Smooth Sailing Through Evidentiary Issues in Subchapter V Non-Dischargeability Trials

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I. Overview

The program is built around a mock adversary proceeding, Cash Captains, Inc. v. Reef, in which a merchant cash advance funder sues a Subchapter V small business debtor under 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), (a)(4), and (a)(6). Several scenes stage the evidentiary problems that recur in these trials: summary evidence under Rule 1006; business records under Rules 803(6) and 902(11); judicial notice under Rule 201; and hearsay, including opposing-party statements, the scope of agency under Rule 801(d)(2)(D), and the authentication of text messages.

Practitioners may also find useful Judge Michael G. Williamson, Practical Evidence Manual (v46, Sept. 14, 2021), which organizes the Federal Rules around the problems that recur in bankruptcy practice.

II. Evidentiary Rules

This section addresses each Federal Rule of Evidence, Federal Rule of Civil Procedure, and Federal Rule of Bankruptcy Procedure covered in the program, with recommendations tailored to Subchapter V non-dischargeability adversary proceedings.

A. Federal Rule of Evidence 103(a)(2) - Offer of Proof

Rule Text Summary. Rule 103(a) permits a party to claim error in an evidentiary ruling only if the error affects a substantial right. Where the ruling excludes evidence, Rule 103(a)(2) requires the party to inform the court of the evidence's substance by an offer of proof, unless the substance was apparent from the context. Under Rule 103(b), once the court rules definitively on the record (before or at trial) no renewal is required to preserve the claim. Rule 103(c) permits the court to direct that an offer be made in question-and-answer form.

Substantive Explanation. The offer of proof does two things: it gives the trial court what it needs to reconsider, and it gives the appellate court a record. Without one, the objection is generally waived. The offer should identify the evidence, the purpose for which it is offered, and the theory of admissibility.

Practical Recommendations. Make the offer immediately when evidence is excluded, and state four things: (1) what the evidence is, including the witness who would present it; (2) the purpose (*e.g.*, actual fraud, reliance, damages); (3) the basis for admissibility; and (4) the prejudice from exclusion. Courts often permit a narrative offer in a bench trial. Take the invitation but keep it specific; a vague narrative preserves nothing.

B. Federal Rule of Evidence 106 - Remainder of or Related Statements

Rule Text Summary. As amended effective December 1, 2023: "If a party introduces all or part of a statement, an adverse party may require the introduction, at that time, of any other part — or any other statement — that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection."

Substantive Explanation. The 2023 amendment made two changes. First, a completing statement required by the fairness standard is admissible over a hearsay objection. The Advisory Committee Note explains that the rule of completeness "cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds and exclude a statement that would correct the misimpression," and that "[a] party that presents a distortion can fairly be said to have forfeited its right to object on hearsay grounds to a statement that would be necessary to correct the misimpression." Second, the rule now reaches "all statements, in any form -- including statements made through conduct or sign language," not merely writings and recordings. Unrecorded oral statements previously had to be completed through Rule 611(a) or the common law, a route the Note calls "cumbersome" and "a trap for the unwary." Whether a completing statement comes in for its truth or only for context "will depend on the circumstances."

Practical Recommendations. In a non-dischargeability trial the funder typically offers a slice of the debtor's communications (*e.g.*, one line from an email chain, one message out of a text exchange, one sentence of a recorded call). Rule 106 is the debtor's answer, and since 2023 it is a stronger one: the completing material comes in at that time and over a hearsay objection. Where the court admits an oral account of a statement for a limited purpose but excludes the underlying writing as hearsay, Rule 106 is the argument that the writing must come in too if fairness requires it, and the hearsay objection that excluded it is no longer an answer. Counsel offering a partial statement should be ready to defend the selection as non-distorting. Counsel invoking the rule should identify the specific completing material, articulate the misimpression the partial offer creates, and state whether completion is sought for context or for truth. Because the rule now covers oral statements, the same analysis applies to testimony about what the debtor said in a meeting.

C. Federal Rule of Evidence 201 - Judicial Notice of Adjudicative Facts

Rule Text Summary. Rule 201 governs judicial notice of an adjudicative fact only, not a legislative fact. Under Rule 201(b), the court may notice a fact not subject to reasonable dispute because it is generally known within the court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. The court may notice on its own, Rule 201(c)(1), and must do so on request if supplied with the necessary information, Rule 201(c)(2). Notice may be taken at any stage, Rule 201(d), and on timely request a party is entitled to be heard on the propriety of notice and the nature of the fact noticed, including after the fact, Rule 201(e).

Substantive Explanation. Rule 201 reaches adjudicative facts—the who, what, when, where, and how of the dispute—not legislative facts used in developing legal principles. The distinction matters because the rule's procedural protections, including the right to be heard under Rule 201(e), attach only to adjudicative facts.

Requests in bankruptcy cases usually concern records from the main case (*e.g.*, schedules, proofs of claim, orders, docket entries). Courts routinely notice that a document was filed and when. They may not notice the truth of what it says. That line does most of the work in non-dischargeability litigation, where a funder wants to rely on statements in the debtor's schedules, disclosure statement, or earlier motion papers.

Practical Recommendations. Identify the specific fact to be noticed, not the document. State which subsection of Rule 201(b) applies. Be ready to explain why the fact is not reasonably subject to dispute. Do not use judicial notice to prove an element of a § 523 claim from the schedules: schedules are evidentiary admissions, not judicial admissions, and the debtor may explain or contradict them at trial. Offer them instead under Rule 801(d)(2)(A). Debtors should expect examination on any inconsistency between a schedule and trial testimony; the schedules are rebuttable, but the credibility damage is not.

D. Federal Rules of Evidence 611(a) and 107 - Mode and Order of Presentation; Illustrative Aids

Rule Text Summary. Rule 611(a) directs the court to exercise reasonable control over the mode and order of examining witnesses and presenting evidence, so as to make those procedures effective for determining the truth, avoid wasting time, and protect witnesses from harassment or undue embarrassment. Effective December 1, 2024, new Rule 107 supplies particularized standards for illustrative aids. Rule 107(a) permits the court to allow 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. Rule 107(b) provides that an illustrative aid is not evidence and must not go to the jury during deliberations absent consent or a good-cause order. Rule 107(c) requires that, when practicable, an aid used at trial be entered into the record. Rule 107(d) routes any summary admitted as evidence to prove the content of voluminous admissible evidence to Rule 1006.

Substantive Explanation. Before December 1, 2024, demonstrative exhibits were regulated under the general authority of Rule 611(a). The Advisory Committee Note to Rule 107 states that the illustrative aid, "which the courts have previously regulated pursuant to the broad standards of Rule 611(a)," is "now to be regulated by the more particularized requirements of this Rule 107." The line that matters is unchanged: an illustrative aid is not evidence and assists comprehension; a Rule 1006 summary is substantive evidence of the content of voluminous admissible materials. Rule 107(d) and Rule 1006(c) cross-reference each other and require counsel to pick one.

Practical Recommendations. Say on the record which rule the exhibit comes in under. Rule 107(a) carries its own balancing test—utility in assisting comprehension against prejudice, confusion, delay, and waste—phrased differently from Rule 403 and worth citing by number. Rule 107(b) is inert in a bench trial; Rule 107(c) is not. Ask that the aid be entered into the record even though it is not admitted, so a reviewing court sees what the trial court saw. Where a chart could do either job, build it to satisfy Rule 1006 and offer it in the alternative under Rule 107.

E. Federal Rule of Evidence 801 - Definitions: Hearsay and Non-Hearsay

Rule Text Summary. Rule 801 defines hearsay as a statement the declarant does not make while testifying at the current trial or hearing, offered to prove the truth of the matter asserted in the statement; Rule 802 makes hearsay inadmissible unless a federal statute, the Federal Rules of Evidence, or other rules prescribed by the Supreme Court provide otherwise. Rule 801(d)(2) excludes from hearsay a statement offered against an opposing party that (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 the party authorized to speak 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 co-conspirator during and in furtherance of the conspiracy. The statement must be considered but does not by itself establish authority under (C), the relationship under (D), or the conspiracy under (E). Effective December 1, 2024, Rule 801(d)(2) gained a final paragraph: "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."

Substantive Explanation. Hearsay is excluded because the statement was not made under oath, before the trier of fact, subject to cross-examination. A statement offered for any other purpose is not hearsay. Three non-truth purposes recur here: effect on the listener (*e.g.*, what the funder knew or believed when it advanced the money), verbal act (*e.g.*, a representation that is itself an operative element of the fraud claim), and circumstantial evidence of the declarant's state of mind.

In a non-dischargeability proceeding, Rule 801(d)(2) does some heavy lifting. The debtor's own emails, texts, funding applications, financial statements, and oral statements can come in against the debtor with no hearsay analysis at all under subsection (A), and statements by the debtor's agents and employees within the scope of the relationship can come in under subsection (D). The paragraph added effective December 1, 2024, extends the same treatment to a party standing in a declarant's shoes. The Advisory Committee Note gives three examples, two of which arise constantly in bankruptcy: assignor and assignee, and "debtor/trustee when the trustee is pursuing the debtor's claims." The Note states the rationale: a party that "derives its interest from a declarant or principal is ordinarily subject to all the substantive limitations applicable to them, so it follows that the party should be bound by the same evidence rules as well." Two limits matter. The paragraph does not reach a statement admissible against an agent but not against the principal, "for example, if the statement was made by the agent after termination of employment." And "[t]he rationale of attribution does not apply, and so the hearsay statement would not be admissible, if the declarant makes the statement after the rights or obligations have been transferred, by contract or operation of law, to the party against whom the statement is offered."

Practical Recommendations. Creditor's counsel should inventory every relevant statement by the debtor and offer it under Rule 801(d)(2)(A); identify statements by the debtor's employees, agents, and business partners that fit subsection (D); and, for third-party statements, identify a non-truth purpose. Watch the dual-purpose problem: the same email may be admissible to show what the funder knew and inadmissible to prove the fact asserted in it. Rule 105 supplies the mechanism: when the court admits evidence admissible for one purpose but not another, it must, "on timely request, . . . restrict the evidence to its proper scope." The request must be timely. In a bench trial the ruling on it is what confines the court's own use of the exhibit, so make the request on the record rather than assuming the distinction is understood.

F. Federal Rule of Evidence 803(6) - Records of a Regularly Conducted Activity (Business Records)

Rule Text Summary. Rule 803(6) excepts from the rule against hearsay a record of a regularly conducted activity if: (A) it was made at or near the time by — or from information transmitted by — someone with knowledge; (B) it 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) these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification complying with Rule 902(11) or (12) or with a statute permitting certification; and (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The certification route in subsection (D) arrived with the 2000 amendment, in parallel with new Rules 902(11) and (12). The 2014 amendment placed the burden under subsection (E) on the opponent, on the reasoning that "the basic admissibility requirements are sufficient to establish a presumption that the record is reliable."

Substantive Explanation. The exception rests on the premise that a business depends on the accuracy of records it makes and keeps routinely. The qualified witness need not have created the record or have firsthand knowledge of any entry. "A qualified witness is one who can explain the system of record keeping and vouch that the requirements of Rule 803(6) are met," and "the witness need not have personal knowledge of the record keeping practice or the circumstances under which the objected to records were kept." *United States v. Box*, 50 F.3d 345, 356 (5th Cir. 1995). The Eleventh Circuit is in accord: the proponent "ordinarily need not be the entity whose first-hand knowledge was the basis of the facts sought to be proved," though it must show that the recording entity's business practice was to obtain the information from persons with personal knowledge and that the proponent's practice was to maintain the records. *United States v. Bueno-Sierra*, 99 F.3d 375, 378–79 (11th Cir. 1996). *Carrizosa v. Chiquita Brands International, Inc.*, 47 F.4th 1278, 1299–1300 (11th Cir. 2022), applied that standard to admit a foreign criminal indictment on the declaration of a lawyer "deeply familiar" with the process that produced it, endorsing the treatise view that "qualified witness" is "given a very broad interpretation" and that "the witness need not even be an employee of the record-keeping entity."

Records prepared primarily for litigation are a different matter. *Palmer v. Hoffman*, 318 U.S. 109 (1943), decided under the Federal Business Records Act of 1936, 28 U.S.C. § 695, held that a railroad engineer's accident statement was "not a record made for the systematic conduct of the business as a business," and that "the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made 'in the regular course' of the business within the meaning of the Act." *Id.* at 113. Such reports "are calculated for use essentially in the court, not in the business"; their "primary utility is in litigating, not in railroading." *Id.* at 114. Under the current rule the objection runs through Rule 803(6)(E), where the burden is the opponent's. The Advisory Committee Note to the 2014 amendment confirms the route and lowers the bar for making the argument: the opponent "is not necessarily required to introduce affirmative evidence of untrustworthiness," and "might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party." The problem is live whenever a party prepared a financial summary or analysis after the dispute arose.

Practical Recommendations. Prepare the qualified witness to walk five points: what the system is; how records are created and by whom; when they are created relative to the events; that creation is a regular practice; and that the system is relied on in the ordinary course. A witness who can say only that the business keeps records, without describing the system that produced these records, may not qualify; depose the proposed custodian in advance if the point is contested. Be ready for the *Palmer* objection as to any record created after the dispute arose and carry a fallback: the same document may come in as an opposing-party statement under Rule 801(d)(2), or under one of the other Rule 803 exceptions discussed in the next subsection.

G. Other Hearsay Exceptions Raised in the Program - Rules 803(1), 803(3), 803(8), 803(18), and 807

Rule Text Summary. Rule 803(1) excepts a statement "describing or explaining an event or condition, made while or immediately after the declarant perceived it." Rule 803(3) excepts a statement of the declarant's "then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition," but "not including a statement of memory or belief to prove the fact remembered or believed." Rule 803(8) excepts a record or statement of a public office setting out the office's activities, a matter observed under a legal duty to report, or (in a civil case) "factual findings from a legally authorized investigation," provided "the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." Rule 803(18) reaches a statement in a treatise, periodical, or pamphlet "called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination" and "established as a reliable authority"; if admitted, "the statement may be read into evidence but not received as an exhibit." Rule 807(a) admits a statement not covered by Rule 803 or 804 if it is "supported by sufficient guarantees of trustworthiness" considering the totality of the circumstances and any corroborating evidence and is "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." Rule 807(b) requires reasonable notice.

Practical Recommendations. These are the fallbacks when a document fails Rule 803(6). An internal email that is not a business record may still come in under Rule 803(1) if written while or immediately after the author perceived what she describes or under Rule 803(3) if offered to show her then-existing belief rather than the truth of what she believed. This distinction usually decides the objection and is one that Rule 803(3) polices by excluding statements of memory or belief offered to prove the fact believed. Rule 807 is a last resort with a notice requirement; a party that gave no notice should not expect to invoke it mid-trial. Rule 803(18) requires an expert on the stand, so it is unavailable in a trial with no expert witness. Rule 803(8) matters most for records of the bankruptcy court and of state regulators, and its trustworthiness clause, like Rule 803(6)(E), puts the burden on the opponent.

H. Federal Rule of Evidence 805 - Hearsay Within Hearsay

Rule Text Summary. Federal Rule of Evidence 805 provides that hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Substantive Explanation. Rule 805 governs a document that contains statements by people outside the organization that made it. A memorandum summarizing a customer's oral statement has two layers: the memorandum (potentially a business record under Rule 803(6)) and the customer's statement inside it (needing its own exception or non-hearsay status). Establishing that the container is a business record does nothing for the statement inside.

Practical Recommendations. In these cases, the inner layer is usually a statement by the debtor, a customer, or a broker. Analyze the layers separately: is the document admissible, and is each statement in it independently admissible (*e.g.*, as a party-opponent statement under Rule 801(d)(2), a statement against interest, or for a non-truth purpose such as notice)?

I. Federal Rule of Evidence 901 - Authenticating or Identifying Evidence

Rule Text Summary. Under Rule 901(a), the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Rule 901(b) gives a non-exclusive list of examples, including Rule 901(b)(1) (testimony of a witness with knowledge that an item is what it is claimed to be); Rule 901(b)(4) (the appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances); and Rule 901(b)(9) (evidence describing a process or system and showing that it produces an accurate result).

Substantive Explanation. Authentication is a light burden, a prima facie showing. The court does not decide authenticity; it decides admissibility, and the dispute goes to weight. In *Curtis v. Perkins (In re International Management Associates, LLC)*, 781 F.3d 1262, 1266–67 (11th Cir. 2015), a Chapter 11 trustee "met his authentication burden, which is a light one," by establishing "only a prima facie case that [the documents] are what he claims they are," using circumstantial evidence "through the testimony of a witness knowledgeable about them." Once that showing is made, "the ultimate question of the authenticity of the documents would have been left to the factfinder." *Id.* at 1267.

Electronic communications require evidence sufficient to support a finding of authorship, and a provider certificate will not supply it. *In United States v. Browne*, 834 F.3d 403 (3d Cir. 2016), the Third Circuit held that Facebook chat logs, "considered in their entirety," are not records of a regularly conducted activity under Rule 803(6) at all, and so cannot be self-authenticated under Rule 902(11). *Id.* at 411. The reason is that Rule 803(6) "is designed to capture records that are likely accurate and reliable in content," and "Facebook does not purport to verify or rely on the substantive contents of the communications in the course of its business." *Id.* at 410. A custodian can confirm only "that the depicted communications took place between certain Facebook accounts, on particular dates, or at particular times," which "is no more sufficient to confirm the accuracy or reliability of the contents of the Facebook chats than a postal receipt would be to attest to the accuracy or reliability of the contents of the enclosed mailed letter." *Id.* at 410–11. The court reserved the narrower proposition that a certificate might authenticate the technical metadata alone, which "might be more readily analogized to bank records or phone records." *Id.* at 411. The records still came in: extrinsic evidence under Rule 901(a) linked the defendant to the account, and four of the five chats were then admitted as party-opponent statements under Rule 801(d)(2)(A). *Id.* at 411–16. Authorship "may be established for authentication purposes by way of a wide range of extrinsic evidence." *Id.* at 412.

Practical Recommendations. Treat authentication as a threshold, not a battleground: stipulate to routine documents and save the fight for exhibits that matter. Do not plan to authenticate text messages, chat logs, or funding-portal correspondence by provider certificate; under *Browne* the certificate reaches the metadata, not the content, and the content is what proves the fraud. Assemble instead whatever the case actually offers: carrier or provider records, email server logs, employer or CRM records, account records, testimony from either end of the conversation, distinctive content, or the continuity of an ongoing exchange. Then take the second step *Browne* illustrates: once authorship is established, the debtor's own messages are party-opponent statements under Rule 801(d)(2)(A), and no hearsay exception is needed. Do not authenticate from the face of a printout alone, and do not concede that any single category of extrinsic evidence is required.

J. Federal Rule of Evidence 902(11) - Certified Domestic Records of a Regularly Conducted Activity

Rule Text Summary. Rule 902(11) makes self-authenticating "[t]he 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."

Substantive Explanation. Rule 902(11) substitutes a written certification for live foundation testimony, which is efficient where the records come from a third party or an institution. Three limits are frequently missed. The rule reaches only Rule 803(6)(A)–(C): it does not answer a Rule 803(6)(E) trustworthiness objection, and it does nothing for third-party statements recorded inside the certified document. It presupposes that the document is a business record in the first place, a premise that fails for communications a service provider merely transmits and stores. *United States v. Browne*, 834 F.3d 403, 410–11 (3d Cir. 2016). And the notice requirement is substantive: the rule ties it to giving the adverse party "a fair opportunity to challenge" the record and the certification, which the Advisory Committee Note to the 2000 amendment describes as "a full opportunity to test the adequacy of the foundation set forth in the declaration."

Practical Recommendations. Serve the notice and certification with the exhibit list or pretrial submissions, confirm that the certification addresses Rule 803(6)(A)–(C) as to the specific records, and produce the records promptly on request. On the receiving end, check the certification against subsections (A) through (C), object promptly, and preserve the Rule 803(6)(E) objection, which the certification does not foreclose. Two days before trial is generally not reasonable notice; the program illustrates a court finding such notice inconsistent with the "fair opportunity to challenge" standard and requiring the custodian to appear.

K. Federal Rule of Evidence 1006 - Summaries to Prove Content

Rule Text Summary. Rule 1006 was amended effective December 1, 2024, and provides that 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." Rule 1006(b) requires the proponent to make the underlying originals or duplicates available for examination or copying at a reasonable time and place and permits the court to order production in court. Rule 1006(c) routes a summary "that functions only as an illustrative aid" to Rule 107.

Substantive Explanation. The 2024 amendment settled three recurring disputes. A Rule 1006 summary is substantive evidence: the Advisory Committee Note states that such summaries "must be admitted as substantive evidence" and that "[t]he court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence." The underlying materials need not be admitted—the rule now says "whether or not they have been introduced into evidence"—and the Note calls the contrary holdings mistaken. And a summary is not excluded merely because the underlying documents were admitted in whole or in part. What remains required is that the underlying materials be admissible; the rule reaches "voluminous admissible" writings. That is the enduring core of *United States v. Johnson*, 594 F.2d 1253, 1257 (9th Cir. 1979) ("the proponent of a summary must demonstrate the admissibility of the underlying writings or records summarized, as a condition precedent to introduction of the summary into evidence under Rule 1006"). A summary must also independently survive Rule 403, which is where an argumentative summary fails: the Note states that "if the summary does not accurately reflect the underlying voluminous evidence, or if it is argumentative, its probative value may be substantially outweighed by the risk of unfair prejudice or confusion." Rule 403 permits exclusion where 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." A summary that characterizes rather than tabulates—labelling payments "diverted," for example—is the standard casualty.

The Eleventh Circuit reached the same result under the pre-amendment text. *Curtis v. Perkins (In re International Management Associates, LLC)*, 781 F.3d 1262, 1266 (11th Cir. 2015) ("The rule does not require the proponent to introduce the underlying documents into evidence . . . . But we have held that it is necessary to establish that the underlying documents would have been admissible if the proponent had sought their admission."). The trustee there carried both the Rule 901 authentication burden and the Rule 803(6) foundation through his own testimony, and the bankruptcy court could consider otherwise inadmissible hearsay under Rule 104(a) in deciding the question. *Id.* at 1266–68.

Practical Recommendations. Confirm that every category of underlying record is admissible (usually through Rule 803(6) or Rule 902(11)) recognizing that admissibility, not admission, is what the rule requires. Make the records available well in advance, as Rule 1006(b) requires. Keep the summary accurate and non-argumentative so that it survives Rule 403, be ready to explain how it was built, and label it a Rule 1006 summary to distinguish it from a Rule 107 illustrative aid. On the other side, demand the underlying records, audit the summary against them, and attack any category that lacks a foundation. The questions are admissibility and availability, not whether each source record was separately admitted.

L. Federal Rules of Bankruptcy Procedure 9017, 7026, and 9014 - Evidence and Discovery

Rule Text Summary. Two rules make the Federal Rules applicable in bankruptcy. Rule 9017, as restyled effective December 1, 2024, provides: "The Federal Rules of Evidence and Fed. R. Civ. P. 43, 44, and 44.1 apply in a bankruptcy case." Rule 7026, restyled the same date, provides in its entirety: "Fed. R. Civ. P. 26 applies in an adversary proceeding."

Substantive Explanation. The Federal Rules of Evidence apply in a bankruptcy case, which reaches both adversary proceedings and contested matters. Rule 7026 carries the whole of FRCP 26 into adversary proceedings, and a § 523 claim is an adversary proceeding under Rule 7001, so the full rule applies, including the initial disclosures and pretrial-disclosure obligations that produce the exhibit and witness lists the parties fight over. The line between an adversary proceeding and a contested matter is where bankruptcy practice departs from district court practice, and it is the point most often missed. Rule 9014(c)(1) applies an enumerated list of Part VII rules to contested matters, including Rule 7026, but Rule 9014(c)(2) carves back many important parts. Unless the court orders otherwise, FRCP 26(a)(1) mandatory disclosure, "(a)(2), disclosures about expert testimony," (a)(3) other pretrial disclosures, and (f) the mandatory pre-conference meeting "do not apply in a contested matter." The practical consequence reaches well beyond experts: in a contested matter no party is obliged to serve initial disclosures or pretrial disclosures at all absent an order. Rule 9014(c)(3) requires notice and a reasonable opportunity to comply before the court orders additional Part VII rules in. Confirm at the outset which rules govern rather than assuming district court practice carries over.

III. Case Law

A. *Curtis v. Perkins (In re International Management Associates, LLC)*, 781 F.3d 1262 (11th Cir. 2015)

Holding. The Eleventh Circuit affirmed the admission of a Chapter 11 trustee's Rule 1006 summaries of a Ponzi-scheme debtor's records. Rule 1006 "does not require the proponent to introduce the underlying documents into evidence," but it is "necessary to establish that the underlying documents would have been admissible if the proponent had sought their admission." *Id.* at 1266. The trustee "met his authentication burden, which is a light one," by establishing "only a prima facie case" of authenticity through circumstantial evidence and the testimony of a knowledgeable witness; authenticity itself was then for the factfinder. *Id.* at 1266–67. The trustee also qualified as a "custodian or another qualified witness" under Rule 803(6)(D)—"[a] qualified witness is one who can explain the system of record keeping and vouch that the requirements of Rule 803(6) are met"—and such a witness "does not need firsthand knowledge of the contents of the records, of their authors, or even of their preparation." *Id.* at 1268. Under Rule 104(a) the bankruptcy court could rely on hearsay in resolving the question. *Id.*

Practice guidance. Federal Rules of Evidence 1006, 901, and 803(6).

B. *United States v. Johnson*, 594 F.2d 1253 (9th Cir. 1979)

Holding. "The proponent of a summary must demonstrate the admissibility of the underlying writings or records summarized, as a condition precedent to introduction of the summary into evidence under Rule 1006." *Id.* at 1257. Reversing mail-fraud convictions, the Ninth Circuit held that the district court erred in permitting a summary of seized corporate records without first requiring a foundation establishing their admissibility and was "incorrect to suggest that the opponents had the burden of determining that a foundation was lacking." *Id.* at 1255. Availability for inspection is not a substitute: counsel may not "abrogate other restrictions on admissibility like the hearsay rule by the use of summaries," and the court "cannot read Rule 1006 as preempting the other Rules." *Id.* Note the limit: *Johnson* requires admissibility, not admission, a point Rule 1006(a) now states expressly.

Practice guidance. Federal Rule of Evidence 1006.

C. *United States v. Bueno-Sierra*, 99 F.3d 375 (11th Cir. 1996)

Holding. The Eleventh Circuit affirmed admission under Rule 803(6) of a port authority's berth-request form, over the objection that the custodian did not know who prepared the forms. "The touchstone of admissibility under the business records exception to the hearsay rule is reliability, and a trial judge has broad discretion to determine the admissibility of such evidence." *Id.* at 378. The proponent "ordinarily need not be the entity whose first-hand knowledge was the basis of the facts sought to be proved," but must establish "that it was the business practice of the recording entity to obtain such information from persons with personal knowledge and the business practice of the proponent to maintain the records produced by the recording entity." *Id.* at 378–79.

Practice guidance. Federal Rule of Evidence 803(6).

D. *United States v. Box*, 50 F.3d 345 (5th Cir. 1995)

Holding. The Fifth Circuit affirmed the admission of county attorney records authenticated by an official who did not hold the office when the records were made. "A qualified witness is one who can explain the system of record keeping and vouch that the requirements of Rule 803(6) are met; the witness need not have personal knowledge of the record keeping practice or the circumstances under which the objected to records were kept." *Id.* at 356. Rule 803(6) "sets forth its own basis for authentication," and the trial court has broad discretion over admissibility. *Id.* The Eleventh Circuit adopted this formulation in *Curtis v. Perkins*, 781 F.3d at 1268.

Practice guidance. Federal Rule of Evidence 803(6).

E. *Carrizosa v. Chiquita Brands International, Inc.*, 47 F.4th 1278 (11th Cir. 2022)

Holding. A Colombian criminal indictment was admissible as a business record under Rule 803(6), and as a public record under Rule 803(8), on the declaration of a Colombian lawyer "deeply familiar" with the process that generated it, although he neither created the record nor worked for the issuing entity; the district court erred in excluding it. *Id.* at 1299–1300. Applying *Curtis v. Perkins* and *Box*, and citing *Bueno-Sierra* for the proposition that the witness "need not be the [one] whose first-hand knowledge was the basis of the facts sought to be proved," the court endorsed the treatise view that "qualified witness" is "given a very broad interpretation," requiring only "enough familiarity with the record-keeping system of the entity in question to explain how the record came into existence," and that "the witness need not even be an employee of the record-keeping entity." *Id.*

Practice guidance. Federal Rules of Evidence 803(6) and 803(8).

F. *Palmer v. Hoffman*, 318 U.S. 109 (1943)

Holding. Decided under the Federal Business Records Act of 1936, 28 U.S.C. § 695, the predecessor of Rule 803(6), *Palmer* held that a railroad engineer's statement about a grade-crossing accident was not a record made "in the regular course" of the railroad's business. It was "not a record made for the systematic conduct of the business as a business," and "the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made 'in the regular course' of the business within the meaning of the Act." *Id.* at 113. "Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading." *Id.* at 114.

Practice guidance. Federal Rule of Evidence 803(6), and in particular Rule 803(6)(E).

G. *In re Bestway Products, Inc.*, 151 B.R. 530 (Bankr. E.D. Cal. 1993)

Holding. Taking "judicial notice of court records" is "a convenient shorthand for two distinct concepts—importing the documents into the record of the matter at hand and establishing their authenticity," and importing documents "really is not a matter of judicial notice at all; it is a matter of offering evidence." *Id.* at 540. Notice that papers are in the official court file (the least controversial use) establishes that they are genuine "without going through the steps normally needed to authenticate documents." *Id.* at 541. But "[t]he fact that the documents are genuine does not mean that the court can automatically accept as true the facts contained in such documents"; statements inside must independently satisfy the Rules. *Id.* In *Bestway* the debtor's own statement in a prior schedule was admissible because it was not hearsay under Rule 801(d)(2). *Id.* The opinion labels "widely-criticized" the third use, taking as conclusively established extrajudicial facts mentioned in the records, "thereby depriving a party of the right to dispute the facts and eviscerating the doctrine of collateral estoppel." *Id.* at 541 & n.33.

Practice guidance. Federal Rule of Evidence 201.

H. *In re Scarpinito*, 196 B.R. 257 (Bankr. E.D.N.Y. 1996)

Holding. The bankruptcy court declined the creditor bank's request that it take judicial notice of docket entries reflecting discovery disputes and infer from them that the bank had been unaware of the debtor's fraud before discharge. "While a bankruptcy judge may take judicial notice of a bankruptcy court's records, . . . we may not infer the truth of facts contained in documents, unfettered by rules of evidence or logic, simply because such documents were filed with the court." *Id.* at 267. The inference the bank proposed was "not the sole rational inference which may be deduced from the facts presented." *Id.*

Practice guidance. Federal Rule of Evidence 201.

I. *In re Cobb*, 56 B.R. 440 (Bankr. N.D. Ill. 1985)

Holding. On a stay-relief motion, the debtors' statement of the value of their home in their schedules "is nothing more than an admission by a party opponent. The admission is not conclusive. It is merely an exception to the hearsay rule which can be overcome by competent evidence offered by the debtor." *Id.* at 442. A footnote explains why the schedules were evidential rather than judicial admissions: they were filed in the case generally rather than in the particular contested matter, and so were not a "pleading" for that motion; a statement of value "is a matter of opinion rather than fact" and so "probably cannot give rise to a judicial admission"; and the debtor may amend schedules until the case is closed without prior permission of the court. *Id.* at 442 & n.3.

Practice guidance. Federal Rules of Evidence 201 and 801(d)(2).

J. *United States v. Browne*, 834 F.3d 403 (3d Cir. 2016)

Holding. Facebook chat logs, "considered in their entirety," are not business records under Rule 803(6) and therefore "cannot be authenticated by way of Rule 902(11)." *Id.* at 411. Two reasons. The relevance of the records turned on authorship, and the custodian "attested only that the communications took place as alleged between the named Facebook accounts"; accepting that as sufficient "would amount to holding that social media evidence need not be subjected to a 'relevance' assessment prior to admission." *Id.* at 410. And the theory "is predicated on a misunderstanding of the business records exception itself," because Rule 803(6) "is designed to capture records that are likely accurate and reliable in content," whereas "Facebook does not purport to verify or rely on the substantive contents of the communications in the course of its business." *Id.* The certificate is "no more sufficient to confirm the accuracy or reliability of the contents of the Facebook chats than a postal receipt would be to attest to the accuracy or reliability of the contents of the enclosed mailed letter." *Id.* at 410–11. The court declined to adopt the Government's position because it "would mean that all electronic information whose storage or transmission could be verified by a third-party service provider would be exempt from the hearsay rules." *Id.* at 411. It expressly reserved the narrower question whether a certificate could authenticate technical metadata alone — timestamps and the fact that an exchange occurred between particular accounts — which "might be more readily analogized to bank records or phone records." *Id.* The Third Circuit affirmed nonetheless: extrinsic evidence under Rule 901(a) supported a reasonable finding of authorship, id. at 411–15, and four of the five chats were then "properly admitted as admissions by a party opponent under Rule 801(d)(2)(A)," *id.* at 415–16. The fifth, an exchange between two victims in which the defendant did not participate, was inadmissible hearsay, though its admission was harmless. Authorship "may be established for authentication purposes by way of a wide range of extrinsic evidence." *Id.* at 412.

Practice guidance. Federal Rules of Evidence 901, 902(11), and 801(d)(2)(A).

K. *Boren v. Sable*, 887 F.2d 1032 (10th Cir. 1989)

Holding. A worker injured at a plant sued the plant manager individually, not the corporate employer, and offered statements by two co-employees as opposing-party statements under

Rule 801(d)(2)(D). The Tenth Circuit affirmed their exclusion because neither declarant was the defendant's agent. The configuration is the key to the case. Quoting *United States v. Young*, 736 F.2d 565, 567–68 (10th Cir. 1983), the court explained that "[t]he fact that the statement was made by a corporate employee to another corporate employee, rather than to a third party, would not preclude the admission of that statement against the corporation under Rule 801(d)(2)(D)," but that "when such a statement is offered against another corporate employee, instead of the corporation, proper admission under Rule 801(d)(2)(D) will necessarily depend on the nature of the relationship between the declarant and the defendant." *Id.* at 1038–39. Expanding the rule to reach "statements made by any person who is subordinate to a party opponent may create a loophole in the hearsay rule." *Id.* at 1039. An agency relationship "is not created solely by the fact that the purported principal is a corporate officer," *id.*, and a declarant's "mere occupation of a subordinate position in the corporate chain of command" will not do, *id.* at 1040. "There must be some evidence that [the defendant] directed [the declarant's] work on a continuing basis." *Id.* at 1041.

Note on Scope. Read *Boren* for what it decides. It addresses whether an agency relationship exists between a declarant and an individual defendant; it is not authority on the separate question whether a statement concerns "a matter within the scope of that relationship" when offered against the corporate employer itself, the configuration in which *Young* says admission is not precluded. In a non-dischargeability trial the funder is ordinarily a corporate party, so a statement by its employee is tested on scope, not on whether the employee was the agent of some individual. Counsel resisting such a statement should argue scope directly: what the employee was authorized to do, and whether the subject of the statement fell within it. Counsel offering it should establish the employment relationship, its duration, and the connection between the declarant's duties and the subject matter, remembering that under the closing sentence of Rule 801(d)(2) the statement must be considered but does not by itself establish the existence or scope of the relationship.

Practice guidance. Federal Rule of Evidence 801(d)(2)(D).

IV. Practical Recommendations Summary

The following checklist consolidates the operational points from Sections II and III.

A. Trial Preparation

- Build the exhibit list early. For each exhibit, identify the foundation required—authentication, hearsay exception, expert predicate—and the witness who will lay it.
- Serve Rule 902(11) certifications with the exhibit list, not on the eve of trial. Confirm each certification addresses Rule 803(6)(A)–(C) as to the specific records; it does not foreclose a Rule 803(6)(E) objection.
- For Rule 1006 summaries, confirm every category of underlying record is admissible; under the 2024 amendment the underlying materials need not be introduced. Make them available in advance, as Rule 1006(b) requires, and be ready to explain how the summary was built.

- Identify all party-opponent admissions (debtor's emails, text messages, loan applications, financial statements, and oral statements) and organize them for use under Rule 801(d)(2)(A).
- Draft offers of proof in advance for evidence likely to draw an objection: the evidence, its purpose, the basis for admissibility, and the prejudice from exclusion.

B. Business Records and Summaries

- Identify the custodian or qualified witness for each category of record. The witness need not have created the record or know any entry firsthand but must be able to explain the system and vouch for the Rule 803(6) elements.
- Prepare the witness on Rule 803(6)(A)–(C): timeliness of recording, knowledge of the source, regularity of the activity, and regularity of the record-making practice. Trustworthiness under Rule 803(6)(E) is the opponent's burden, but be ready to meet it.
- Be alert to the *Palmer v. Hoffman* doctrine: records prepared in anticipation of litigation may not qualify as business records, even if the entity routinely creates similar records for business purposes.
- Distinguish Rule 1006 substantive summaries (evidence) from Rule 107 illustrative aids (not evidence). State each exhibit's purpose on the record and ask that illustrative aids be entered into the record under Rule 107(c) even though they are not admitted.

C. Judicial Notice and Bankruptcy Schedules

- When requesting judicial notice under Rule 201, identify the specific fact to be noticed and articulate whether it is generally known or capable of accurate and ready determination.
- Bankruptcy schedules are evidentiary admissions, not judicial admissions. Offer them under Rule 801(d)(2)(A) rather than relying on judicial notice; the debtor may explain or contradict them at trial.
- Judicial notice of a filing establishes that it exists and is genuine. It does not admit what the filing says; statements inside must independently satisfy the Federal Rules of Evidence.

D. Hearsay and Authentication

- Analyze each out-of-court statement for both hearsay and non-hearsay purposes. A statement offered to show its effect on the listener or as a verbal act is not hearsay.
- For writings containing statements by multiple declarants, conduct a layer-by-layer analysis under Rule 805. Each layer must independently satisfy a hearsay exception or qualify as non-hearsay.
- Authenticate electronic communications with extrinsic evidence of authorship (*e.g.*, carrier or provider records, employer or CRM records, account records, participant testimony, distinctive content, or continuity of an exchange). A provider certificate under Rule 902(11) reaches the metadata, not the content.

- Use stipulations to authenticate routine documents and reserve evidentiary disputes for genuinely contested issues.
- Ensure that the availability of cross-examination is not relied upon as a freestanding hearsay exception; a declarant's presence in the courtroom does not cure hearsay unless a specific exception applies.
- When an opponent offers part of a statement, invoke Rule 106. Since the 2023 amendment the completing material comes in at that time and over a hearsay objection, and the rule now reaches unrecorded oral statements as well as writings.

E. Objections and Preservation of Error

- Make contemporaneous, specific objections on the record. A general objection may not preserve the specific ground for appeal.
- When evidence is excluded, make an immediate offer of proof under Rule 103(a)(2) identifying the substance of the evidence, its purpose, the legal basis for admissibility, and the prejudice from exclusion.
- Request a Rule 105 limiting ruling where evidence is admissible for one purpose but not another. The request must be timely, and in a bench trial the ruling is what confines the court's own use of the evidence.

* * *

These materials accompany a mock trial based on a hypothetical scenario. The parties, facts, exhibits, testimony, and rulings are fictional and illustrative only. Nothing here is legal advice or a representation about the outcome of any actual case. The materials are prepared for attorney attendees and submitted in connection with the program's CLE accreditation application; they are not a substitute for independent research and analysis on the facts of a specific case.