

# CREDIT APPLICATIONS TO COURT AND BEYOND

**RIEMER CONFERENCE  
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# CREDIT APPLICATIONS TO COURT AND BEYOND

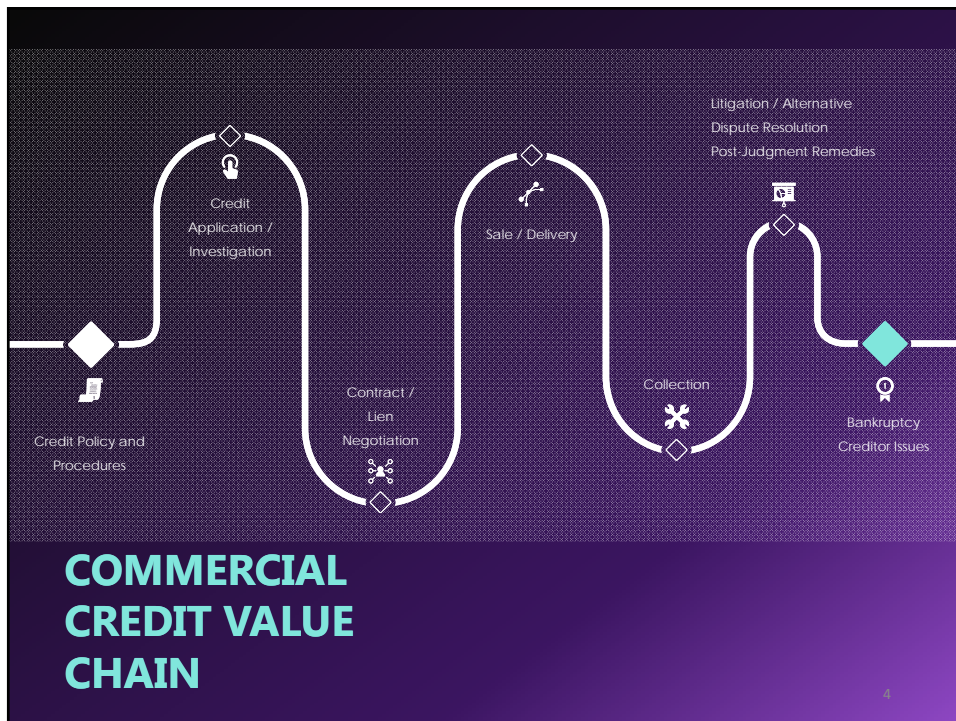


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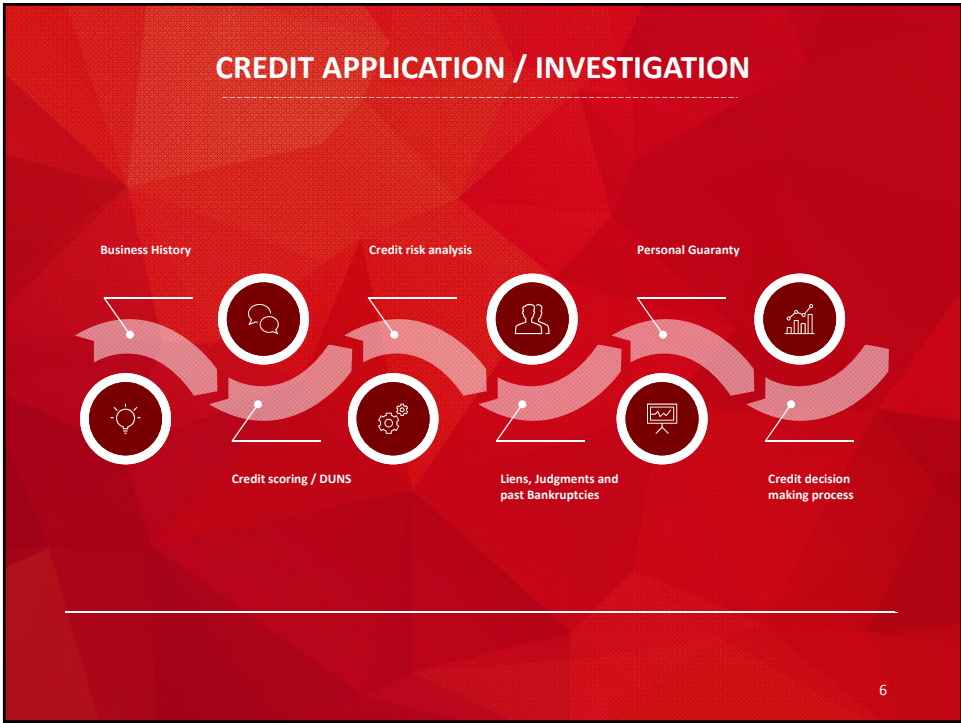
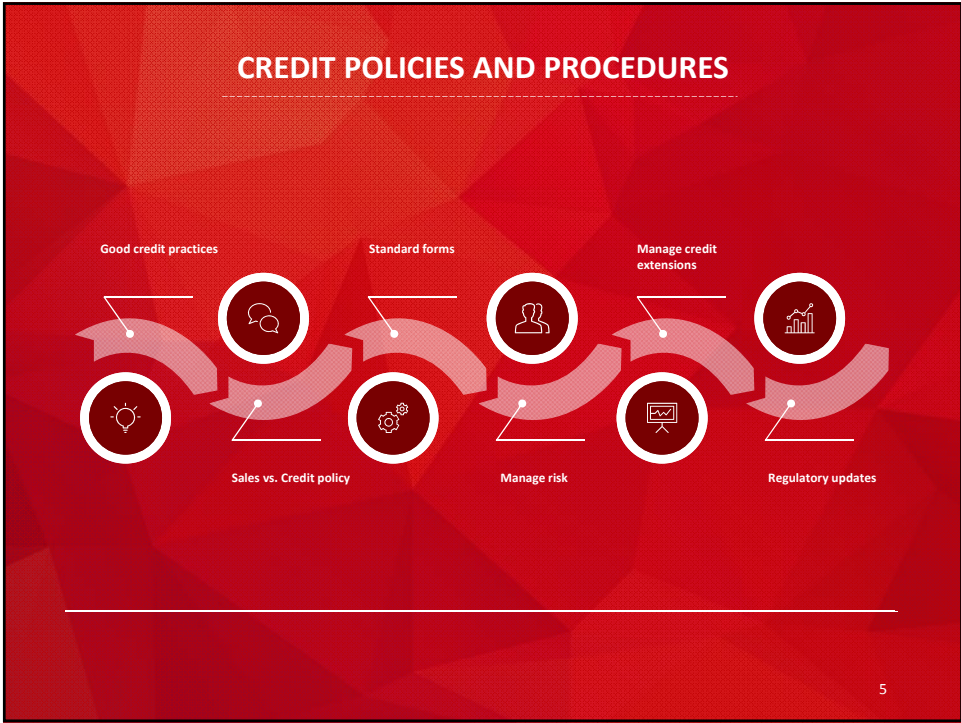
# CREDIT APPLICATIONS TO COURT AND BEYOND



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## CREDIT APPLICATION: WHY USE IT AT ALL

- ▶ **Formation of a contractual relationship**
  - Invoices are not contracts
- ▶ **The credit application with its terms and conditions is often the only written agreement**
- ▶ **The credit application can provide information and specific legal remedies**

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## CREDIT APPLICATION: ESSENTIAL TERMS

- ▶ **TERMS AND CONDITIONS OF SALE**
  - **Interest**
  - **Attorneys' fees**
  - **Costs of collection**
  - **“Reasonable” doesn't cut it**
  - **CAVEAT: state rules may differ**

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## CREDIT APPLICATION: ESSENTIAL TERMS

- **Correct Names**
- **Type of Business Organization**
  - **Business Establishment Details**
    - **EIN Number**
      - **Becoming more and more important!**
    - **Date of establishment of business**
    - **State of incorporation or other type of organization**
- **Principal Place of Business**
- **Requirement for Change of Name or Ownership of customer**

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## CREDIT APPLICATION: ESSENTIAL TERMS

- **Venue & Jurisdiction**
  - Language that permits, but does not mandate, a particular state and/or court where a lawsuit may be commenced should be included on credit application
  - This contract shall be construed under and governed by the laws of the State of \_\_\_\_\_. Any litigation concerning this contract may be commenced, at the sole discretion of credit grantor, in any local, state or federal court within the state of \_\_\_\_\_.

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## A PROPER GUARANTY IS ESSENTIAL TO WINNING

- ▶ **Why have a personal guaranty?**
- ▶ **Who should sign it?**
- ▶ **Does it really help in collections?**
- ▶ **When does it get signed?**
- ▶ **Is there certain language to form a guaranty?**
- ▶ **What if she/he signs as President (or some other qualification)?**

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## ESSENTIAL ELEMENTS OF A GUARANTY

- Party information
- Consideration for guaranty
- Signature as individual (not titled)
- Dated
- Witness/Notarization

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## UNACCEPTABLE GUARANTY

**Guaranty of Collection - BAD**

**All collection efforts must be exhausted first before the credit grantor can seek recovery from the guarantor**

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## **ACCEPTABLE GUARANTY**

### **Guaranty of Payment – GOOD**

**A requirement to pay immediately upon a default in payment by the primary debtor**

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## **RECOMMENDED LANGUAGE FOR A GUARANTY**

**The Guarantor acknowledges that this Guarantee is a Guarantee of Payment, and the Guarantor's obligations under this Guarantee are and shall at all times continue to be absolute and unconditional in all respects, and shall at all times be valid and enforceable irrespective of any other agreements or circumstances of any nature whatsoever which might otherwise constitute a defense to this Guarantee and the obligations of the Guarantor under this Guarantee or the obligations of any other person or party (including, without limitation, the Customer) relating to this Guarantee or the obligations of the Guarantor hereunder.**

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“THIS IS GOING NOWHERE. IT’S TIME TO GET HELP, BUT WHERE DO I GO?”

Selecting your third party partner to handle the collection / litigation process can be the most important decision you make in the Value Chain process.

Here are some qualifications that you should consider when choosing an agency.

- 01 IS THE AGENCY LICENSED AND BONDED?**  
The vast majority of collection firms are not properly licensed with all required states and cities. How safe does that make you feel?
- 02 IS THE AGENCY CERTIFIED?**  
Again, most agencies are not certified through the CLLA/IACC. Check the websites of both organizations for a list of certified agencies.
- 03 IS THE AGENCY A MEMBER OF THE CLLA/IACC?**  
Incredibly, the percentage of agencies that have achieved membership in the industry associations is very small.
- 04 HOW IS THE AGENCY RATED?**  
Check the Better Business Bureau. One or two complaints can be a fluke, but a slew of complaints should be a red flag.
- 05 DOES SIZE MATTER?**  
A large, national firm is not necessarily a better fit than a small, local one. It depends on your needs, the agency’s strengths, its reputation and its track record.

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# Collection Agency Myths



**GO WITH THE LOWEST FEE RATE**



**ALL AGENCIES ARE THE SAME**



**USING AN AGENCY WILL HURT MY BUSINESS**

It's not about the rate, it's about the performance. Your bottom line return net of fees should be the most important factor.

**Remember the old adage – you get what you pay for!**

There are all kinds of agencies out there, but no two are created equally. Find the agency that places your brand ahead of profits.

**A strong client/agency partnership is essential for mutually positive results.**

Quite the opposite; a good agency will not only get you paid but protect your customer relationships, allowing for future business opportunities.

**There's a big difference between a customer and a *paying* customer!**

# KEY BENEFITS

There's a lot more to a collection agency than making phone calls and sending emails and letters. How your agency of choice interacts with your customers as well as with you is a key factor in the success and long-term viability of the relationship.

**TRANSPARENCY**  
Can the agency provide you with an online access that allows you to see all facets of the collection process?

**IT'S YOUR MONEY**  
How fast does the agency remit money? Remember, it is not a collection until it is in your bank.

**TECHNOLOGY**  
Is the agency's system secure enough to protect your confidential information?

Get your piece of the "pie"

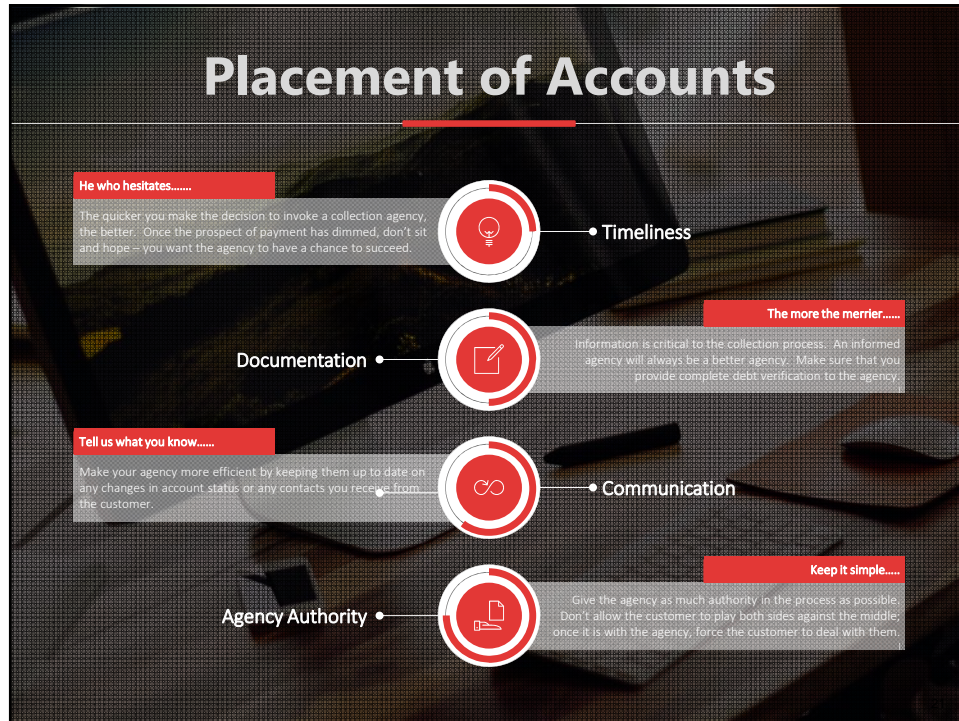
Professionalism  
Industry Reputation  
Experience



**CLIENT KNOWLEDGE**  
Is your customer just a number? How much does the agency know about your business?

**LET'S TALK**  
Does the agency hold a regular dialogue with its clients to insure that the relationship is moving in a positive direction?

**ONE-STOP SHOP**  
Is the agency able to smoothly transition accounts to attorneys for litigation?



## PREPARING FOR LITIGATION

- **Sufficient Details – Enable Attorney to Prepare Complaint**
  - **Good sold and delivered – unpaid?**
  - **Work, labor & services?**
  - **Combination of goods sold/services provided**

## ESSENTIAL LITIGATION DOCUMENTS

- ▶ **Purchase Order**
- ▶ **Acknowledgment**
- ▶ **Written and Signed Contract**
- ▶ **Bill of Lading or other delivery receipt**
- ▶ **Statement of Account**
- ▶ **Guaranties**

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## PREPARING FOR LITIGATION

- **Statement of Account**
  - **Different courts have different requirements for an acceptable Statement of Account**
  - **Computer Generated**
  - **On Proper Letterhead/Stock**
    - **If computer regenerated make sure letterhead and logo matches**
  - **Actually sent to customer**

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## PREPARING FOR LITIGATION

- ▶ **Scanned Documentation**
  - **Documents must be scanned exactly as they appear**
  - **Document must be precisely scanned, not just the data**
  - **“Best Evidence Rule”**
  - **Policy and Procedure must be proven**

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## LITIGATION HOLD

- **Defined as “Communication that suspends normal disposition or processing of Records because of current or reasonably anticipated litigation”**
- **Requirements**
  - **Identifying and Preserving Relevant Information**
  - **Issuing written notice to individuals most likely to have relevant information to lawsuit**
  - **Monitoring compliance**

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## LITIGATION HOLD

XYZ Company has just begun or is about to commence a lawsuit against ABC Company to collect moneys due and owing for goods sold and delivered and/or work, labor and services rendered for which it has not been paid. As this lawsuit proceeds, you must preserve all paper and electronic documents, materials, and data pertaining or relating to business dealings with or involving ABC Company, including any tape recordings of telephone conversations.

This Litigation Hold applies to all forms of information including, without limitation, all Communications, e-mails, voicemail messages, paper documents, electronic documents, \*.pdf files, presentations, spreadsheets, and any other hard or electronic data relating to information regarding business dealings with this entity or anyone connected with that entity regardless of how or where any such data is recorded or stored. This Litigation Hold also relates to reports, correspondence, handwritten notes, draft documents, calendar entries, and recordings, whether stored in your office, at home, on a Blackberry (or "smartphone"), PDA or elsewhere. This Litigation Hold supersedes all other document retention policies, applies to documents that you create in the future, and will remain in effect until the dispute is resolved.

**DO NOT DESTROY, DELETE OR ALTER ANY DOCUMENT, DATA OR INFORMATION IDENTIFIED BY THIS MEMO. IF YOU HAVE ANY DOUBT WHETHER ANY DOCUMENT, DATA, OR INFORMATION IS IDENTIFIED BY THIS MEMO, YOU MUST PRESERVE IT.**

To protect electronic data from automatic or inadvertent deletion, the IT Department has been asked to provide access to your e-mail account to the Legal Department so we can conduct a search for any messages concerning ABC Company.

Please respond via e-mail message acknowledging that you have received this notice, that you understand your obligations to preserve data and that you agree to comply with this notice.

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## SPOLIATION OF EVIDENCE

**FAILURE TO PROPERLY PRESERVE ALL OF THIS DATA, RECORDS, ETC. WILL BE REGARDED BY THE COURT AS "SPOLIATION OF EVIDENCE"**

- **Loss of your lawsuit because you cannot prove your case**
- **Dismissal of the lawsuit because the court will punish you for not preserving necessary evidence**
  - **The court may presume you destroyed evidence because it would be harmful to your case**
- **Punitive damages to punish you for destroying or not preserving evidence**
- **Attorneys fees awarded to the other side to be paid by you**
- **Sanctions against your attorney for not causing you to preserve the data**

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## ANSWER

- ▶ **Barebones General Denial**
- ▶ **Denies all claims specified in your Complaint**

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## COMMON AFFIRMATIVE DEFENSES

- **Culpable conduct claimed in diminution of damages**
  - **Defendant must prove you are partly or fully to blame for your own damages**
- **Discharge in Bankruptcy**
- **Illegality by statute or common law**
- **Fraud**
- **Payment**

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## COMMON AFFIRMATIVE DEFENSES cont'd.

- Statute of Frauds
  - Certain contracts must be in writing and signed
    - E.g. – sales of goods in excess of \$500
  - Merchants excused **IF**
    - Merchants have done business before
    - Custom and usage in industry or trade that written contracts are not used
  - Documentation other than written contract creates a contract
    - E.g. – purchase order and acknowledgement

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## COUNTERCLAIMS

- Any claim which defendant has against you
- **DO NOT IGNORE COUNTERCLAIM(S)**
- Examples:
  - Claim that product is defective
  - Claim that defective product caused your customer loss of its customers or business
  - Negligent Misrepresentation
  - Fraud

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## COUNTERCLAIMS

- **Triggers certain events**
  - You must respond to Counterclaim in certain courts
  - State court rules, federal rules, local court rules differ
    - Some courts state if you do NOT respond to a counterclaim it is deemed denied
    - Some courts state if you do NOT respond to a counterclaim it is deemed admitted
  - You must assert affirmative defenses, if any
  - If counterclaim is completely unrelated to original claim there may be a new set of Litigation Hold Issues

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## DISCOVERY

- **Overall term for all of the information which each side produces to prove one's case or disprove other side's case**
- **Various different types of Discovery**

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## TYPES OF DISCOVERY

- **Interrogatories**
  - Series of questions posed by one side requiring detailed answers from other side
  - Generally attorney prepares answer to Interrogatories in conjunction with from client
- **Notices to Admit**
  - Requires a party to answer truthfully whether or not an alleged fact is admitted

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## TYPES OF DISCOVERY

- **Production of Documents**
  - Requires a party to produce every iota of documentation which is requested.
  - The Maintenance of Records is imperative to be able to respond to Document Production
- **Depositions - Testimony taken under oath**
  - Of a party
  - Of a non-party
  - Court Reporter required
  - Transcript must be ordered
    - Can be costly

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## MEDIATION

- ▶ **Mediation is a process used by parties in litigation to settle disputes**
  - Not to be confused with arbitration
- ▶ **Often Court Ordered but can be voluntary**
- ▶ **Confidential**
- ▶ **Whether a witness is required varies by jurisdiction**

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## MEDIATION

- ▶ **Some Factors to consider when deciding to mediate!**
  - Complexity
  - Level of Detail
  - Strength of Case
  - Obstinace of the other side
  - Amount of Damages
  - Informal discovery
  - Cost of proceeding to trial

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## SUMMARY JUDGMENT

- ▶ **Used when there are no fact issues**
- ▶ **Difficult to obtain**
- ▶ **Helps avoid trials when issue is money, delay or debtor simply just “gets it wrong”**

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## CAN YOU WIN YOUR CASE?

- **During Discovery – determine with your attorney whether you can or cannot win your case**
- **Documentation**
- **Legitimate defenses from other side**
- **Witnesses**
  - **person with actual knowledge of the facts**
  - **person who can testify as to Business Records**
  - **Expert (not often necessary)**

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## PRE-TRIAL ACTIVITY

- **Must Have Witness(es)**
- **Preparation of Witnesses**
- **Type of Witnesses**

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## PARTY WITNESS(ES)

- **Original Sales Personnel/Account Manager**
- **Current Sales Personnel/Account Manager**
- **Sales Manager**
- **Credit Manager at time of transaction**
- **Current Credit Manager**
  - **Generally, owner or officer may NOT be best witness because he/she may not have actual and personal knowledge of the facts**

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## NON-PARTY WITNESS(ES)

- **Necessary to testify to specific event or fact**
  - **Example: Your company hired another company to produce a specialty product. That non-party witness will testify as to the special product which it produced, under what contract that product was produced, and to whom that specialty product was delivered**
    - **Even if the non-party witness is willing to come to court and testify on your behalf voluntarily, it is always wise to serve that non-party with a subpoena compelling his/her appearance. This is important so that the court views that witness as a disinterested party and not one in court merely doing you a favor.**

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## NON-PARTY WITNESS SUBPOENA

- **The subpoena must be accompanied with a witness fee which differs from court to court. In most instances, a subpoena to testify can be served as little as 24 hours in advance.**
  - **The time within which to serve a non-party subpoena also differs depending on the various court rules.**
- **While specific language may vary, generally the language on a trial subpoena contains one important paragraph:**

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## SUBPOENA

- ***YOUR ARE HEREBY COMMANDED to appear before the Honorable \_\_\_\_\_, a Justice of this Court at [Part or Room], held at the courthouse located at \_\_\_\_\_ on the \_\_\_ day of \_\_\_\_\_, at 9:30 in the morning, and at any recessed or adjourned date of the trial, to testify and give evidence as a witness on behalf of the Plaintiff in the above-entitled action; and for a failure to attend you will be deemed guilty of a contempt of court and liable for all damages sustained to the party aggrieved thereby and to forfeit \$\_\_\_\_\_ in addition thereto.***

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## TESTIMONY

- **Actual/Personal Knowledge of facts**
  - **Salesman**
    - **what was sold**
    - **what documents were presented to customer**
    - **what documents were received from customer**
    - **the pricing**
    - **terms and conditions of sale (such as delivery)**

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## TESTIMONY

- **Actual/Personal Knowledge of facts**
  - **Credit Manager or credit analyst**
    - **process by which credit is approved**
    - **type of credit application used**
    - **terms & conditions and where those T&C's are found**
    - **how customer was made aware of terms & conditions**
  - **Payments made or not made**
  - **Knowledge of any complaints**

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## TESTIMONY

- **Actual/Personal Knowledge of facts**
  - **Production Manager**
    - **What was made or produced**
      - **Defects**
      - **Lack of defects**
      - **Discussions as to the product**
      - **Any remedial action which was taken**  
e.g. – replacement of product

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## WITNESSES

- **Credibility**
  - **Length of time in job**
  - **Background**
  - **Knowledge of industry**
  
- **In other words “WHO IS THE JUDGE MOST LIKELY TO BELIEVE”?**

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## BUSINESS RECORD EXCEPTION TO HEARSAY

- **Credit Executive responsible for all credit activities**
- **Credit Executive taking over a position**
- **Credit Executive reviewing all credit files**
  - **Credit Executive knowledge of 3<sup>rd</sup> party documents**
    - **Delivery receipts, etc.**
- **All Files maintained under supervision and control of credit executive**
  - **Supervision**
  - **Control**

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## BUSINESS RECORD EXCEPTION TO HEARSAY

- **Credit Executive's job responsibility is to be familiar with all documents**
  - **EITHER** Credit Executive at company when original transaction took place -
  - **OR** Credit Executive hired after transaction took place

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## BUSINESS RECORD EXCEPTION TO HEARSAY

- **Credit Executive at company when original transaction took place**
  - **Credit Executive had actual knowledge at time of original transaction**
  - **Credit Executive approved credit at time of original transaction**
  - **Sales people answerable to credit executive at time of original transaction**
  - **Credit Executive involved with discussions about payment, disputes, etc.**

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## BUSINESS RECORD EXCEPTION TO HEARSAY

- **Credit Executive hired after transaction took place**
  - **Credit Executive must have reviewed all files upon taking job**
  - **Credit Executive must be completely familiar with sales transactions**
  - **Credit Executive must learn all credit files**
  - **Credit Executive in control of all files**

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## PREPARATION

- **DON'T pretend to be knowledgeable if you are not – you WILL be tripped up on cross-examination**
- **Re-read any deposition transcripts where you were deposed**
  - **The other side can impeach your trial testimony by introducing your deposition testimony where you said something contradictory to what you are saying in court**

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## SETTLEMENT FORMS

- ▶ **Why use them?**
  
- ▶ **Key Terms**
  - **Account or Invoice Specific**
  - **Admission – Valid and Existing**
  - **Date of First Payment**
  - **Release**
  - **Default and Late Notice Provisions**
  - **Stipulation vs. Consent Judgments**

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## SETTLEMENT FORMS

- ▶ **Waiver Example**

No amendment or modification of this Agreement, and no waiver, discharge or termination of any one or more of the provisions in this Agreement shall be effective unless in writing and signed by all of the parties. Nothing herein requires the Creditor to accept late payments; however, should the Creditor accept any late payments, any acceptance of late payment will not excuse the Customer's default or mean that the Customer can keep making payments after they are due. Furthermore, should the Creditor accept late payments, the parties agree that the Customer will continue to be in default and that Creditor may enforce this Agreement at any time regardless of the number of late payments accepted and require that the full amount owed under this Agreement be paid to Creditor.

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## SETTLEMENT FORMS

### ▶ Stipulation Example

In the event Customer fails to pay as agreed, Customer agrees that the full amount owed of \$8,393.32 is due and owing in addition to prejudgment interest and attorney's fees less any amounts paid under this agreement.

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A judgment doesn't win you the war ...

... it only wins you the battle.



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## WRIT OF EXECUTION

- ▶ **Used to seize and sell non-exempt property belonging to the Debtor**
  
- ▶ **Pros**
  - **Uniformed Officer**
  - **Inexpensive**
  - **Low Risk**
  
- ▶ **Cons**
  - **Auction Price is not the best price**
  - **Little Flexibility**

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## GARNISHMENT

- ▶ **Used to seize assets in the hands of third parties; usually a bank account**
  
- ▶ **Effective but cost and availability varies by jurisdiction**
  
- ▶ **Possible Exposure**

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## CONTEMPT

- ▶ **Used to place Debtors in jail for failing to obey a Court Order**
- ▶ **Helps align the Debtor's priorities to that of the Creditor**
- ▶ **Possible Damage to Company's Brand**

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## Is this type of press you want?

The screenshot shows a news article on the DAILY NEWS website. The headline reads: "Houston man arrested by seven U.S. Marshals for not paying \$1,500 student loan from 1987". Below the headline are social media sharing icons for Facebook, Twitter, and Email. A red banner across the article reads "Website blocked by Trend Micro Worry-Free Business Security". Below the banner is a "Restricted website blocked" message with a red circle and slash icon, followed by the URL "http://ap.amv.tz/latestarwood.html?key=eyJlpoZXBmb3plLjwlpjZGVmYXVsdCisinY0lyNDU5NmJMLCJwbHvnaW5zlp7ImRmc0E" and the category "Made for AdSense". To the right of the blocked message is an advertisement for "MIX WITH MUSIC DEEP & EDDY VODKA". The browser's address bar shows "CREDIT APPLICATION" and a "Show all" button.

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## RECEIVERSHIPS

- ▶ **Not available in every state**
- ▶ **A receivership is a post judgment tool in which a receiver is appointed by the Court to capture any assets owned by a debtor and to liquidate them for our benefit.**
- ▶ **If the liquidation results in more money than what is owed under the judgment, the receiver's fee of 25% is taxed to the Debtor and the Creditor recovers 100% of the judgment. If the liquidation results in insufficient money to satisfy the judgment, the Creditor and the Receiver share in the proceeds.**

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## RECEIVERSHIPS

- ▶ **In this post judgment tool, the following can be done: garnish bank accounts without spending money, change locks, redirect mail, and deposit payments made payable to Debtor, etc.**
- ▶ **Remember: The client may have reduced say in what kind of pay out they get so long as the payout is for the full amount of the Judgment.**

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## BANKRUPTCY ISSUES

- ▶ **During the collection process or during litigation, a debtor may file a bankruptcy proceeding**
- ▶ **Chapter 7**
  - All assets are turned over to a trustee for liquidation
- ▶ **Chapter 11**
  - A debtor may try to reorganize and pay something to creditors
- ▶ **Chapter 13**
  - An individual debtor will try to restructure its debts

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## AUTOMATIC STAY

- ▶ **Automatic Stay applies in most cases**
  - Did the corporation or personal guarantor file the bankruptcy
- ▶ **Automatic Stay not applicable regarding 3<sup>rd</sup> party personal guarantors without specific court order**
  - Penalties may be imposed on creditor for violating automatic stay
  - Look to your agency/law firm for guidance

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## TYPES OF BANKRUPTCY

### ▶ Chapter 7

- Agency or law firm should file a proof of claim and monitor the proceeding
- Likelihood of recovery is 5% to 10%
- Do NOT miss the Bar Date for filing a proof of claim
- Watch for an objection to Claim and make sure a response is timely
- Creditor, agency or lawfirm may be the subject of a preference demand and/or adversary proceeding
- A non-dischargeability action (only in individual cases) may be warranted
- A judgment lien or UCC lien may have priority

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## TYPES OF BANKRUPTCY

### ▶ Chapter 11

- A reorganization or a liquidating chapter 11 can pay dividends to a creditor of an average of 30% and may be as high as 100% (unlikely)
- Agency or law firm should file timely proof of claim
- Prepare to respond to objection to claim]
- Preference claim may be asserted against creditor, agency or lawfirm
- A creditor with an executory contract may be paid in full
- A creditor with a judgment lien or UCC lien may have a priority claim entitled to higher payment than others or recovery of property

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## TYPES OF BANKRUPTCY

### ▶ Chapter 13

- Agency or law firm must file a timely proof of claim
- Prepare to respond to any objection to claim
- The dividend to creditors can range from 5% to 50% or more
- A judgment lien or UCC lien gives priority to that creditor
- Often the chapter 13 is dismissed permitting creditor to continue its collection or judgment enforcement efforts