STARTING OUT RIGHT: EVIDENCE BASICS

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United States Bankruptcy Court
for the Western District of Texas, Austin Division

BIOGRAPHICAL INFORMATION

Judge Davis received a Bachelor of Arts degree in economics and mathematics from the University of Minnesota in 1980. He graduated from the University of Virginia School of Law in 1983.

Prior to his judicial appointment in April of 2013, Judge Davis was a partner at Baker Botts for 19 years where he practiced corporate restructuring and bankruptcy law. Judge Davis was selected as a leader in his field -- bankruptcy and restructuring -- by Chambers USA and was repeatedly recognized as a Best Lawyer and Super Lawyer in Texas by those publications. He also served as a member of the Honorable Arthur L. Moller/David B. Foltz, Jr. American Inn of Court while in Houston. Judge Davis is currently serving as the Program Chair and a founding officer of the Honorable Larry E. Kelly American Inn of Court in Austin.

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I. Introduction

The law of evidence, in bankruptcy court, is contained in the Federal Rules of Evidence. But any meaningful discussion of evidence cannot end there, and for two reasons. First, much of what can and cannot be done in a courtroom is as much governed by the lore as by the law of evidence. Thus, some understanding of that lore is essential to effectively dealing with evidence and evidentiary objections in the courtroom. Second, evidence is usually dealt with on the fly, and amidst the activity taking place in the courtroom. Although evidentiary issues can, to some degree, be anticipated and prepared for in the quiet contemplation of the lawyer's office, making or meeting an evidentiary objection must generally be done on your feet in a reactive, and not a contemplative, environment.

For both these reasons, evidence is a particularly practical area of the law and is best understood as a part of the live courtroom setting. So, in addition to covering substantive aspects of evidence that frequently arise in bankruptcy, including judicial notice, and certain witness and document issues, this paper will also include "tips" that capture the more practical aspects—the lore—of evidence.

- **Practice Tip No. 1: Don't forget the roadmap! And the burden of proof!**

  Always have handy the "roadmap"—the list of the substantive elements that you have to prove to prevail in the trial or on the motion set for hearing. For instance, if you are prosecuting or defending a motion for relief from stay, know (and constantly remind yourself) that the movant must show either (1) cause, or that (2) the debtor has no equity in the property, AND the property is not necessary to an effective reorganization. And keep in mind that under Section 362(g), the party requesting relief has the burden of proof on the debtor's equity, but the party opposing relief has the burden on all other issues.

  Similarly, in a preference action, the trustee must always remember that he or she must establish each of the elements of section 547(b), and though the trustee enjoys a presumption on insolvency, if the transferee provides any

proof of solvency, the presumption is gone and trustee must then carry the burden of proof on that issue as well.

II. Judicial Notice Of "Schedules And Statements"

Rule 201 of the Federal Rules of Evidence allows courts to take judicial notice of a fact that is not subject to reasonable dispute because it "(1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b). However, this rule only governs judicial notice of adjudicative facts. FED. R. EVID. 201(a). "Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case." 2 BARRY RUSSELL, BANKR. EVID. MANUAL § 201:2 (2014 ed.) (citing FED. R. EVID. 201 (1972 proposed rule) advisory committee's note). Some facts that courts have judicially noticed include:

- Speed limit on a given street at a given location. *United States v. Bradford*, 78 F.3d 1216, 1221 n. 8 (7th Cir. 1996).
- Prime rate of interest or LIBOR. *Transorient Navigators Co., S.A. v. M/S Southwind*, 788 F.2d 288, 293 (5th Cir. 1986); *Whitney Bank v. Point Clear Dev., L.L.C.*, No. 11-0657–WS–M, 2012. WL 2277597, at *1 n. 2 (S.D. Ala. 2012).
- Closing market prices for exchange listed securities. *In re USEC Secs. Litig.*, 190 F. Supp. 2d 808, 826 n. 14 (D. Md. 2002).
- Date and time of foreclosure sales. *Geibank Indus. Bank v. Martin (In re Martin)*, 97 B.R. 1013, 1020 (Bankr. N.D. Ill. 2006).
- Current mortgage rates. *Pylant v. Pylant (In re Pylant)*, 467 B.R. 246, 254 n. 9 (Bankr. M.D. Ga. 2012).
- Proceedings in other courts of record. *Antioch Co. Litig. Trust v. Hardman*, 438 B.R. 598, 610 n. 12 (S.D. Ohio 2010).

In the bankruptcy context, the court can take notice that schedules were filed, that they were filed on a given date, and that specific items of property were listed. *See Fla. Bd. of Trs. of Internal Improvement Trust Fund v. Charley Toppino & Sons, Inc.*, 514 F.2d 700, 704 (5th Cir. 1975) ("It is not error . . . for a court to take judicial notice of related proceedings and records in

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First appeared as part of the conference materials for the
11th Annual Consumer Bankruptcy Practice session
"Evidence Skits: How to Get In Tax Returns, Schedules, Appraisals, and Other Key Documents"