AMERICAN BANKRUPTCY INSTITUTE

2019 Southwest Bankruptcy Conference

Evidence, Part IIA: Consumer Workshop on Evidence

Stephen E. Berken
Berken Cloyes, PC; Denver

J. Scott Bovitz
Bovitz & Spitzer; Los Angeles

Hon. Daniel P. Collins
U.S. Bankruptcy Court (D. Ariz.); Phoenix

Karen L. Kellett
Kellett & Bartholow PLLC; Dallas

CONCURRENT SESSION

2019

EVIDENTIARY ISSUES IN CONSUMER CASES

Presented By:

Karen L. Kellett, Esq., Kellett & Bartholow, PLLC, Dallas, Texas

Stephen E. Berken, Esq., Berken & Cloyes, P.C., Denver, Colorado

Honorable Daniel P. Collins, U.S. Bankruptcy Court, D. Arizona, Phoenix

J. Scott Bovitz, Esq., Bovitz & Spitzer, Los Angeles, California

Co-Authored By:

Karen L. Kellett, Esq., Kellett & Bartholow, PLLC, Dallas, Texas

Stephen E. Berken, Esq., Berken & Cloyes, P., Denver, Colorado

Claude D. Smith, Esq., Kellett & Bartholow, PLLC, Dallas, Texas

2019 American Bankruptcy Institute
SW CONFERENCE
September 5 – 7, 2019
Las Vegas, Nevada

A. ***701 Testimony of Lay Witnesses.***

Federal Rule of Evidence 701, made applicable to bankruptcy proceedings through Federal Rule of Bankruptcy 9017, governs the admissibility of opinion testimony by lay witnesses (as opposed to expert witnesses). Fed. R. Evid. 701 provides as follows:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
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> (a) rationally based on the witness's perception;
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> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
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> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701.

Rule 701 incorporates the personal knowledge requirements of Fed. R. Evid. 602, where "a witness may testify to a matter only if evidence is introduced sufficient to support a finding that a witness has personal knowledge of the matter," (which evidence can include the witness' own testimony).

The Committee Notes on the Rules for the 2000 Amendment states that Rule 701 was "amended to eliminate the risk that the reliability requirements set forth in Rule 702 (for expert testimony) will be evaded through the simple expedient of proffering an expert in lay witness clothing," and thereby avoid the expert witness disclosure requirements of Fed. R. Civ. P. 26 as well.[1] The Notes also state that the amendment does not distinguish between expert and lay

[1] The 2000 Amendment added 701(c) to "emphasize that the Rule does not require witnesses to qualify as experts unless their testimony is of the type traditionally considered within the purview of Rule 702." *See* Committee Notes for 2000 Amendment of Fed. R. Evid. 701.

witnesses, but rather between expert and lay testimony, suggesting that the same witness could provide both in the proper context—so long as such witness is qualified as an expert as to that portion of the testimony that is based on scientific, technical or specialized knowledge. The amendment was not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3rd Cir. 1995). The Committee provides, as an example of this type of testimony, the testimony of an owner or officer of a business to testify as to the value or projected profits of a business, without the necessity of qualifying the witness as an expert on value (such as an accountant or appraiser). The Committee Notes cite *Lightning Lube, Inc. v. Witco Corp*., 4 F.3d 1153 (3rd Cir. 1993) as an example, where the owner of a business was permitted to give lay opinion as to damages because it was "based on his knowledge and participation in the day-to-day affairs of his business." *Lightning Lube, Inc.*, 4 F.3d at 1175. This type of opinion testimony is not based on experience, training or specialized knowledge but based on the witnesses' perception and personal knowledge.

Under the second prong of Fed. R. Evid. 701, the lay testimony must be helpful to clearly understanding the witness's testimony or to determining a fact in issue to be admissible. In *U.S. v. Fulton*, 837 F.3d 281 (3rd Cir. 2016), the Third Circuit reversed the conviction of a defendant which was based, in part, on the lay testimony of a police officer that a third-party could not have committed a bank robbery during the time in question because he was "on the phone." U.S. v.

Fulton, 837 F.3d at 289. The officer admitted under cross examination that he did not know whether the third-party actually answered the phone, as the call records only indicate that he received a call. *Id*. at 290. The Third Circuit found that the officer's interpretation of the records was not helpful in determining the issue, as a jury was equally capable of interpreting the call records. In fact, the only value of the officer's testimony was to "tell the jury which result to reach." *Id*. at 294. The officer's interpretation of the phone records as a lay witness "did exactly what the body of case law interpreting Rule 701(b) prohibits," in that it provided unhelpful and possibly inaccurate opinion testimony as to phone records which were not "unclear, coded, or in need of interpretation." *Id*.

United States v. An Easement and Right-of-way over 6.09 Acres of Land, 140 F. Supp. 3d 1218 (N.D. Ala. 2015) was a condemnation case where the United States sought to condemn an easement for electric transmission lines across land owned by two companies. Two principals from the defendant companies provided testimony as to land value, and the government moved to exclude that testimony, claiming that the defendants failed to comply with the disclosure requirements of Rule 26(a)(2)(C), and that the testimony failed the reliability standards of Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d (1993). The defendants claimed exemption from *Daubert* and the Rule 26 disclosure requirements, citing case law that lets owners give opinions on the value of their own property without qualifying as experts. The Court admitted the defendants' opinion on value because the witnesses based their opinions on their own observations and not based on specialized knowledge. The Court acknowledged that Fed. R. Evid. 701 applies to testimony, not witnesses, and that within the testimony of a single witness, Rule 702 might apply to the exclude testimony

based on specialized knowledge, if the witness was not otherwise qualified as an expert. Because the defendant landowners based some of their opinions on their experience as developers, their familiarity with the local real estate market, and their understanding of how developments are designed marketed and sold, the Court found these opinions were based on specialized knowledge. The Court therefore analyzed the admissibility of this testimony under Rule 702 and required disclosures under Fed. R. Civ. Pro. 26.

This case exposes the danger in relying on Rule 701 lay testimony that can arise in some cases. This is also equally true in bankruptcy cases when a debtor testifies as to value: the court could exclude all or a portion of the testimony that the court finds was based on specialized knowledge and not personal experience, and therefore subject to the extra requirements of Fed. R. Evid. 702 and disclosure under Fed. R. Civ. Pro. 26. Two examples are as follows: *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1208 (10th Circ. 2011) (lay opinion of plaintiff's principal as to value of plaintiff's real estate, impacted by depreciation and deterioration, improperly admitted as requiring technical or specialized knowledge); *Compania Administradora de Recuperacion de Activos Administradora de Fondos de Inversion Sociedad Anonima v. Titan Int'l., Inc*., 533 F.3d 555, 560 (7th Cir. 2008) (plaintiff's president could not give valuation opinions concerning corporate assets as a lay witnesses, because he lacked personal knowledge concerning such assets.)

Expert valuation testimony of an appraiser does not always result in an automatic victory for the creditor in a head-to-head battle with the debtor. In *In re Rozinski*, 487 B.R. 549 (Bankr. D. Colo. 2013), the Court found that the Chapter 13 debtor's testimony regarding value of her home was sufficient prima facie evidence to establish value under 11 U.S.C. § 506(a) as less than

the amount of the first lien on the home. *Rozinski*, 487 B.R. at 559. When the creditor's expert was unable to provide reliable testimony to refute the debtor's valuation, the court found the creditor's second lien on the home was stripped under section 506. *Id*. at 560-61. The debtor in *Rozinski* relied on two comparable properties in her immediate, small neighborhood, and provided extensive testimony on the poor condition of a nearby interstate highway, which could only expand in the direction of her home due to a nearby dog food factory located on the other side of the highway. *Id.* at 556. Conversely, the creditor's expert provided four comparable sales and four active listings. The court gave little weight to active listings based on the limited number of sales in the area, which undercut the expert's opinion that it was a "hot" real estate market in that area. *Id*. at 560. And the court found that the comparable properties outside of the immediate neighborhood relied upon by the expert were not representative of the values in the debtor's neighborhood. *Id*.

Is it hearsay to rely on popular, internet-based home valuations? The debtor in *Rozinski* relied, in part, on Zillow.com valuations of comparable properties and for recent sales data, but it does not appear that the creditor raised a hearsay exception. The creditor's expert, for her part, relied on Multiple Listing Service data and her software programs, which could be hearsay as well. Most of the cases that address the use of Zillow find it to be hearsay under Fed. R. Evid. 802 not subject to any exception set forth in Fed. R. Evid. 803.[2] In *In re Cocreham*, 2013 WL 4510

[2] Under Fed. R. Evid. 801, hearsay is defined as a statement (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement. Fed. R. Evid. 801. Fed. R. Evid. 802 states that hearsay is not admissible unless any of the following provides otherwise: a federal statute, the federal rules of evidence, or other rules prescribed by the Supreme Court. F.R.E. 802. A simple example of this is provided in *Emiabata v. P.A.M. Transport, Inc.*, No. 2:18-cv-45, 2019 WL 1388861 *2 (E.D. Kent. March 27, 2019), where the court refused to admit third-party statements as to liability in a truck accident offered by a pro se plaintiff.

694 No. 13-26465 (Bankr. E.D. Cal. August 23, 2013), the bankruptcy court for the Eastern District of California stated that the Zillow valuations relied upon by both the debtor and the creditor were inadmissible hearsay because, "as other courts have noted, Zillow.com is "inherently unreliable." *Cocreham*, 2013 WL 4510694 at *3. The court noted that Fed. R. Evid. 803(17) excepts from the hearsay rule market compilations generally used and relied upon by the public, but the parties failed to lay a proper foundation that the values reported on the Zillow meet this criteria. *Id*. The *Cocreham* court doubted that a foundation could be laid. Quoting language from similar opinions, the court concluded that "Zillow is a participatory site almost like Wikipedia. Whereas Wikipedia allows anyone to input or change specific entries, Zillow allows homeowners to do so. A homeowner with no technical skill beyond the ability to surf the web can log in to Zillow and add or subtract data that will change the value of his property." *See In re Darosa* 442 B.R. 173, 177 (Bankr. D. Mass. 2010). *See also In re Phillips,* 491 B.R. 255, 260 (Bankr. D. Nev.2013). For this reason, the court ruled that reports such as Zillow are not compilations made admissible by Fed. R. Evid. 803(17). *Id.*

Fed. R. Evid. 803**(**17) provides a hearsay exception for *"*Market Reports and Similar Commercial Publications," including "market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations."

Although Zillow may not typically qualify under this exception, more reliable services such as the Multiple Listing or similar publications would if foundation is established *See, e.g., U.S. v. Cassiere*, 4 F.3d. 1006, 1019 (1st Cir. 1999) (publication called "County Comps" admitted under Fed. R. Evid. 803(17) as evidence of value, because it was monthly publication of properties sold and listed generally used and relied upon by appraisers.) However, this may give rise to

authentication issues if the testimony is coming from a debtor, who may not have regular access to MLS records.[3] The County Comps publication in *U.S. v Cassiere* was, in fact, authenticated by the operating manager of that publication. *Id*. at 1019. Another alternative would be to rely on other sources, such as the values listed in county tax records which may or may not qualify as a public record under Fed. R. Evid. 803(8) or as a record that affects and interest in property under 803(14) and (15). The debtor could potentially authenticate those records by testifying as to how she obtained the tax record—that is, entering her address on county's tax website, etc.

It is unlikely that any other hearsay exceptions would apply to *Zillow* valuations, but it has been attempted in at least one case. In *In re Tabor*, 583 B.R. 155 (Bankr. N.D. Ill. 2018), chapter 13 debtor's counsel attempted to skirt the hearsay rules by introducing Zillow information—not for the truth of the matter asserted—but to "show the process used when preparing the Debtor's Schedules," and thus excepted as a then-existing mental, emotional or physical condition under Fed. R. Evid. 803(3).[4] While it is unclear whether the *Tabor* court permitted the Zillow printout for purposes other than value (there appears to be a typographical error in the reported decision), the court expressly declined to admit the Zillow printouts for establishing value, deeming them to be hearsay for that purposes. *In re Tabor* 583 B.R. at 169. An important

[3] Fed. R. Evid. 901, *Authenticating or Identifying Evidence*, provides that: "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Fed. R. Evid. 901(a). Several non-exclusive examples are listed under Fed. R. Evid. 901(b), including testimony of a witness with knowledge (2) non-expert opinion about writing; (3) comparison by an expert witness or trier of fact, (4) distinctive characteristics and the like, (5) opinion about a voice, (6) evidence about a telephone conversation, (7) evidence about public records, (8) evidence about ancient documents or data compilations, (9) evidence about a process or system and (10) methods provided by statute or rule. For a discussion of authentication, *see Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773-774 (9th Cir. 2002).

[4] The debtor in *Tabor* argued, in the alternative, that the Zillow printouts may be admitted for the truth of the valuations of the debtor's properties as the debtor could use them as the owner of the properties in testifying as to their value.

distinction is that this case did not involve a debtor's testimony as to value; rather the issue here was alleged misconduct by the debtor's attorney accused of filing Chapter 13 schedules and plans with misstated property values. *Id*.

B. ***Proper and Helpful Use of Expert Witness Testimony***

1. Experts used in what ways:

- Valuation expert: *See, e.g.*, *Alberts v. HCA, Inc.*, 496 B.R. 1, 16-18 (D.D.C. 2013).
- Expert on fee awards in consumer litigation: *See, e.g.*, *In re Martinez v. Law Offices of David Stern, P.A.*, 266 B.R. 523 (S.D. Fla. 2001).
- Mortgage industry expert: *See, e.g., Randleman v. Fidelity Nat. Title Ins. Co.*, 2009 WL 1514595, N.D. Ohio, May 29, 2009.
- Mortgage servicer payment application: *See, e.g., Martinez v. Weyerhaeuser Mortg. Co.*, 959 F.Supp. 1511 (S.D. Fla. 1996).
- Lost profits: *See, e.g., Sargon Enters., Inc. v. Univ. of S. Cal.*, 55 Cal. 4th 747 (2012).

2. How does a judge treat expert testimony?

Fed. R. of Evid. 702, made applicable to bankruptcy proceedings through Fed. R. of Bank. Pro. 9017,[5] governs the admissibility of expert testimony. Rule 702 provides as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

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[5] Fed. R. Civ. P. 26(a)(2)—which governs disclosures relating to expert testimony—applies automatically in adversary proceedings but does not apply in a contested matter unless the court "directs otherwise." *See* Fed. R. Bankr. P. 9014(c). Therefore, if expert testimony is likely in a contested matter, the best practice would be to stipulate as to expert disclosures or seek a court order that Rule 26(a)(2) applies. A third option is to serve discovery requests as to the opposition's expert.

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

In applying Rule 702, the Court is a "gatekeeper" charged with determining whether proffered testimony meets the requirements of Rule 702 by a preponderance of the evidence. *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 592 & n. 10, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) ("*Daubert I* "). The Court must first determine that the witness is qualified by special knowledge as an expert in the relevant area of expertise, then scrutinize the proffered expert testimony to assure that the expert had sufficient data, used reliable scientific methods, and applied those methods to the data in a reliable way. Finally, the Court must determine if the proffered expert testimony is helpful to the trier of fact. *See, e.g., In re Silicone Gel Breast Implants Prods. Liab. Litig.,* 318 F.Supp.2d 879, 889–93 (C.D. Cal. 2004). It is the burden of the party proffering the expert testimony who bears the burden of establishing by a preponderance of the evidence that the testimony satisfies the requirements of Rule 702. *Daubert I,* 509 U.S. at 593 n. 10, 113 S. Ct. 2786 (citation omitted).

Several evidentiary guidelines have developed to assist the court in its role as gatekeeper of expert testimony. "As a general rule, an expert's testimony on issues of law is inadmissible." *United States v. Bilzerian, 926 F.2d 1285, 1294* (2d Cir. 1991). *See also Marx & Co., Inc. v. Diners' Club, Inc., 550 F.2d 505, 510*(2d Cir. 1977) *(*"The special legal knowledge of the judge makes the witness' testimony superfluous.") Second, a bankruptcy court should not

admit into evidence an expert report that serves as a mere "conduit" for hearsay, because "the job[] of judging [the hearsay] witnesses' credibility and drawing inferences from their testimony belongs to the factfinder." *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013) (affirming exclusion of expert report "undergirded by hearsay statements"). "Although the Fed. R. Evid. 703 allows experts some leeway with respect to hearsay evidence, a party is not permitted to call an expert for the purpose of introducing otherwise inadmissible hearsay evidence as the basis of the expert's testimony. *Id*. Finally, a bankruptcy court will not allow an expert to offer "'factual narratives and interpretations of conduct or views as to the motivation of parties. *Weisfelner v. Blavatnick (In re Lyondell Chem. Co.),* 2016 WL 5900154, *3 (Bankr. S.D.N.Y Oct. 11, 2016) (quoting *In re Rezulin Prod. Liab. Litig., 309 F. Supp. 2d 531, 541* (S.D.N.Y. 2004)).

In acting as gatekeeper, courts have broad leeway in calling balls and strikes. In the context of a valuation, they are not bound to select the valuation of one expert over the other, especially when the valuation is not supported by the evidence. *See In re Diamond Beach, VP, LP*, 551 B.R. 590, 610 (Tex. S.D. 2016). In a majority of cases, bankruptcy court judges have broad discretion to determine value independent of any one expert's opinion. *See Alberts v. HCA, Inc*., 496 B.R. 1, 16-18 (D.D.C. 2013) (stating that "[t]he role of a bankruptcy court judge is not simply to pick which expert the judge likes most and then credit that expert's testimony fully. He may decide to credit or discredit, in whole or in part, the testimony of any expert witness, and decide the case on the evidence."). *Alberts v. HCA, Inc*., 496 B.R. at 18. In *Alberts*, the court found that "[b]ankruptcy judges, acting as factfinders, are free to credit or disregard portions of expert

testimony without subjecting those decisions to *de novo* review." *Id*. at 13 (citing *In re Exide Tech.*, 303 B.R. 48 (Bankr. D. Del. 2003)).

When a bankruptcy judge rejects the opinions of both sides' experts because they are not supported by the evidence—and instead derives a separate opinion on value not based on any one expert's opinion, the parties often argue on appeal that the judge has "usurped" the role of the expert witness. *See Alberts v. HCA, Inc*., 496 B.R. at 16. Less accusatory variations of this argument include: (a) the trial court should have selected one of the expert opinions, (b) that the court "did not base its valuation on the evidence at trial," and (c) that the court's valuation "significantly departed from the range of expert testimony offered at trial." *In re Diamond Beach, VP, LP*, 551 B.R. at 599. These arguments are generally held to be without merit, as it is well within the role of the bankruptcy court as gatekeeper to "disregard expert testimony that [the bankruptcy court judge] d[oes] not find supported by the record ... [is] acting within his role as fact–finder, not usurping the role of expert witness." *Alberts v. HCA, Inc*., 496 B.R. at 17. As stated, the court may credit or discredit all or a portion of each expert's testimony, and decide the case based on the evidence. *Id. at* 18. Other cases following this approach include *In re Grind Coffee & Nosh, LLC*, No. 11–50011–KMS, 2011 WL 1301357, at *6 (Bankr. S.D. Miss. Apr. 4, 2011) (citing *Patterson v. LJR Invs., LLC* (*In re Patterson*), 375 B.R. 135, 144 (Bankr. E.D. Pa. 2007)). "A bankruptcy court is not bound by valuation opinions or reports submitted by appraisers, and may form its own opinion as to the value of property in bankruptcy proceedings." *In re Barbieri*, No. 00–22274–478, 2009 WL 5216963, at *10 (Bankr. E.D.N.Y. Dec. 29, 2009); *In re Smith*, 267 B.R. 568, 572–74 (Bankr. S.D. Ohio 2001)). "The Court may accept an appraisal in its entirety or may choose to give weight only to those portions of an appraisal that assist the Court in its

determination." *Id*. at *6 (citing *In re Brown*, 289 B.R. 235, 238 (Bankr. M.D. Fla.2003)). "[W]hen competing appraisals are submitted, the court is required to consider portions of each to arrive at what it believes to be a realistic market value for the property." *Id*. at *6 (quoting *In re Belmont Realty Corp.*, 113 B.R. 118, 121 (Bankr. D. R.I. 1990)).

In *In re Diamond Beach*, the bankruptcy court rejected the cost-approach valuations of "land plus amenities" of a yet unbuilt Phase II beach resort proposed by each side's expert witness, and instead derived his own value based on a "modified income approach," because the Fifth Circuit (and the Appraisal Institute on relevant points) had stated that the cost approach was inappropriate in valuing non-fee simple elements—that is, the right to use the amenities in Phase I but with no ownership of same. *In re Diamond Beach, VP, LP*, 551 B.R. at 608.

Discussion Cases:

In re Patterson, 375 B.R. 135 (Bankr. E.D. Pa. 2007).

In re Smith 267 B.R. 568, 572–573 (Bankr. S.D. Ohio 2001).

3. What is the role of the bankruptcy court as a gatekeeper on expert testimony?

Many cases turn on the Court's determination under Rule 702(b)—the determination that the expert's testimony is based on reliable data and methodology. The court must be "certain that an expert ... employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999); *see also Daubert v. Merrell Dow Pharms., Inc.,* 43 F.3d 1311, 1316 (9th Cir. 1995) ("*Daubert II*") (stating that *Daubert I* requires federal courts to "satisfy themselves that scientific evidence meets a certain standard of reliability" beyond "the expert's bald assertion of validity"). The party presenting the expert

testimony "must show that the expert's findings are based on sound science" by providing "objective, independent validation of the expert's methodology." *Daubert II,* 43 F.3d at 1316. "[T]he test of reliability is flexible" and may include specific factors mentioned in *Daubert I* and other decisions, but the court has "broad latitude" in applying factors it deems appropriate to determine reliability of the expert. *Kumho,* 526 U.S. at 141–42, 119 S. Ct. 1167. Some factors that the court may consider are: (a) general acceptance of the method in the scientific community; (b) whether the method has been subject to publication or peer review; (c) whether the known or potential error rate is acceptable; (d) whether the testimony is based on independent research or prepared specifically for litigation; and (e) whether the expert points to an objective source to show that the expert has followed the scientific method.[6] *See Daubert II,* 43 F.3d at 1316–19. In *Kumho Tire Co. v. Carmichael* 526 U.S. 137 (1999), the Supreme Court clarified that the *Daubert* factors may apply to non-scientific testimony, meaning "the testimony of engineers and other experts who are not scientists." The circumstances present in each case will determine which factors the court should consider in making its determination. *Id.* at 150, 119 S. Ct. 1167.

In *Sargon Enters., Inc. v. Univ. of S. Cal.*, 55 Cal. 4th 747 (2012), the trial court excluded the testimony of plaintiff's expert on lost profits because that testimony was unduly speculative and not based on the factual evidence presented at trial. In this case, a small dental implant company, which had developed and patented a revolutionary single stage dental implant, sued the University of Southern California for breach of contract, alleging that the university failed to

[6] The *Daubert* standard replaced the *Frye* "general acceptance" standard in federal courts and most state courts. *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923) (the method by which the evidence was obtained was generally accepted by experts in that particular field.)

complete clinical tests of plaintiff's product. Plaintiff alleged that the university's failure to run clinical trials prevented plaintiff from becoming a worldwide leader in the dental implant industry, resulting in damages from $200 million to $1 billion. *Sargon Enters., Inc. v. Univ. of S. Cal.*, 55 Cal. 4th at 753. In rejecting the testimony of the Sargon's expert, the court found the "market share approach" acceptable, but found that the expert's opinion on market share was "not based on actual historical financial results or comparisons to similar companies and, therefore, is not based on matter of a type an expert may reasonably rely." *Id. at* 623-624. The expert's flaw was that he compared the plaintiff to industry leaders, who already had significant market shares, instead of comparing plaintiff to similarly situated start-up companies. In reversing the appellate court and reinstating the trial court's exclusion of the expert testimony, the Supreme Court stated that the "trial court's preliminary determination whether the expert opinion is founded on sound logic is not a decision on its persuasiveness." *Id. at* 772. The Court concluded that, although the market share approach may be proper in the right type of case, it was within the trial court's discretion to exclude expert testimony as "not relevant to the measure of lost profit damages" when the testimony is not based on evidence "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates…" *Id. at* 776.

Discussion Cases:

Sargon Enters., Inc. v. Univ. of S. Cal., 55 Cal. 4th 747 (2012).

In re Diamond Beach, VP, LP, 551 B.R. 590, 610 (Tex. S.D. 2016).

Randleman v. Fidelity Nat. Title Ins. Co., 2009 WL 1514595, (N.D. Ohio, May 29, 2009).

4. Should the bankruptcy court exclude an expert witness under Federal Rule of Evidence 615?

Fed. R. Evid. 615 provides as follows:

> At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:
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> **(a)** a party who is a natural person;
>
> **(b)** an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
>
> **(c)** a person whose presence a party shows to be essential to presenting the party's claim or defense; or
>
> **(d)** a person authorized by statute to be present.

Fed. R. Evid. 615.

Generally, the decision whether to permit an expert witness to be present for the testimony of other witnesses is within the discretion of the trial court. *Morvant v. Construction Aggregates Corp.,* 570 F.2d 626, 630 (6th Cir. 1978) (Court held that "where a party seeks to except an expert witness from exclusion under Rule 615 on the basis that he needs to hear firsthand the testimony of the witnesses, the decision whether to permit him to remain is within the discretion of the trial judge, and should not normally be disturbed on appeal."). *Morvant,* 570 F.2d 630. *Morvant* and other cases have found that Fed. R. Evid. 703, which provides the bases of expert testimony, does not provide for the automatic exemption from sequestration for experts under Rule 615. *Id. at* 630. *See also Opus v. Heritage Park, Inc*., 91 F.3d 625, 629 (4th Cir. 1996). In this situation, it would perhaps be appropriate for a party to move that Rule 615 does not apply on the basis that the expert's presence is essential to a party's claim or defense

under Fed. R. Evid. 615(c).[7] Unless the expert witness is also a fact witness, it is not likely that the expert witness will be excluded. The *Morvant* court "perceive[d] little, if any, reason for sequestering a witness who is to testify in an expert capacity only and not to the facts of the case." *Morvant v. Construction Aggregates Corp.,* 570 F.2d at 629. *See also Stryker Corp. v. Ridgeway*, 2016 WL 6583544, W.D. Mich., Jan. 25, 2016.

Conversely, *Mayo v. Tri-Bell Industries, Inc*., 787 F.2d 1007 (5th Cir. Tex. 1986), ruled that a prior version of Fed. R. Evid. 703 *does* imply that experts are automatically exempted from sequestration, because Fed. R. Evid. 703 provides that the expert may base his opinion on data obtained "at or before the hearing." *Mayo v. Tri-Bell Industries, Inc*., 787 F.2d at 1013. The *Mayo* court continued: "[b]ecause the experts were not witnesses whose recollections might have been colored by accounts of prior witnesses, there was no prejudice." Id., citing *Trans World Metals, Inc. v. Southwire Co.,* 769 F.2d 902, 910–11 (2d Cir. 1985). Although Fed. R. Evid. 703 was amended in 2011 and the "at or before the hearing" language was removed, the Committee Notes for the 2011 Amendment state that the changes were "stylistic only," and that there is "no intent to change any result in any ruling on evidence admissibility."

The 9th Circuit appears to follow the *Morvant* line of cases in not finding an automatic exemption for experts under Rule 615, but freely exempting experts from sequestration upon a reasonable showing by counsel as to the essentialness of the expert. *See, e.g.*, *United States v. Seschillie*, 310 F.3d 1208, 1215 (9th Cir. 2002) (court found that trial court abused its discretion in

[7] "The Advisory Committee notes to Rule 615 specify that this exception contemplates 'an expert needed to advise counsel in the management of litigation.'" *Jeung v. McKrow*, 264 F. Supp. 2d 557, 574 (E.D. Mich. 2003)(citing Fed. R. Evid. 615(3) Advisory Committee notes). The Sixth Circuit has stated that "where a fair showing has been made that the [presence of an] expert witness is in fact required for the management of the case, and that is made clear to the trial court, we believe that the trial court is bound to accept any reasonable, substantiated representation to this effect by counsel." *Morvant v. Construction Aggregates Corp.,* 570 F.2d at 630.

sua sponte excluding expert witness upon a fair showing by counsel that expert was essential to presentation of case.)

Discussion Cases:

Mayo v. Tri-Bell Industries, Inc., 787 F.2d 1007 (5th Cir. Tex. 1986).

C. *Confidentially Speaking*.

When does the attorney-client privilege extend to non-clients? If a caretaker joins the client and attorney in an initial consultation, can the opposing side seek otherwise privileged information from the caretaker? What if the client is a child and the parent attends the meeting? What about an accountant? A doctor? A priest?

The answer is: it depends. Because the third-party witness is not a client, allowing such a witness to attend a client meeting creates a risk that the attorney-client privilege will not extend to otherwise privileged communications.

In a federal case, the basis for any assertion of privilege is derived from Federal Rule of Evidence 501, which provides as follows:

> The common law--as interpreted by United States courts in the light of reason and experience--governs a claim of privilege unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.
>
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Fed. R. Evid. 501. Therefore, in a federal case in the context of a federal question, one must seek to justify a privilege under the common law as interpreted by the U.S. Courts, unless the U.S. Constitution, federal statute or Supreme Court rules otherwise speak on the issue. United State

Courts have considered the assertion of the marital privilege, the attorney-client privilege, the confessor-penitent privilege, and the doctor-patient privilege, although the precise boundaries of the privileges are continually being debated and redefined. *See, e.g., Upjohn Co. v. United States,* 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed. 2d 584 (1981) (rejecting "control group" test for attorney-client privilege in corporate context as too narrow); *United States v. Byrd,* 750 F.2d 585 (7th Cir. 1984) (holding that spousal testimonial privilege not assertable where the allegedly privileged communications occurred during a long-term separation).

Rule 501 is not restrictive; rather, it authorizes federal courts to define new privileges by interpreting "the principles of the common law … in light of reason and experience," and encourages courts to "continue the evolutionary development of testimonial privileges." *Trammel v. United States*, 445 U.S. 40, 47, 100 S.Ct. 906, 910 63 L.Ed. 2d 186 (U.S. 1980).

To the extent the matter at hand is a state law issue, state law privileges would be relevant, *e.g.* Nevada recognizes a marital communication privilege in N.R.S. 49.295.

Rule 1.14 of the American Bar Association's Model Rules of Professional Conduct provides guidance as to when privilege applies for clients who have diminished capacity to adequately consider legal decisions, including minors and those with mental impairments.[8] Rule 1.14 states that a lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with such clients, but concedes that it might not always be possible:

> [1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished

[8] California, as the last state to adopt the ABA Model Rules (in 2018), did not adopt Model Rule 1.14.

> capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

ABA Model Rule 1.14, Comment 1. The Comments to the Rule also contemplate how the attorney-client privilege is handled in this context. Comment 3 to Rule 1.14 speaks directly:

> ***The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege.*** Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

In the appropriate case, the attorney could seek the appointment of a guardian ad litem, conservator or guardian to protect the client's interest as provide in Model Rule 1.14(b), whether to protect attorney-client privilege or for other substantive reasons, but Comment 7 to the Rule provides significant leeway, stating that the decision as to whether seek appointment of a legal representative for a client is "a matter entrusted to the professional judgment of the lawyer." ABA Model Rule 1.14, Comment 7.

D. ***Authentication of Business Records***

Parties can introduce business records pursuant to a declaration rather than by live testimony: however, the business records declaration or affidavit must satisfy the substantive criteria set forth in Fed. R. Evid. 902(11) in order to lay a proper foundation for admission of the record. Fed. R. Evid. 803(6).

The business records exception is set forth in Fed. R. Evid. 803(6), which excludes from the rule against hearsay, regardless of whether the declarant is available as a witness:

> **(6)** ***Records of a Regularly Conducted Activity*****.** A record of an act, event, condition, 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)** the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evid. 803.

Fed. R. Evid. 803 was amended in 2000 to add a provision that, in lieu of testimony, the foundation for admissibility of a business record may be established by a certification that complies with rule Fed. R. Evid. 902 (11).

Fed. R. Evid. 902(11) provides that business records are self-authenticating and require no extrinsic evidence of authenticity in order to be admitted, if the following criteria are met:

> **(11)** ***Certified Domestic Records of a Regularly Conducted Activity*****.** The 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.

Fed. R. Evid. 902.[9]

The Committee Notes to the 2000 Amendment state that the "foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses." Prior to the amendment, courts generally required foundation witnesses to testify. *See, e.g., Tongil Co., Ltd. v. Hyundai Merchant Marine Corp*., 968 F.2d 999(9th Cir. 1992) (reversing a judgment based on business records where a qualified person filed an affidavit but did not testify). As the Committee Notes point out, "[p]rotections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases." Fed. R. Evid. 803 Committee Notes on Rules – 2000.

As stated in *Rambus, Inc. v. Infineon Techs., AG*, 348 F. Supp. 2d 698, 699-701 (E.D. Va. 2004), the theory behind the business records exception is that "[r]eports and documents prepared in the ordinary course of business are generally presumed to be reliable and trustworthy." *Rambus*, 348 F. Supp. at 702, quoting *Certain Underwriters at Lloyd's, London v. Sinkovich,* 232 F.3d 200, 204–05 (4th Cir. 2000). Business records are considered trustworthy because "businesses depend on such records to conduct their own affairs; accordingly, the employees who generate them have a strong motive to be accurate and none to be deceitful" and secondly, because "routine and habitual patterns of creation lend reliability to business records." *Id.* at 205. Courts should consider "the character of the records and the earmarks of reliability … from their source and origin and the nature of their compilation" in determining

[9] Fed. R. Evid. 902(12) states that, in a civil case, an original or copy of foreign records may qualify as business records if it meets the requirements of Fed. R. Evid. 902(11) with the difference that the certification must be signed in a manner that would subject the maker to criminal penalty in which the certification is signed.

admissibility. *Rambus*, 348 F. Supp. at 702 (quoting *Palmer v. Hoffman*, 318 U.S. 109, 114, 63 S.Ct. 477, 87 L. Ed. 645 (1943)).

In *Rambus,* the plaintiff sought to introduce over 500,000 pages of documents that were produced by third-parties pursuant to subpoenas issued by both the Federal Trade Commission ("FTC") and plaintiff in a related FTC proceeding. Plaintiff offered "authenticating" declarations under Fed. R. Evid. 902(11) in an effort to have them admitted. Defendant opposed the admission of the records on several grounds, including that the declarations failed to meet the specific requirements of Fed. R. Evid. 902(11) and 703(6), and that no foundation had been laid (…the documents were "untethered to any witness testimony.") *Id*. at 700.

In throwing out the declarations, the court in *Rambus* found that many of the declarations failed to make any reference to the declarants knowledge, or even awareness of the record-keeping practices of the third-party company that produced the documents, and therefore these declarations failed under the first requirement of Rule 902(11), that the declaration be made by a custodian or qualified witness. *Id*. at 703. Other declarations purported to be made by custodians of the records but did not outline that they had knowledge of their company's record keeping systems. *Id*.

As for the second requirement of Rule 902(11)—whether the record was made at or near the time of occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters—six of the declarations failed to include such a statement, and therefore failed under this requirement. *Id*.

Only one declaration failed to satisfy the third requirement of 902(11): that the records be kept in the regularly conducted activity of the producing party's business. The court allowed

linguistic variations on this requirement, permitted statements that the record "was maintained in the ordinary course of business." *Id*. at 704.

For the final requirement-- that it was the regular practice of a "regularly conducted activity" to make and keep records of the type presented, the *Rambus* court emphasized that it must be the regular practice of the business, not the custodian, to make and keep such records. *Id*. at 705, *citing United States v. Freidin*, 849 F.2d 716, 720-21 (2nd Cir. 1998). Other courts have drawn similar distinctions. *See Pierce v. Atchison T. & S.F. Ry.,* 110 F.3d 431, 444 (7th Cir. 1997); *Monotype Corp. PLC v. Inter. Typeface Corp.,* 43 F.3d 443, 450 (9th Cir. 1994); *O'Malley v. U.S. Fid. & Guar. Co.,* 776 F.2d 494, 500 (5th Cir. 1985). The court in *Rambus* found that none of the fourteen affidavits satisfied the final requirement of Rule 902(11), by either failing to state the required language, or by specifying that it was the employee's regular practice (and not the company's regular practice) to make and keep the proffered records.

As a final point in the *Rambus* case, the court found that many of the proffered records were not the records of that company. Rule 902(11) does not require that the documents to have been prepared by the company that has custody of them, as long as they were created in the regular course of *some* entity's business. *Id*. at 706, referencing 5 Weinstein's Federal Evidence § 803.08[8][a]). The caveat, however, as Weinstein points out, is that because Rule 902(11) contains the same requirements as Rule 803(6), the declaration must demonstrate a chain of custody and communication for each participant that made or kept the record as a business record. *Id*. at 706-707. As to the declarations in *Rambus* which referenced documents made or kept by an outsider/third party, none of those declarations established a chain of

custody/communication as to the documents proffered, and therefore those declarations failed. *Id*.

A similar issue of custody arose in *Smith v. Litchford & Christopher, P.A. (In re Bay Vista of Va., Inc.*) 428 B.R. 198, 212, 214-215 (Bankr. E.D. Va. 2010), where a bankruptcy court refused to admit under the business records exception documents found by the trustee among the debtor's business files. The trustee was unable to meet his burden under Fed. R. Evid. 602 because he lacked personal knowledge to authenticate the documents and could not show he was the custodian of such records. *Id*. at 214-215. As an additional complicating factor for the trustee, the documents did not appear to have been drafted by the debtor, but by third-parties who presumably sent the documents to the debtor. The trustee was also unable to satisfy the last two requirements of 803(6): that the documents were kept in the course of a regularly conducted business activity and that it was the regular practice of the debtor's business activity to make the records. Therefore, the documents were not admissible. *Id*.

An interesting complication also arises in the context of authenticating e-mails. "An e-mail created within a business entity does not, for that reason alone, satisfy the business records exception of the hearsay rule." *Morisseau v. DLA Piper*, 532 F. Supp. 2d 595, 621 n.163 (S.D.N.Y. 2008) (citing Fed. R. Evid. 803(6)). "[I]t is not enough to say that as a general business matter, most companies receive and send emails as part of their business model." *In re Oil Spill,* No. MDL 2179, 2012 WL 85447, at *3 (E.D. La. Jan. 11, 2012). Courts apply a similar approach to emails as they do to any other business memoranda. *See Penberg v. HealthBridge Mgmt.*, 823 F. Supp. 2d 166, 187 (E.D.N.Y. 2011). Each email must satisfy each element of the Rule 803(6) test. To be admissible, an email must have been written "at or near the time" of the occurrence of the facts

described in the email. Fed. R. Evid. 803(6). Importantly, Rule 803(6) requires both that the activity recorded in the email be a "regularly conducted" business activity, *and* that sending the email be a regular part of that activity. *Id.* The email record must be "regularly made in furtherance of the employer's needs." *Penberg*, 623 F. Supp. 2d at 187. The party offering the document into evidence must provide a custodial witness to prove "all" of the conditions required by Rule 803(6). *In re Oil Spill,* 2012 WL 85447, at *3. Finally, the party objecting to admission of the documents may show that despite satisfaction of the other elements, the emails "indicate a lack of trustworthiness." Fed. R. Evid. 803(6).