valuation hearing, Ben wrote the mileage of his car on a post it note. After his attorney began questioning him, he couldn't recall the exact mileage. Ben's attorney wants to show him the post-op note and offer it into evidence.

Can Ben's attorney show him the note?

Can Ben offer it as a substantive exhibit?

Can Mountain View offer it as a substantive exhibit?

# FED.R.EVID. 803

Availability of Declarant Immaterial. Not excluded by the rule against hearsay.

Rule 803(5) - Recorded Recollection. A record that:

- (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
- (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
- (C) accurately reflects the witness's knowledge.



If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

Beware: There is some overlap between recorded recollections (Rule 803(5)) and refreshed recollections (Rule 612). A recorded recollection can serve as substantive evidence while a writing used to refresh memory cannot.

## EVIDENCE ISSUE #4


During the nondischargeability trial, Ben offers in evidence a letter written by the Bank's loan officer. The letter, which was placed in Ben's loan file, states that the loan officer suspected Ben's financial statement contained some errors. The loan officer doesn't typically prepare letters of this sort, but Ben's case was complicated.

Is the letter admissible over the Bank's objection?

# “BUSINESS RECORD” UNDER RULE 803?

Rule 803(6) Records of a Regularly Conducted Activity. A record of an act, event, condition or opinion, or diagnosis if:

- (A) the record was made at or near the time by– or from information transmitted by– someone with knowledge;
- (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- (C) making the record was a regular practice of that activity;
- (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
- (E) Neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.


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- Examples of business records include bank statement and certain types of invoices.
  - The record must be kept in the ordinary course of a regularly conducted activity. The fact that a document is kept in the business file does not automatically make it a business record.
  - Pursuant to Rule 902(11), an affidavit can be used to authenticate business records.
  - The custodian used to authenticate a business record need not be the same person who created it.
  - Appraisals are not business records.



# OPPOSING PARTY STATEMENT UNDER RULE 801?

Rule 801(d)(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

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- Deposition transcripts and affidavits are generally admissible against party opponents.
  - A statement by an opposing party also includes letters, records, or other written documents prepared by the opposing party. For example, a debtor's schedules are admissible against the debtor.
  - Statements by opposing parties do not have to be admissions or concessions.

## EVIDENCE ISSUE #5

The Bank offers in evidence a summary it prepared of Ben's assets and liabilities at the time it approved the loan. The summary is based on various bank records and financial statements, all of which have been admitted into evidence.

Is the summary admissible as evidence of Ben's assets and liabilities?

Is the summary admissible as a demonstrative exhibit?



## RULE 1006

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 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.



# COMMON ISSUES

- The materials upon which the summary is based must be *admissible*. However, if the underlying materials have been *admitted*, the summary should be offered as a demonstrative exhibit.
- A Rule 1006 summary serves as independent substantive evidence while a demonstrative exhibit is comparable to argument by counsel.
- The party offering the summary must allow opposing counsel to inspect the underlying documents.

## EVIDENCE ISSUE # 6

The Bank offers in evidence the deposition of a loan officer who is ill and cannot appear at the hearing. At the deposition, the loan officer testified that Ben made a number of false statements about alternative sources of income. Ben's counsel, who was present at the deposition, objects.

Should the deposition be admitted?

Would it make a difference if the loan officer was present in the courtroom?

# RULE 804: HEARSAY EXCEPTIONS DECLARANT **MUST** BE UNAVAILABLE

Rule 804(b)(1) - Former Testimony. Testimony that:

- (A) was given as a witness at a trial, hearing, or lawful deposition whether given during the current proceeding or a different one; and
- (B) is now offered against a party who had – or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross or redirect examination.



# COMMON ISSUES

- Former testimony can only be offered under Rule 804 when the witness is unavailable.
- If the witness is present, think about whether the testimony is admissible as a prior inconsistent statement or a statement by a party opponent under Rule 801.
- Deposition transcripts can typically be offered under rule 804 when opposing counsel was present at the deposition and/ or had an opportunity to depose the witness. However, be sure to look at Federal Rule of Civil Procedure 32, which governs the use of deposition testimony at trial.
- Affidavits are not admissible under rule 804.

# EVIDENCE ISSUE # 7

The Bank offers in evidence an affidavit of the Bank's president, whom neither party deposed prior to the trial.

Is the affidavit admissible over Ben's objection?

What if Ben sought to introduce the affidavit?

## EVIDENCE ISSUE # 8

In an effort to establish the accuracy of his financial statement, Ben offers in evidence a statement contained in a quitclaim deed which eliminated his interest in a rental home he owned with his ex-wife. The deed states that “Ben Miller releases to Elizabeth Smith the real property located at 425 Date St. NW.” The Bank objects on grounds of hearsay.

Should the objection be sustained?

## EVIDENCE ISSUE #9

The Bank offers in evidence a loan document that contains a signed statement from Ben's employer about Ben's salary. The loan document was prepared by the loan officer and placed in the loan file in the ordinary course of business. Ben objects on grounds of hearsay.

Should the objection be sustained?

# EVIDENCE ISSUE # 10

The Bank offers in evidence copies of the promissory note, loan agreement, and mortgage signed by Ben. Ben objects on the basis of the best evidence rule. Should the objection be sustained? Ben also objects on the basis of hearsay.

Should the objection be sustained?