AMERICAN BANKRUPTCY INSTITUTE

2017 Delaware Views from the Bench

Mid-Level Track

Time for Trial: Presenting Evidence in Contested Matters Before Bankruptcy Courts

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DELAWARE VIEWS FROM THE BENCH: 2017

"LAYING AND ATTACKING EVIDENTIARY FOUNDATIONS IN A CONTESTED MATTER"[1]

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[1] For purposes of these written materials, the defined word "Code" refers to the United States Bankruptcy Code, 11 U.S.C. 101-1532. The defined term "F.R.B.P." refers to the Federal Rules of Bankruptcy Procedure. The defined term "F.R.C.P." refers to the Federal Rules of Civil Procedure. The defined term "F.R.E." refers to the Federal Rules of Evidence. The defined term "Local Rule" refers to the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware.

I. Laying the Foundation: Contested Matters

Disputes that arise in bankruptcy cases can generally be divided into three categories: (i) administrative matters; (ii) adversary matters; and (iii) contested matters. This presentation focuses on laying an evidentiary foundation in a contested matter before a bankruptcy court.

Contested matters are governed by F.R.B.P. 9014.

Rule 9014 Contested Matters

> (a) *Motion*. In a contested matter not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court directs otherwise.
>
> * * * * *

Contested matters do not qualify as adversary proceedings, as they are not included in the scope of F.R.B.P. 7001 which deals with adversary proceedings. However, F.R.B.P. 9014(d) provides that testimony of witnesses with respect to disputed material factual issues in contested matters shall be taken in the same manner as testimony in an adversary proceeding.

> (d) *Testimony of witnesses*. Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding.
>
> (e) *Attendance of witnesses*. The court shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify.

Local Rule 9013-1(d) provides "***all hearings on a contested matter will be an evidentiary hearing*** at which witnesses will be required to testify in person in Court with respect to any factual issue in dispute unless these Rules, the parties or the Court provides otherwise." (Emphasis added.)

Types of contested matters governed by F.R.B.P. 9014 include:

- Dismissal or conversion of a bankruptcy case (F.R.B.P. 1017(f)(1));
- Objections to confirmation of a chapter 11 plan (F.R.B.P.3020(b));
- Relief from the automatic stay, (F.R.B.P. 4001(a));

- Prohibiting or conditioning use, sale, or lease of property (F.R.B.P. 4001(a));
- Use of cash collateral (F.R.B.P. 4001(b));
- Obtaining credit (F.R.B.P. 4001(c));
- Avoidance of a lien under Section 522(f) (F.R.B.P. 4003(d));
- Assumption or rejection of an executory contract or unexpired lease (F.R.B.P. 6006);
- Approval or disallowance of a disclosure statement, including objections thereto (F.R.B.P. 3017 and 3017.1);
- Acceptance or rejection of a plan (F.R.B.P. 3018);
- Modification of an accepted plan (F.R.B.P. 3019);
- Objections to a claim (F.R.B.P. 3007);
- Reconsideration of a claim (F.R.B.P. 3008);
- Valuation of a security (F.R.B.P. 3012);
- Classification of claims or interests (F.R.B.P. 3013);
- Grant or denial of a discharge (F.R.B.P. 4004);
- Motion to reopen case (F.R.B.P. 5010);
- Agreement concerning coordination of proceedings in Chapter 15 cases (F.R.B.P. 5012);
- Proposed use, sale or lease of property (F.R.B.P. 6004(b));
- Objection to payment of professional fees (F.R.B.P. 2016); and
- Examination under F.R.B.P. 2004 (F.R.B.P. 2004).

Practice Pointer: never treat a contested matter as a "routine motion." Contested matters must be supported by evidence, either in favor of or against the relief requested. A thorough understanding of the Code, the F.R.B.P., the F.R.C.P., the Local Rules, the Judge's Courtroom Procedures and the F.R.E. are all essential to succeeding on a contested matter.

A. Evidence Defined

The Federal Rules of Evidence apply in bankruptcy proceedings. F.R.E. 101 provides :

> **(a) Scope.** These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in F.R.E. 1101.

Proceedings before a United States district court, bankruptcy court, magistrate judge, court of appeal, Court of Federal Claims and the district courts of Guam, the Virgin Islands and the Northern Mariana Islands are all identified in F.R.E. 1101 as courts to which the Federal Rules of Evidence apply.

So what is "evidence" – any species of proof, or probative matter, legally presented at the trial of an issue by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purposes of inducing belief in the minds of the court or jury as to their contention." BLACK'S LAW DICTIONARY, 555 (6th ed. 1990).

Evidence is testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.

Remember:

- **"Facts are stubborn things and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence."** ~ John Adams

- **Argument is not Evidence.** F.R.C.P. 43, made applicable to bankruptcy cases by Rule 9017, requires the testimony of witnesses to be taken under oath in open court.

- **Documents attached to pleadings and motions –** are not evidence unless formally admitted and received by the Court. (A careful practitioner should consider filing a Motion in Limine to exclude potential evidence included as part of a motion initiating a contested matter).

B. Types of Evidence

- **Real Evidence** – refers to a tangible object that is directly or indirectly related to the controversy – i.e., a key, jewelry, a computer.

- **Documentary Evidence –** refers to any evidence introduced at a trial in the form of documents. Although this term is most widely understood to mean writings on paper (such as an invoice, a contract or a will), the term includes any media by which information can be preserved.

- **Testimonial Evidence** – refers to evidence given by a witness under oath either orally in court or in writing in the form of a declaration.

- **Demonstrative Evidence –** refers to evidence that is addressed directly to the senses without intervention of testimony – such as charts, graphs, videotape, and computer animation, which illustrate related verbal testimony. Demonstrative evidence carries no independent probative value, and its primary purpose is to illustrate the testimony of a witness to help the factfinder understand difficult factual issues.

C. Foundation And The Predicates For The Admissibility Of Evidence

Evidentiary foundations must be established before any type of evidence can be admitted. **A piece of evidence is not admissible if a proper foundation is not made for its admission.**

Evidence is generally admissible if it is:

(i) Relevant (F.R.E. 401);

(ii) Authenticated (F.R.E. 901, 902); and

(iii) Not subject to exclusion.

Relevant Evidence: (F.R.E. 401 (a) and (b)) – To be admissible, evidence must be relevant in that "it has a tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." F.R.E. 401.

Concepts of relevancy are broadly interpreted. The Third Circuit has stated in noting the definition of relevant evidence for trial, "[u]nder Fed. R. Evid. 401 , 'relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Gibson v. Mayor of Wilmington*, 355 F.3d 215, 232 (3d Cir. 2004) (quoting F.R.E., 401). That court noted further that Rule 401 may not raise the standard high enough: "Rule 401 gives judges great freedom to admit evidence, it diminishes substantially their authority to exclude evidence as irrelevant." *Id*. (citations omitted).

F.R.E. 402 provides "relevant evidence is admissible unless any of the following provide otherwise: the United States Constitution; a federal statute; the Federal Rules of Evidence; or Other Rules prescribed by the Supreme Court. Irrelevant evidence is not admissible."

F.R.E. 403 provides "the Court may exclude relevant evidence if its 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."

For purposes *of exclusion* under F.R.E. 403 a party is not protected from all prejudice—**only unfair prejudice**. *See United States v. Bergrin*, 682 F.3d 261, 279 (3d Cir. 2012) ("It must always be remembered that *unfair* prejudice is what Rule 403 is meant to guard against . . . ."); *see also United States v. Cunningham*, 694 F.3d 372, 390 (3d Cir. 2012).

Note: Evidentiary rulings are reviewed for abuse of discretion and "'trial judge[s are] given very substantial discretion when striking a Rule 403 balance . . . [and] may not be reversed unless . . . arbitrary and irrational.'" *Hurley,* et al. *v. Atlantic City Police Dep't,* et al., 174 F.3d 95, 110 (3d Cir. 1999).

D. Authentication / Personal Knowledge

F.R.E. 901(a) provides: The requirement of authenticating or identifying an item of evidence is satisfied when the proponent produces "**evidence sufficient to support a finding that the item is what the proponent claims** . . . ."

The burden of proof for authentication is "slight." *U.S. v. Mebrtatu*, 543 Fed. Appx. 137, 140 (3d Cir. 2013); *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1985). "All that is required is a foundation from which the fact-finder could legitimately infer that the evidence is what the proponent claims it to be." *McQueeney*, 779 F.2d at 928 (citations omitted).

The standard for authentication does not require that no questions remain about the reliability of the evidence. *Id.* (citing *U.S. v. Goichman*, 547 F.2d 778, 784 (3d Cir. 1976) ("Once a prima facie case is made, the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence, not the court.")). Conclusive proof of a document's authenticity is not required, but merely a prima facie showing of some competent evidence to support the authenticity of the document. *United States v. Turner*, 718 F.3d 226, 232 (3d Cir. 2013) (internal citations omitted).

Circumstantial evidence may suffice to authenticate a document. *United States v. Isley*, 386 Fed. Appx. 117, 120 (3d Cir. 2010) ("This court has held that 'circumstantial evidence may . . . suffice to authenticate a document . . . [and that] [t]he burden of proof for authentication is slight . . . . [as] [a]ll that is required is a foundation from which the fact-finder could legitimately infer that the evidence is what the proponent claims it to be.'") (quoting *McQueeney v. Wilmington Trust Co.,* 779 F.2d 916, 928 (3d Cir. 1985)).

Raj Singh v. Mariner Post-Acute Network, Inc. (In re Mariner Post-Acute Network, Inc.), 2005 U.S. Dist. LEXIS 13673, *3 (D. Del. July 8, 2005), *aff'd* 2005 U.S. App.

LEXIS 25009 (3d Cir. Nov. 18, 2005) (affirming bankruptcy court's ruling where the bankruptcy court found "that the invoices [supporting a proof of claim] produced by [the claimant] were inadmissible because they were not authenticated under Federal Rule of Evidence 901(a).")

Fruehauf Trailer Corp. v. Gen. Bearing Corp. (In re Fruehauf Trailer Corp.), 2008 Bankr. LEXIS 823, *5-6 (Bankr. D. Del. March 27, 2008) (finding that copies of debtor's checks to plaintiff in preference action were "easily" authenticated under Rule 901(a) as "[t]he burden of proof for authenticity is slight.").

Self-Authenticating. Under F.R.E. 902, certain items of evidence are self-authenticating and require no extrinsic evidence of authenticity in order to be admitted. Self-authenticating evidence includes: domestic public documents that are sealed and signed; domestic public documents that are not sealed but are signed and certified; foreign public documents; certified copies of public records; official publications; newspapers and periodicals; acknowledged documents; commercial paper; presumptions under a federal statute; certified domestic records of a regularly conducted activity; and certified foreign records of a regularly conducted activity.

Competency of a Witness. A witness is presumed to be competent unless proven otherwise. F.R.E. 601. However, under F.R.E. 602 the witness must have personal knowledge of the matter, otherwise the witness is not competent to testify regarding the matter.

The court must decide any preliminary question about whether a witness is qualified under F.R.E. 401. Note: Experts witnesses may rely on inadmissible evidence in forming opinions. F.R.E. 703.

E. Best Evidence Rule. Contents of Writings, Recordings, and Photographs.

Rule 1003. Admissibility of Duplicates. A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Rule 1004. Admissibility of Other Evidence of Content. An original is not required and other evidence of the content of a writing, recording or photograph is admissible if:

> (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
>
> (b) an original cannot be obtained by any available judicial process;
>
> (c) the party against whom the original would be offered had control of the original; was at the time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
>
> (d) the writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Copies of Public Records to Prove Content. The proponent may use a copy to prove the content of an official record—or of a document that was recorded or filed in a public office as authorized by law—if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Rule 1006. Summaries to Prove Content. The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Rule 1007. Testimony or Statement of a Party to Prove Content. The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Rule 1008. Functions of the Court and Jury. Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines—in accordance with Rule 104(b)—any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

F. Key Questions Regarding the Admission of Evidence.

1. **Is the evidence relevant?** Does the proposed evidence make a fact that is of consequence to the action more or less probable than it would be without the evidence?

2. **Has the evidence been authenticated?** Has the proponent produced "evidence sufficient to support a finding that the electronic evidence is what the proponent claims?"

3. **Is the evidence hearsay?** Is the evidence offered to prove the truth of what it asserts? If so, does it satisfy a hearsay exception? Are confrontation rights implicated?

4. **Is the evidence a writing, recording, or photograph? Is it offered to prove the content?** If so, is it either the original or a duplicate (counterpart produced by the same impression as the original, or from same matrix, etc.) unless genuine questions of authenticity or fairness exist?

5. **What is the probative value of the evidence?** Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence? [Rule 403]

Practice Pointer: Always be prepared to explain the relevancy of your evidence and the issue to which the evidence relates.

II. Laying the Foundation: Admitting Evidence (the Easy Way)

A. Stipulation

Aa stipulation can facilitate the presentation of evidence without calling witnesses or presenting other proof. Black's Law Dictionary defines a stipulation as "the name given to any agreement made by the attorneys engaged on the opposite sides of a cause, regulating any matter incidental to the proceedings or trial, which falls within their jurisdiction." BLACK'S LAW DICTIONARY 1415 (6th ed. 1990).

Courts look with favor on stipulations because they save time and simplify the matters that must be resolved. Stipulations are voluntary, however, and courts may not require litigants to stipulate with the other side.

A valid stipulation is binding only on the parties who agree to it. Courts are usually bound by valid stipulations and are required to enforce them. *Rodriquez v. Senor Frog's de La Isla, Inc.* (642 F.3d 28, 35) (1st Cir. 2011) (court rejecting party's claim it could challenge a motion in limine ruling after a stipulation on the issue was later entered and read to the jury, "having freely stipulated to a key fact, [defendant] Senor Frog must now live with the consequences.")

Parties may stipulate to any matter concerning the rights or obligations of the parties. Litigants cannot, however, stipulate as to the validity or constitutionality of a statute or as to what the law is, because such issues must be determined by the court.

Litigants can also enter into agreements concerning the testimony an absent witness would give if he were present, and the stipulated facts can be used in evidence. Such evidentiary devices are used to simplify and expedite trials by dispensing with the need to prove uncontested factual issues.

> **Note: the astute practitioner should make sure that the evidence contained within a stipulation meets the threshold requirement of admissibility under the Federal Rules of Evidence – that is the evidence is relevant, authenticated and not subject to exclusion.**

B. Attorney's Proffer of a Witness's Direct Testimony

A bankruptcy courts often allow an attorney to present the direct testimony of a witness in either written or oral form, in lieu of a presenting the testimony through questions and answers. Such a presentation is routinely referred to as a "proffer."

Proffers are used in bankruptcy cases, especially contested matters, to streamline the hearing and the issues before the court. While neither the Federal Rule of Evidence nor the Federal Rules of Bankruptcy Procedure contain an express provision authorizing proffers, bankruptcy courts have allowed the use of a "proffer" when the witness is present to hear the oral proffer and is available for cross-examination and redirect testimony.

A proffer does not run afoul of F.R.C.P. 43, made applicable by Rule 9017, which provides a witness' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, the Federal Rules of Civil Procedure, or other rules adopted by the Supreme Court provide otherwise.

> **Note: the astute practitioner should make sure that the evidence contained within a proffer meets the threshold requirement of admissibility under the Federal Rules of Evidence – that is the evidence is relevant, authenticated and not subject to exclusion.**

C. Judicial Notice of Adjudicative Facts (F.R.E. 201)

Judicial notice of adjudicative facts is set forth in F.R.E. 201:

> (a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
>
> (b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> (1) is generally known within the trial court's territorial jurisdiction; or
>
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
>
> (c) Taking Notice. The court:
>
> (1) may take judicial notice on its own; or
>
> (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
>
> (d) Timing. The court may take judicial notice at any stage of the proceeding.
>
> (e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

Judicial notice is used to permit a court to enter into evidence a fact that is widely known or authoritative without requiring a party to lay a foundation and formally move the fact into evidence.

A court can only take judicial notice of an adjudicative fact, not a legal fact.

F.R.E. 201(c)(2) provides that the court "must take judicial notice if a party requests it and the court is supplied with the necessary information." F.R.E. 201(c)(2). *White v. New Century TRS Holdings, Inc. (In re New Century TRS Holdings, Inc.)* 502 B.R. 416 (Bankr. D. Del. 2013) (court taking judicial notice of certain information provided by the movant, but not taking notice of certain other information as a result of the movant's failure to provide the necessary information, any explanation of their request or they were not facts).

Judicial notice may be taken at any stage of a proceeding, including appeal. *Nantucket Inv. II v. Cal Fed. Bank (In Re Indian Palms Assocs.),* 61 F.3d 197, 204 (3d Cir. 1995) (affirming bankruptcy court's denial of motion to strike because it was appropriate for the court to take judicial notice of pleadings filed on the case's docket, even if the pleadings were not directly related to the contested matter at hand).

Additionally, "[i]n light of the fact that the court may take judicial notice of adjudicative facts on its own initiative, the Rule provides that the opportunity to be heard may occur after judicial notice has been taken." *Id.* at 206, n. 13.

Exemplar Delaware cases where the court took judicial notice of an adjudicative fact include:

> *In re LandSource Communities Development, LLC,* 485 B.R. 310 (Bankr. D. Del. 2013) (court taking judicial notice of its docket, citing F.R.E .201(b)).
>
> *In re Indian Palms Assoc., Ltd.*, 61 F.3d 197, 205 (3d Cir. 1995) (A court may take judicial notice of an adjudicative fact under F.R.E. 201 that is not subject to reasonable dispute "as long as it is not unfair to a party to do so and does not undermine the trial court's fact finding authority.").
>
> It is not unusual for a Court to take judicial notice of its docket. *See Meyers v. Herrernan*, 740 F.Supp.2d 637, 640 n. 4 (D. Del. 2010) ("The court may take judicial notice of documents from the docket of a bankruptcy proceeding."); *Official Comm. Of Asbestos Claimants v. Asbestos Prop. Damage Comm. (In re Federal-Mogul, Inc.)*, 330 B.R. 133, 136 (D. Del. 2005) (same); *In re Int'l Wireless Comm'n Holdings, Inc.*, , 1999 WL 33483582, *2 (Bankr. D. Del. 1999) (The court took judicial notice of the docket and claims register).
>
> In *PHP Liq., LLC v. Robbins (In re PHP Healthcare Corp.),* 128 Fed. Appx. 839, 844 (3d Cir. 2005), the Third Circuit took judicial notice of stock prices on the New York Stock Exchange.

In *Ahmed Amr v. Greenberg Traurig LLP (In re Syntax-Brillian Corp.)*, 2016 U.S. Dist. LEXIS 170522, *38, n. 21 (D. Del. Dec. 9, 2016), the court took judicial notice of letter from Trustee to Appellant.

In *Copley Press, Inc. v. Peregrine Sys. (In re Peregrine Sys.)*, 311 B.R. 679, 692 (D. Del. 2004), the court took judicial notice "of the existence and contents of the" bankruptcy case's docket, but "without making any determination regarding the truth of any facts represented therein." *See also Carr v. New Century TRS Holdings, Inc. (In re New Century TRS Holdings, Inc.)*, 2012 Bankr. LEXIS 9, *12 (Bankr. D. Del. Jan. 9, 2012) (taking judicial notice of "new evidence" but not making "determination about its admissibility or the truth").

Some plan confirmation orders also take judicial notice of all prior case proceedings, including documents filed on the case's docket and arguments made at hearings. *See*, *, In re Protostar Ltd*., 2010 Bankr. LEXIS 5186, *6 (Bankr. D. Del. Oct. 6, 2010) (MFW); *In re TLC Vision (USA) Corp.*, 2010 Bankr. LEXIS 3320, *7 (Bankr. D. Del. May 6, 2010) (KG); *In re Stallion Oilfield Servs. Ltd.*, 2010 Bankr. LEXIS 4500, *5 (Bankr. D. Del. Jan. 20, 2010) (BLS).

D. Admissions

There are two types of admissions: evidentiary admissions (i.e., admissions against interest and admission by a part opponent); and judicial admissions. Both can prove valuable in a contested matter.

1. Evidentiary Admissions – are statements made by a party, the party's agent, employee or authorized representative, in or out of court, that are typically used to contradict or otherwise impeach the party's current assertion. F.R.E. 801(d)(1)-(2). *See Fidelity & Deposit Co. of Md. v. Hudson United Bank*, 653 F.2d 766, 777 (3d Cir.1981) (a statement made by a party in connection with other litigation that is adverse to or inconsistent with its position in a pending proceeding is admissible as an evidentiary admission in the pending suit).

Evidentiary admissions are an exception to the hearsay rule. *Id.*.

Unlike judicial admissions, evidentiary admissions are not conclusive or binding on the trier of fact and may be considered as another item in evidence. *Kasbee v. Huntington Nat'l Bank (In re Kasbee),* 466 B.R. 719 (Bankr. W.D. Pa. 2010) (evidentiary admission is admissible but not conclusive)

Evidentiary admissions are subject to contradiction and explanation and are merely considered another item in evidence. A party may introduce superseded admissions into evidence to be considered as adverse evidentiary admissions by the factfinder. *In re Gruppo Antico, Inc.*, 359 B.R. 578, 587-88 (Bankr. D. Del.2007) (quoting *In re C.F. Foods, L.P.*, 265 B.R. 71, 87 (Bankr. E.D. Pa.2001)). Even the Debtors agree with the foregoing standard in their brief which summarizes how to apply the doctrine of judicial admissions, i.e., "statements contained in a party's pleadings are binding on that party and are considered judicial admissions unless the statements are withdrawn or amended." *See Brief in Support of Motion for Summary Judgment*, p. 3, Adversary Proceeding, Document No. 21.

2. Judicial Admissions – have been described as "a formal act, done in the course of judicial proceedings, which waives or dispenses with the production of evidence, by conceding for purposes of litigation that the proposition of fact alleged by the opponent is true." 4 John H. Wigmore, Wigmore on Evidence, note 14, Sec. 1058 at 27 (1981 & Supp. 1991).

A judicial admission conclusively concedes the truth of a fact alleged and relieves the opposing party of the need to introduce any further evidence on the admitted fact.

"Judicial admissions are concessions in pleadings or briefs that bind the party who makes them." *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 211 n. 20 (3d Cir.2006) citing *Parilla v. IAP Worldwide Serv., VI, Inc.*, 368 F.3d 269, 275 (3d Cir.2004) (finding that the plaintiff was bound because she "expressly conceded those facts in her complaint."), citing, *inter alia*, *Soo Line R. Co. v. St. Louis Southwestern Ry.*, 125 F.3d 481, 483 (7th Cir.1997) (noting the "well-settled rule that a party is bound by what it states in its pleadings"); *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir.1972) (noting that unequivocal "judicial admissions are binding for the purpose of the case in which the admissions are made[,] including appeals").

Judicial admissions commonly appear by way of: statements made by a party's counsel; stipulations, pleadings, statements in pretrial order, responses to requests for admission and written discovery, content of court orders, the Debtor's Schedules and Statement of Financial Affairs, and statements in a proof of claim.

To be conclusive and binding, a judicial admissions must be unequivocal. *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir.1972); *In re Teleglobe Comm'ns Corp.* 493 F.3d 345 (3d Cir. 2007). Similarly, they must be statements of fact that require evidentiary proof, not statements of legal theories. *Id.*

Admissions made in separate proceedings are non-binding and non-conclusive. *See In re SemCrude, LP*, 436 B.R, 317 (Bankr. D. Del, 2010) (quoting *In re Woskob,* 2001 U.S. Dist. LEXIS 13749*,* *10-11 (M.D. Pa. 2001) ("Even if the [statement in a prior bankruptcy petition] was a judicial admission, it was neither binding nor conclusive because it was a part of . . . a completely separate legal proceeding."), *vacated on other grounds*, 305 F.3d 177, 188 (3d. Cir. 2002)).

Judicial admissions are also restricted in scope to matters of fact. Conclusions of law are not judicial admissions. *See In re SemCrude, LP*, 436 B.R, 317 (Bankr. D. Del, 2010) (quoting *In re Pittsburgh Sports Assocs. Holding Co.,* 239 B.R. 75, 81 (Bankr. W.D. Pa. 1999), *vacated on other grounds*, 1999 Bankr. LEXIS 1872 (Bankr. W.D. Pa. 1999) ("judicial admissions are restricted in scope to matters of fact. . . . A legal conclusion — e.g., that a party was negligent or caused an injury — does not qualify [as] a judicial admission."))

An unequivocal judicial admission is binding on the party who made it which is to be distinguished from an evidentiary admission which is admissible but not conclusive. *In re Jordan*, 403 B.R. 339, 351 (Bankr.W.D. Pa.2009).

E. Remainder of or Related Writings (F.R.E. 106)

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time. F.R.E. 106.

III. Laying the Foundation: Common Rules that Exclude Evidence

A. Hearsay Rule

"Hearsay" is a statement that the declarant does not make while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." F.R.E. 801(c). (Hearsay is an out of court statement offered to prove the truth of the matter asserted.) Out-of-court statements not offered to prove the truth of the matter asserted are not hearsay.

Exceptions to the hearsay rule include, among other exceptions: present sense impression; excited utterance, recorded recollection, records of regularly conducted activity, absence of a record of a regularly conducted activity, public records, public record of vital statistics, absence of a public record, market reports and similar commercial publications, and statements in learned treatises, periodicals or pamphlets.

The Advisory Committee Notes exclude from this definition an offered statement whose significance

> lies solely in the fact that it was made [as] no issue is raised as to the truth of anything asserted …. The effect is to exclude from hearsay the entire category of " **[*12]** verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.

F.R.E. 801(c), Advisory Committee Notes.

Business Records Exception to Hearsay Rule: business and financial records are generally excepted from the hearsay rule. In *Hechinger Liquidation Trust v. Rager (In re Hechinger Inv. Co . of Delaware)*, 298 B.R. 240 (Bankr. D. Del. 2003). The court following F.R.E. 803(6) noted "[i]n order for the business record exception to apply, a party must lay a proper foundation through the testimony of a credible witness. After that, a document will be admitted if a party demonstrates that: (1) the record was made in the regular practice of the business, (2) kept in the regular course of the business, (3) made by a person with knowledge, and (4) made at or near the time of the event recorded."

The court in *In re Exide Technologies,* 340 B.R. 222 (Bankr. D. Del.2006), similarly noted that F.R.E. 803(6) does not require that foundation evidence for the admission of business records be provided by the actual custodian of the records. (Court citing *United States v. Console,* 13 F.3d 641, 656-657 (3d Cir. 1993); *United States v. Pelullo,* 964 F.2d 193, 201 (3d Cir. 1992)). Rather, "other qualified witnesses" are permitted to lay a foundation and those whom may fall within this rubric is broad. *See Console,* 13 F.3d at 657; *Pelullo,* 964 F.2d at 201. "Indeed, a qualified witness need only have a familiarity with a business' record-keeping practices and be able to attest that: (1) the declarant in the records had personal knowledge to make accurate statements; (2) the declarant recorded the statements contemporaneously with the actions that were the subject of the reports; (3) the declarant made the record in the regular

course of the business activity; and (4) such records were regularly kept by the business." *See Console,* 13 F.3d at 657; *Pelullo,* 964 F.2d at 201.

In re Scoli, Case No. 12-10572*,* Sontchi, J., (Bankr. D. Del. Jan. 28, 2013), the court found, over the debtor's objection, that transcript of the section 341 meeting of creditors was not hearsay.

In *Lyn v. Transamerica Small Business Capital, Inc. (In re Lyn)*, 483 B.R. 440 (Bankr. D. Del. 2012), the court, quoting *Penthouse Media Grp. v. Guccione (In re Gen. Media, Inc.*), 335 B.R. 66, 71-72 (Bankr. S.D.N.Y. 2005), noted "[t]he Court may consider "materials outside of the pleadings to resolve any jurisdictional disputes, but cannot rely on conclusory or hearsay evidence.'"*Id.* at 449. *Compare, Syracuse v. Orion Refining Corp. (In re Orion Refining Corp.)* 397 B.R. 245 (Bankr. D. Del. 2008) (court concluded that declarant stated that she was the custodian of records and that the documents were business records, and court could consider the documents in the context of the motion for partial summary judgment) (citations omitted).

In *In re New Stream Secured Capital, Inc.*, Case No. 11-10753*,* Walrath, J., 2014 BL 160436 (Bankr. D. Del. June 10, 2014), the court permitted the affidavit of the debtor's former controller as the affidavit was based on the controller's personal knowledge.

In *In re Chao v. Lexington Healthcare Group, Inc. (In re Lexington Healthcare Group, Inc.)*, 335 B.R. 570 (Bankr. D. Del. 2005), the court sustained a trustee's objections to certain affidavits finding that "[w]hile the receiver is the custodian of the Debtors' records, it is not the custodian of the records of the Debtors' payroll company or Nationwide. Those records have not been authenticated." *See* F.R.E. 902(11). The affiants' testimony about the contents of those records is, therefore, inadmissible hearsay. *See* F.R.E. 802, 803(6).

In *In re Safety-Kleen Corp.,* 381 B.R. 119 (Bankr.D.Del 2008), the court refused to accept affidavits into evidence at a hearing on an objection to a proof of claim as the affiants did not appear in court to testify, and court concluded affidavits were hearsay.

In *In re Hayes Lemmerz International, Inc.*, 340 B.R. 461 (Bankr. D. Del. 2006) the court stated F.R.E. 801(d)(2)(D) provides an independent basis for admissibility of deposition testimony, and F.R.C.P. "32 is not the exclusive means by which depositions can be admitted" as evidence. The court adopted the testimony should not be excluded simply because the witness is available. *See Long Island Sav. Bank, F.S.B. v. United States,* 63 Fed. Cl. 157, 163-64 (Fed.Cl. 2004) (holding that F.R.E. 801(d)(2)(D) and F.R.C.P. 32 provide independent grounds for admissibility of deposition testimony); *Globe Sav. Bank, F.S.B. v. United States,* 61 Fed. Cl. 91, 95-96 (Fed.Cl. 2004) (same).

Witness's Prior Statements (F.R.E. 801(d)(1)(A) and (B)). A witness's prior inconsistent statement is not hearsay provided: (i) The witness testifies and is subject to cross-examination about the prior statement, and (ii) The statement was given under oath and is inconsistent with the declarant's testimony at trial. F.R.E. 801(d)(1)(A)

A witness's prior consistent statement is not hearsay provided: it is offered to dispute a charge (express or implied) that the declarant recently fabricated it or acted from a recent improper

influence or motive in so testifying; or it is offered to rehabilitate the declarant's credibility as a witness when attacked on another ground. F.R.E. 801(d)(1)(B)

Opposing Party's Statement (F.R.E. 801(d)(2)). An opposing party's statement is not hearsay if it is offered against the opposing party and the statement: (i) was made by the party in an individual or representative capacity; (ii) is one the party manifested that is adopted or believed to be true; (iii) was made by a person whom the party authorized to make a statement on the subject; (iv) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or (v) was made by the party's coconspirator during and in furtherance of the conspiracy. F.R.E. 801(d)(2)(A)-(E).

Recorded Recollection Is Not Hearsay (F.R.E. 803(5)). A record concerning a matter about which a witness once had personal knowledge but as to which the witness now has insufficient knowledge to testify is not hearsay provided the record can be shown to (i) have been made or adopted by the witness when it was fresh in the witness' memory; and (ii) to accurately reflect the witness's memory. If the recorded is admitted, it may be read into evidence but not received as an exhibit unless offered by the adverse party.

Residual Exception to Hearsay Rule (F.R.E. 807). A statement that does not fall within one of the enumerated hearsay exceptions in Rule 803 or 804 may nevertheless be admissible provided it has equivalent circumstantial guarantees of trustworthiness. Five conditions must be met to admit hearsay evidence under the residual exception of Rule 807: (i) There must be equivalent circumstantial guarantees of trustworthiness; (ii) It must be offered as evidence of a material fact; (iii) It must be more probative than other available evidence; (iv) Admittance of the evidence must serve the interests of justice; and (v) Reasonable notice of the intent to offer the statement and the substance of the statement must be provided to the opposing party before trial.

B. Compromise and Offers to Compromise (F.R.E. 408).

Evidence of an offer to compromise or attempting to compromise a claim, and conduct or statement made during compromise negotiations about the claim is not admissible to prove or disprove "the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or contradiction." F.R.E. 408(a).

The court may, however, admit this evidence for another purpose, such as proving a witness's bias or prejudice. F.R.E. 408(b).

In *Williams v. AT&T Corp. (In re Touch America Holdings, Inc.)*, Case No. 03-11915, 2015 BL 351653, Carey, J., (Bankr. D. Del. Oct. 26, 2015) the court noted F.R.E. 408 "does not create a discovery privilege but, rather, addresses whether evidence relating to settlement discussions are admissible at trial. *Sippel Dev. Co., Inc. v. Western Surety Co.*, 2007 BL 215528, 2007 U.S. Dist. LEXIS 27644 , 2007 WL 1115207 , *2 (W.D. Pa. Apr. 13, 2007). Moreover, F.R.E. 408 specifically allows settlement information to be used in asserting the bias or prejudice of a witness. F.R.E. 408(b).

C. Rule of Sequestration of Witnesses (F.R.E. 615)

At a party's request, the court **must** order witnesses excluded so that they cannot hear another witness's testimony. F.R.E. 615. The rule of exclusion of a witness does not apply to (i) a party who is a natural person; (ii) an officer or employee of a party that is not a natural person, after being designated as the party's representative; (iii) a person whose presence a party shows to be essential to presenting the party's claim or defense; or (iv) a person authorized by statute to be present.

IV. Laying the Foundation: Lay Opinion Testimony

A. Mode and Order of Examining Witnesses (F.R.E. 611)

Rule 611 governs the mode and order of examining witnesses, and permits the court to establish procedures intended to (i) facilitate the effective determination of the truth; (ii) avoid wasting time; and (iii) protect witnesses from harassment or undue embarrassment.[2] The rule also governs the scope of cross-examination, which should generally not go beyond the subject matter of the direct testimony and the use of leading questions, which is generally only permissible (i) on cross-examination and (ii) when examining a hostile witness, an adverse party, or a witness identified with an adverse party.[3]

In the bankruptcy context, courts most often invoke this rule when requiring that direct testimony be submitted in the form of a proffer and in limiting the time for trial of contested matters and adversary proceedings. Courts have held that requiring direct testimony to be submitted via written declarations, subject to cross-examination of the witness in court, is consistent with Rule 611 and does not violate litigants' due process rights.[4] The rule has also been invoked to bifurcate trials and alter the usual course of presentation of evidence.[5] For example, the rule has been invoked to require a claimant to present its case first in a hearing on an objection to the claim.[6] Rule 611 also provides a basis for excluding information as immaterial or irrelevant.[7]

B. Opinion Testimony by a Lay Witness (F.R.E. 701)

A lay witness (i.e., a witness that is not testifying as an expert) is only permitted to provide opinion testimony if the opinion is (i) rationally based on the witness's own perception; (ii) helpful to understanding the witness's testimony or determining a fact in issue; and (iii) not based on scientific, technical, or other specialized knowledge within the scope of expert testimony.[8]

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[2] FED. R. EVID. 611.

[3] *Id*.

[4] *In re Duc Doan*, 2007 WL 1535061, at *6 (9th Cir. B.A.P. Aug. 10, 2007); *In re Adair*, 965 F.2d 777, 779 (9th Cir. 1992).

[5] *See In re City of Bridgeport*, 128 B.R. 589, 591 (Bankr. D. Conn. 1991) (limiting parties to 26 hours each to present case at trial); *Spacco v. Bridgewater School Dept*., 739 F.Supp. 30, 33 (D. Mass. 1990) (exercising Rule 611(a) authority in bifurcating trial to hear mootness, justiciability arguments first).

[6] *In re Winn-Dixie Stores, Inc*., 418 B.R. 475, 476-77 (Bankr. M.D. Fla. 2009).

[7] *Sec. Investor Protection Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 2017 WL 2602332, at *5 (Bankr. S.D.N.Y. Jun. 15, 2017).

[8] FED. R. EVID. 701.

The first element is essentially a requirement that the opinion be predicated on a foundation of personal knowledge or observation as required by Rule 602.[9] For example, a witness may not opine that something smelled like dynamite unless it is sufficiently established that the witness actually knows what dynamite smells like.[10] The second element necessarily depends upon the facts of the case. For example, opinion testimony that is too speculative may not be helpful.[11] Moreover, lay opinion testimony is not helpful if it is merely an interpretation of clear statements, matters of common knowledge, or something the trier of fact is capable of determining for itself.[12] The third element is intended to ensure that litigants cannot evade the expert disclosure requirements by presenting expert testimony under the guise of a lay witness.[13] Thus, proponents of lay opinion testimony under Rule 701 should ensure that the testimony does not "exceed the scope of the [witness's] percipient knowledge and venture[] into more general expert testimony" based on scientific, technical, or other specialized knowledge.[14] And the "mere percipience of the witness to the facts on which he wishes to tender an opinion" does not automatically mean the testimony is lay, as opposed to expert, testimony.[15]

Rule 701 does not generally permit a lay witness to express an opinion "as to matters which are beyond the realm of common experience."[16] The type of evidence contemplated by Rule 701 generally relates 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 items that cannot be described factually in words apart from inferences.[17] Other examples include an opinion regarding a person's appearance or the apparent speed of a car.[18]

As an important caveat, Rule 701 does permit the owner of property to testify as to its value.[19] Courts routinely permit owners or officers of a business to testify as to the value or

[9] *Id*. at advisory committee's notes.

[10] 2 Barry Russell, *Bankruptcy Evidence Manual* § 701:1 (2015-2016).

[11] *See, e.g.*, *In re MarketXT Holdings, Corp*., 2011 WL 1422012, at *4 (Bankr. S.D.N.Y. Jan. 7, 2011) (holding that lay opinion regarding business's lost profits was too speculative to be helpful).

[12] *U.S. v. Haines*, 803 F.3d 713, 733 (5th Cir. 2015); *U.S. v. Gadson*, 763 F.3d 1189, 1207 (9th Cir. 2014).

[13] FED. R. EVID. 701 at advisory committee's notes; *In re Diet Drugs*, 2006 WL 3007497, at *2 (E.D. Pa. Oct. 5, 2006).

[14] *Humboldt Baykeeper v. Union Pac. R. Co*., 2010 WL 217990, at *1 (N.D. Cal. May 27, 2010).

[15] *Id*.

[16] *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1214 (10th Cir. 2011).

[17] *Gustafson v. Am. Fam. Mut. Ins. Co*., 2012 WL 5949572, at *2 (Bankr. D. Colo. Nov. 27, 2012) (quoting *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1214 (10th Cir. 2011)).

[18] *Diet Drugs*, 2006 WL 3007497, at *3.

[19] FED. R. EVID. 701 at advisory committee's notes; *Asplundh Mfg. Div. v. Benton Harbor Eng'*g, 57 F.3d 1190, 1196–98 (3d Cir. 1995) (listing testimony as to the value of one's property as "quintessential Rule 701 opinion testimony").

projected profits of the business without the necessity of qualifying the witness as a financial or valuation expert.[20] The basis for permitting such testimony is not experience, training, or specialized knowledge but rather the particularized knowledge the witness has by virtue of his or her position in and relationship to the business.[21] As a result, an officer might be permitted testify as to the proper EBITDA multiple for valuing the debtor's business.[22] Similarly, owners of real property may opine as to the value of the property without having to qualify the owner as an expert.[23] But courts will not permit lay opinion testimony by an owner regarding value where it extends beyond the witness's personal knowledge and experience as an owner of the company and requires the types of calculations, assumptions, and modeling used by experts.[24]

C. Competency (F.R.E. 601)

Rule 601 provides that "[e]very person is competent to be a witness" unless the rules provide otherwise.[25] The purpose of this rule is to eliminate all grounds for disqualification, including age, religious belief, mental incapacity, color of skin, conviction of a crime, and connection with the litigation as a party or interest person.[26] Substantive competency is generally addressed by Rule 602, which requires witnesses to testify based upon personal knowledge, and Rule 603, which requires witnesses to give an oath to testify truthfully.[27]

The rule contains a limited exception that, in a civil case, "state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision." Thus, in an adversary proceeding involving state law claims, the competency of a witness to testify regarding those claims is determined by reference to applicable state law.[28] This limited exception primarily concerns so-called "Dead Man's Statutes," state laws that prohibit an interest party from testifying regarding a transaction with a deceased person.[29]

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[20] *In re Biddiscombe Intern., L.L.C.*, 392 B.R. 909, 918-19 (Bankr. M.D. Fla. 2008).

[21] FED. R. EVID. 701 at advisory committee's note.

[22] *Biddiscombe*, 392 B.R. at 918-19.

[23] *In re Backenstoes*, 2012 WL 4793501, at *15 n.14 (M.D. Pa. Oct. 8, 2012).

[24] *In re MarketXT Holdings, Corp*., 2011 WL 1422012, at *3 (Bankr. S.D.N.Y. Jan. 7, 2011).

[25] FED. R. EVID. 601.

[26] *Id*. at 601 at advisory committee's notes.

[27] FED. R. EVID. 602, 603.

[28] *In re Diamond Furnishing Co., I*nc., 42 B.R. 638, 640 (Bankr. M.D. Pa. 1984).

[29] *Id*.; *see also* 2 Barry Russell, *Bankruptcy Evidence Manual* § 601:1 (2015-2016) (discussing exception).

D. Personal Knowledge (F.R.E. 602)

Rule 602 provides that a witness may only testify "if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter" about which he or she is testifying.[30] The rule specifically excludes expert testimony from the personal knowledge requirement, which is covered by Rule 703.[31] As a corollary to the hearsay rule, this rule requires that a witness's testimony be based on his or her own perception. Thus, courts define "personal knowledge" to mean "knowledge produced by the direct involvement of the senses."[32] If the witness did not personally experience the event about which he or she is testifying, the proper objection is lack of personal knowledge.[33] If a witness testifies that he or she was told of the event by another, the proper objection would be hearsay.[34]

In the bankruptcy context, this rule may be invoked to prevent a trustee from testifying as to events that occurred before his or her appointment. For example, courts have held that a trustee's testimony does not authenticate business records of the debtor that were created before the trustee's appointment where the trustee did not have personal knowledge of, and was not involved in preparing or maintaining, the documents.[35] The court held that "[t]he fact that the Trustee is the statutory success to the assets, liabilities and records of the Debtors does not provide the Trustee with the Debtors' personal knowledge of [the Debtors'] business operations or records . . . ."[36] Under these circumstances, the proper procedure is to subpoena a witness with knowledge of the debtor's business and records, such as a former employee, to authenticate and lay a proper foundation for the admission of the documents.[37]

E. Impeachment (F.R.E. 607)

Any party may attack a witness's credibility, including the party that called the witness.[38] The primary means for attacking a witness's credibility are (1) attacking the witness's

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[30] FED. R. EVID. 602.

[31] *Id*.; FED. R. EVID. 703 (permitting expert to express opinions based on facts of which he does not have personal knowledge).

[32] *In re Baron*, 2015 WL 6956664, at *10 (9th Cir. B.A.P. Nov. 10, 2015) (quoting *U.S. v. Lopez*, 762 F.3d 852, 863 (9th Cir. 2014)).

[33] *See* 2 Barry Russell, *Bankruptcy Evidence Manual* § 602:1 (2015-2016).

[34] *Id*.

[35] *Fisher v. Page*, 2002 WL 31749262, at *6-7 (N.D. Ill. Dec. 3, 2002); *see also In re Bay Vista of Virginia*, Inc., 428 B.R. 197, 215 (Bankr. E.D. Va. 2010) (holding that Trustee did not have personal knowledge to authenticate debtor's business records).

[36] *Fisher*, 2002 WL 31749262, at *7.

[37] *See id.* at *6 (noting that the trustee failed to subpoena former employees of the debtors who would have had personal knowledge of the records the trustee sought to introduce).

[38] FED. R. EVID. 607.

character and reputation for truthfulness, either by introducing opinion testimony regarding the witness's character or raising instances of prior misconduct,[39] (2) referencing prior criminal convictions,[40] (3) introducing evidence of partiality, including interest, bias, corruption, or coercion, and (4) introducing evidence of prior inconsistent statements or conduct.[41]

1. **Character for Truthfulness (F.R.E. 608)**

A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by opinion testimony about that character.[42] But evidence of truthful character is only admissible after the witness's character for truthfulness has been attacked.[43] This rule provides an exception to the general prohibition on the admission of evidence of a witness's character for the purpose of proving a witness acted in conformity therewith.[44]

Reputation or character for truthfulness may also be attacked by introducing evidence of specific instances of a witness's conduct, but only if those instances are probative of the character for truthfulness or untruthfulness of either the witness or another witness whose character the witness has testified about.[45] In determining whether the evidence is probative of truthfulness or untruthfulness, courts may take into consideration how remote in time the impeaching conduct occurred.[46] Remote instances of conduct are generally less probative of the witness's character than more recent conduct. Courts have interpreted this rule as permitting inquiry into the debtor's failure to schedule property in a previous bankruptcy case, which is probative of the debtor's truthfulness.[47] Another court invoked the rule to permit inquiry into allegations and findings by the SEC and NASD that the witness had previously committed financial fraud, because that information related directly related to the witness's truthfulness.[48]

[39] FED. R. EVID. 608(b).

[40] FED. R. EVID. 609

[41] FED. R. EVID. 613, 801(d)(1)(A).

[42] FED. R. EVID. 608(a).

[43] *Id*.

[44] *See* FED. R. EVID. 404(a).

[45] FED. R. EVID. 608(b).

[46] *In re Bencomo*, 2015 WL 3451546, at *5 (9th Cir. B.A.P. Jun. 1, 2015).

[47] *Id*.

[48] *In re Alder, Coleman Clearing Corp*., 1998 WL 160036, at *12 (Bankr. S.D.N.Y. 1998).

The questioning party must have a good-faith factual basis for the questioning regarding the witness's prior conduct.[49] However, extrinsic evidence is generally not admissible to prove specific instances of conduct.[50] Thus, the impeaching party is limited to inquiring into the witness's past conduct on cross-examination and must generally take the answer given by the witness.[51]

2. Prior Criminal Convictions (F.R.E. 609)

While evidence of past crimes is not generally admissible to prove a person's character,[52] Rule 609 permits the admission of a criminal conviction to attack a witness's character for truthfulness if (i) the crime was punishable by death or imprisonment for more than one year, or (ii) the crime involved a dishonest act or false statement.[53] The rule contains exceptions for convictions that are more than 10 years old, convictions for which the witness has been pardoned or rehabilitated, and convictions of juveniles.[54] In civil cases, Rule 609 *mandates* the admission of evidence of a past criminal conviction punishable by death or imprisonment for more than 1 year or crimes involving a dishonest act or false statement, provided the elements of the rule are satisfied, and a judge has no discretion to exclude such evidence.[55] Crimes involving a dishonest act or false statement generally mean crimes involving "deceit, untruthfulness, or falsification bearing on the witness's propensity to testify truthfully."[56] Examples of such crimes include perjury or subornment of perjury, fraud, and embezzlement.[57] The rule does not include crimes such as robbery, assault, and narcotics related offenses.[58]

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[49] *U.S. v. Nixon*, 777 F.2d 958, 970-71 (5th Cir. 1985); *see also* 2 Barry Russell, *Bankruptcy Evidence Manual*, § 608.1 (2015-2016).

[50] Fed. R. Evid. 608(b); *In re Gulph Woods Corp*., 82 B.R. 373, 375 (Bankr. E.D. Pa. 1988); *but see Alder*, 1998 WL 060036, at *10 (admitting extrinsic evidence under Rule 608 where the declarant resort to extrinsic evidence was the only means of presenting evidence of the witness's past conduct).

[51] In re McInerney, 516 B.R. 171, 175 (Bankr. E.D. Mich. 2014) (citing 2 Barry Russell, *Bankruptcy Evidence Manual*, § 608.4 (2013–2014).

[52] FED. R. EVID. 404(b)(1).

[53] FED. R. EVID. 609(a).

[54] FED. R. EVID. 609(b)-(c).

[55] *See* FED. R. EVID. 609(a)(1)(A), (a)(2) (providing that evidence of a past criminal conviction "must" be admitted if certain elements are met); *Green v. Bock Laundry Mach. Co*., 490 U.S. 504, 526 (1989).

[56] 2 Barry Russell, *Bankruptcy Evidence Manual* § 609:2 (2015-2016).

[57] *Threzzy v. O'Leary*, 1991 WL 10746, at *1 (N.D. Ill. Jan. 31, 1991).

[58] *U.S. v. Vasquez*, 2009 WL 902372, at *3 (E.D. Pa. Apr. 3, 2004); *U.S. v. Miller*, 2004 WL 2612420, at *3-4 (E.D. Pa. Nov. 16, 2004); *U.S. v. Brackeen*, 969, F.2d 827, 829 (9th Cir. 1992).

3. Evidence of Partiality or Bias

A witness's character for truthfulness may also be attacked by introducing evidence of partiality, including bias, prejudice, or coercion, both on cross-examination and via the introduction of extrinsic evidence.[59] Such evidence is subject to exclusion in the court's discretion if the court finds that the probative value is substantially outweighed by the risk its admission will create undue prejudice, confuse the issues, or mislead the jury.[60]

4. Prior Inconsistent Statements (F.R.E. 613)

Rule 613 permits the introduction of a witness's prior inconsistent statements to attack the witness's credibility, but extrinsic evidence of such a statement is only admissible if the witness is permitted an opportunity to explain or deny the statement.[61] The rule specifically does not apply to statements by a party opponent, which are independently admissible under Rule 801(d)(2).[62] To be admissible, a prior statement must be inconsistent with the witness's testimony at trial; it is not enough that the statement is inconsistent with another prior statement of the witness.[63] Moreover, the statement must have been made by the witness. For example, a document prepared by someone other than the witness is not admissible to contradict the witness's testimony under Rule 613.[64]

[59] *See, e.g., U.S. v. Abel*, 469 U.S. 45, 51 (1984) (noting that Rules 607, 608, and 611 contemplate impeachment by showing of bias).

[60] *Watcher v. Pottsville Area Emergency Med. Servs., Inc*., 248 Fed. Appx. 272, 278 (3d Cir. 2007); *U.S. v. 412.93 Acres of Land, More or Less, in Franklin and Towamensing Tps., Carbon County, State of Pa., Tract No. 113*, 455 F.2d 1242, 1247 (3d Cir. 1972).

[61] FED. R. EVID. 613.

[62] FED. R. EVID. 613(b).

[63] *U.S. v. Askew*, 201 Fed.Appx. 858, 860 (3d Cir. 2006); *Andrade v. Walgreens-Optioncare, Inc*., 784 F.Supp.2d 533, 537 (E.D. Pa. 2011).

[64] *In re Worldcom, Inc*., 386 B.R. 496, 505 n.5 (Bankr. S.D.N.Y. 2008).

V. Laying the Foundation: Expert Opinion Testimony

A. Disclosure of Expert Testimony (FRCP 26(a)(2))

Federal Rule of Civil Procedure 26(a)(2) provides disclosure requirements for expert witnesses. Rule 26(a)(2) requires a party to disclose the identity of any witness it may use at trial to present expert opinion testimony under Rule 702.[65] The time for disclosure is generally governed by court order, but absent an order or stipulation of the parties, the disclosure must be made 90 days before trial and, for rebuttal witnesses, 30 days after the other party's disclosure.[66] The disclosure must be accompanied by a written report prepared and signed by the witness *if* the witness is one retained or specially employed to provide expert testimony in the case.[67] Thus, while a party must disclose any expert witness it may call at trial, only "retained or specially employed" expert witnesses are required to produce a written report.[68]

For experts that are required to produce a report, the report must contain (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years; (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case.[69] This rule requires the production of materials considered by the expert in forming its opinion, even if the materials would otherwise be privileged communications or work product.[70] Thus, counsel should use caution when communicating with a retained expert witness and should never share written mental impressions to be considered by the expert or draft reports prepared by the attorney.[71] For a witness that is not required to produce a report, the party's expert disclosure must identify the subject matter on which the expert is required to testify and a summary of the facts and opinions to which the witness is expected to testify.[72]

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[65] FED. R. CIV. P. 26(a)(2)(A).

[66] FED. R. CIV. P. 26(a)(2)(D).

[67] FED. R. CIV. P. 26(a)(2)(B).

[68] *See In re Tess Comm's, Inc.*, 291 B.R. 535, 537 (Bankr. D. Colo. 2003). For example, a treating physician who could testify as to facts learned in the treatment of her patient may also testify as an expert without a Rule 26(a)(2)(B) report. *Id*.

[69] FED. R. CIV. P. 26(a)(2)(B).

[70] *In re USGen New England, Inc.*, 2007 WL 2363353, at *7 (Bankr. D. Md. Aug. 16, 2007).

[71] *See Elm Grove Coal Co. v. Director, O.W.C .P*, 480 F.3d 278, 303 (4th Cir.2007) ("... draft expert reports prepared by counsel and provided to testifying experts, and attorney-expert communications that explain the lawyers concept of the underlying facts, or his view of the opinions expected from such experts, are not entitled to protection under the work product doctrine.").

[72] FED. R. CIV. P. 26(a)(2)(C).

Failure to properly disclose an expert witness may result in the exclusion of the expert at trial unless there is a "substantial justification" for the failure to disclose or the failure to disclose is harmless.[73] The exclusion of an undisclosed expert is automatic and self-executing, and therefore the burden rests with the non-disclosing party to demonstrate that a substantial justification for the failure to disclose or that the failure was harmless.[74] Counsel should be mindful of the ongoing obligation to supplement disclosures, including expert disclosures, under Rule 26(e)(2).[75] For example, a party should supplement its expert disclosures as necessary to include any subsequent corrections in the expert's analysis, changes in the bases for the expert's opinions, or additional opinions formed by the expert.[76] Failure to do so could result in the exclusion of the expert's testimony.[77]

B. Admissibility of Expert Testimony (F.R.E. 702)

Rule 702 governs the admission of expert testimony. Under Rule 702, a witness who is qualified as an expert by "knowledge, skill, experience, training, or education" may provide opinion testimony if (i) 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; (ii) the testimony is based on sufficient facts or data; (iii) the testimony is the product of reliable principles and methods; and (iv) the expert has reliably applied the principles and methods to the facts of the case. Courts have distilled these requirements into a three-part test requiring a determination that (1) the witness is qualified as an expert to testify as to a particular matter; (2) the expert's opinion is based upon reliable data and methodology; and (3) the expert's testimony is relevant.[78]

1. The Expert Must be Qualified

A witness proffered as an expert must be qualified by some specialized knowledge or skill, and an examination of a witness's qualifications is a threshold inquiry.[79] Courts have liberally construed this requirement, holding that an expert's qualification can be

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[73] FED. R. CIV. P. 37(c)(1); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp*., 259 F.3d 1101, 1106 (9th Cir. 2001).

[74] *Yeti*, 259 F.3d at 1106; *In re Central European Indus. Dev. Co*., 427 B.R. 149, 159 (Bankr. N.D. Cal. 2009).

[75] FED. R. CIV. P. 26(e)(2).

[76] *Id*; *In re Commercial Fin. Servs., Inc*., 2005 WL 6499289, at *9 (Bankr. N.D. Okla. May 19, 2005).

[77] FED. R. CIV. P. 26(e)(2), 37(c)(1); *In re Connolly N. Am., LLC*, 376 B.R. 161, 182 (Bankr. E.D Mich. 2007).

[78] *In re Young Broadcasting Inc*., 430 B.R. 99, 121 (Bankr. S.D.N.Y. 2010) (citing *Nimely v. City of New York*, 414 F.3d 381, 396–97 (2d Cir. 2005); *see also Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003) ("Rule 702 embodies a trilogy of restrictions on expert testimony: qualification, reliability, and fit.").

[79] *Young Broadcasting*, 430 B.R. at 122 (citing *Zaremba v. Gen. Motors Corp*., 360 F.3d 355, 360 (2d Cir. 2004)).

based on a broad range of knowledge, skill, experience, training, or education.[80] Thus, an academic or professional education is not required; an expert may be qualified by practical experience alone.[81] The test for qualification is applied liberally and flexibly.[82] Experts need not be highly qualified to testify, and any differences in expertise go to the weight to be accorded to the expert's testimony rather than its admissibility.[83] Essentially, courts should consider the totality of the witness's qualifications.[84]

2. **The Expert's Opinion Must be Reliable**

The proponent of expert testimony must also demonstrate, by a preponderance of the evidence, that the proffered testimony is reliable.[85] This requires the court to determine whether "the reasoning or methodology underlying the testimony is scientifically valid and . . . that reasoning or methodology properly can be applied to the facts in issue."[86] In making this analysis, courts may consider, *inter alia*, (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology and (8) the non-judicial uses to which the method has been put.[87] However, these factors are not a checklist; the inquiry is flexible and will necessarily vary from case to case.[88]

In general, the standard for determining the reliability of an expert's testimony is not high.[89] The test is not whether the opinion has the best foundation or is supported by unassailable research, but is whether the opinion is based upon valid reasoning and reliable

[80] *Id*. (citing *U.S. v. Brown*, 776 F.2d 397, 400 (2d Cir. 1985) and *In re Paoli R. Yard PCB Litig. (Paoli I)*, 916 F.2d 829, 855 (3d Cir. 1990)).

[81] *Id*.; *see, e.g., In re Laurel Valley Oil Co*., 2015 WL 4555579, at *4 (Bankr. N.D. Ohio Jul. 28, 2015) ("Nottingham has over ten years of experience buying and selling fuel, and annually purchases approximately fifty-five million gallons of diesel fuel from over twenty different suppliers. The court holds that Nottingham's experience qualifies him as an expert in diesel fuel pricing and general industry practices.").

[82] *In re 4Kids Entertainment, Inc*., 463 B.R. 610, 677 (Bankr. S.D.N.Y. 2011); *Young Broadcasting*, 430 B.R. at 122.

[83] *In re H & M Oil & Gas, LLC*, 511 B.R. 408, 412 (Bankr. N.D. Tex. 2014).

[84] *Young Broadcasting*, 430 B.R. at 122.

[85] *Id*.

[86] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592-93 (1993).

[87] *In re Paoli R.R. Yard PCB Litig*., 35 F.3d 717, 742 n. 8 (3d Cir. 1994).

[88] *Young Broadcasting*, 430 B.R. at 124 (citing *Nimely*, 414 F.3d at 397).

[89] *Id*.

methodology.[90] Thus, courts' analysis focuses on the principles and methodology employed by the expert without regard to the expert's conclusions or the court's belief as to the correctness of those conclusions.[91] Under this standard, testimony will be excluded if it is too speculative or conjectural.[92] It will also be excluded if the underlying assumptions are unrealistic or contradictory.[93] The ultimate purpose of the inquiry is to make certain that, whether the testimony is based on professional studies or personal experience, the witness employs the same level of intellectual rigor as an expert in the relevant field.[94]

"[W]hen expert testimony is challenged under *Daubert*, the burden of proof rests with the party seeking to present the testimony."[95] To meet this burden, a party must introduce "objective, independent validation of the expert's methodology."[96] Failure to introduce such evidence will result in the exclusion of the expert's testimony.[97] The best way to make the requisite showing is to demonstrate that the expert's conclusions are based upon his own research and that the opinions the expert expresses were derived by the scientific method.[98] To make this showing, a party responding to a *Daubert* challenge might introduce evidence that the expert's conclusions have been subjected to scientific scrutiny through publication and peer review.[99] A party could also demonstrate that the expert's theory or conclusions are subject to testing.[100] A theory or conclusion is subject to testing if "it can be challenged in some objective sense" and is not a "subjective, conclusory approach that cannot reasonably be assessed for reliability."[101] In general, the test for reliability is flexible and the court has broad latitude to determine whether an expert's testimony is reliable with or without reference to the factors identified in *Daubert*.[102]

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[90] *Id*. (quoting *In re TMI Litigation*, 193 F.3d 613, 665 (3d Cir. 1999), *amended on other grounds*, 199 F.3d 158 (2000)).

[91] *Id*. (quoting *Amorgianos v. Nat'l R.R. Passenger Corp*., 303 F.3d 256, 266 (2d Cir. 2002)).

[92] *Id*.

[93] *Id*. at 125.

[94] *Id*. (quoting *Kumho Tire Co. Ltd., v. Carmichael*, 526 U.S. 137, 152 (1999))

[95] *H & M*, 511 B.R. at 419-20 (quoting *Moore v. Ashland Chemical, Inc*., 151 F.3d 269 (5th Cir. 1998)).

[96] *Id*. (quoting *Hebbler v. Turner*, 2004 WL 414821 (E.D. La. Mar. 3, 2004)).

[97] *Id*.

[98] *Sanderson v. Int'l Flavors and Fragrances, Inc*., 950 F.Supp. 981, 994 (C.D. Cal. 1996).

[99] *Casey v. Ohio Med. Products*, 877 F.Supp. 1380, 1384 (N.D. Cal. 1995).

[100] *Lidl ex rel. Lidle v. Cirrus Design Corp*., 2010 WL 2674584, at *6 (S.D.N.Y. Jul. 6, 2010).

[101] *Lesser ex rel. Lesser v. Camp Wildwood*, 282 F.Supp.2d 139, 144 (S.D.N.Y. 2003).

[102] *In re Wyly*, 552 B.R. 338, 363 (Bankr. N.D. Tex. 2016) (quoting *Kumho*, 526 U.S. at 141-42).

3. The Expert's Testimony Must be Relevant

Finally, to be admissible expert testimony must be relevant. Expert testimony is relevant if it has a valid connection to the pertinent inquiry.[103] Put differently, expert testimony is relevant if the expert's "reasoning or methodology properly can be applied to the facts in issue."[104] This does not mean that the expert's opinion must necessarily be applied to the specific facts of the case at hand; experts may opine as to general principles if it is useful and relevant to the factual inquiry in the case.[105]

[103] *Kumho*, 526 U.S. at 149.

[104] *In re Dow Corning Corp*., 237 B.R. 364, 367 (Bankr. E.D. Mich. 1999).

[105] *Wyly*, 552 B.R. at 363-64.

VI. Laying the Foundation: Privileges in Bankruptcy Cases

A. Attorney-Client Privilege (F.R.E. 501 and 502).

1. F.R.E. 501 governs choice of law issues. In diversity cases, state law determines the privilege. In cases arising under a federal statute, federal common law applies.

2. F.R.E. 502(g) defines "attorney-client privilege" to mean the "protection that applicable law provides for confidential attorney-client communications."

a. The basic elements of a privileged communication are:

(i) Client;

(ii) Lawyer acting as a lawyer;

(iii) Communication;

(iv) Legal Purpose; and

(v) Confidentiality. *See Teleglobe Communications Corp. v. BCE, Inc. (In re Teleglobe Communications Corp.)*, 493 F.3d 345, 359 (3d Cir. 2007).

b. Who is the client when dealing with a corporate debtor?

(i) Corporation's control group.

(ii) If the individual is not within the corporate control group, federal courts employ the test set forth in *Upjohn Co. v. United States*, 449 U.S. 383, 394-95 (1981),which requires:

(a) The information is necessary to supply the basis for legal advice to the corporation and was ordered to be communicated by superior officers;

(b) The information was not available from "control group" management;

(c) The communications concerned matters within the scope of employee's duties;

(d) The employee was aware that they were being questioned in order for the corporation to secure legal advice; and

(e) The communications were considered confidential when made and kept confidential thereafter.

(iii) Former employees generally do not satisfy the control group test. Some federal courts also restrict the privilege as to former employees. *See, e.g., Infosystems, Inc. v. Ceridian Corp.*, 197 F.R.D. 303, 306 (E.D. Mich. 2000) (except in very

limited circumstances, "counsel's communications with a former employee of the client corporation generally should be treated no differently from communications with any other third-party fact witnesses"); *but see Favala v. Cumberland Eng'g Co*., 17 F.3d 987, 990 (7th Cir. 1994) (former employee could not testify about communications with the company's attorney). Therefore, counsel needs to be aware of potential limitations on the scope of privilege when communicating with former employees of a corporate client.

(iv) Courts apply heightened scrutiny to communications involving in-house counsel. There are two primary concerns:

(a) In-house counsel can have a dual role as both a legal and business advisor. The "expanded role of legal counsel within corporations has increased the difficulty for judges in ruling on privilege claims [and] has concurrently increased the burden that must be borne by the proponent of corporate privilege claims relative to in-house counsel." *In re Vioxx Prods. Liability Litigation*, 501 F. Supp. 2d 789, 799 (E.D. La. 2007).

(b) The second concern is the improper use of the in-house attorney to shield communications. "[T]he advent of e-mail . . . has made it so convenient to copy legal counsel on every communication that might be seen as having some legal significance at some time, regardless of whether it is ripe for legal analysis." *Vioxx Prods. Liability Litigation*, 501 F. Supp. 2d at 798. As a result, some courts hold that emails on which legal counsel are merely copied do not trigger the attorney-client privilege. *See, e.g.*, *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 629 (D. Nev. 2013).

(c) As a result of these concerns, there is often no presumption of privilege arising from the fact that in-house counsel was involved in the communication. *See, e.g*., *United States v. Chevron,* 1996 WL 444597 (N.D. Cal. 1996). Instead the party asserting a privilege must make a "clear showing" that the communication was made in a legal capacity. *See, e.g*., *Ames v. Black Entertainment Television,* 1998 WL 812051, at *8 (S.D.N.Y. 1998) (where in-house counsel has responsibilities outside "lawyer's sphere," company must make "clear showing that [in-house counsel] gave [advice] in a professional legal capacity"). Finally, courts express particular skepticism when documents are sent simultaneously to legal and non-legal personnel. *See Teltron, Inc. v. Alexander***,** 132 F.R.D. 394 (E.D. Pa. 1990) (ordinary business advice not protected).

3. Waiver. Federal Rule of Evidence 502 was recently amended. The Rule "seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of disclosure of a communication or information covered by the attorney-client privilege or work product protection." *See* Advisory Committee Notes to F.R.E. 502.

a. Waiver generally occurs when the privileged information is disclosed outside of the attorney-client relationship.

b. In bankruptcy where a trustee has been appointed for a corporate debtor, the trustee controls the privilege and makes the determination as to whether to waive the privilege. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985).

(i) The Supreme Court left open the question of whether a trustee may waive the privilege where the debtor is a human being. *Weintraub*, 471 U.S. at 356.

(ii) A trustee has been held to control the privilege for an individual debtor's post-petition communications undertaken in the debtor's capacity as the chapter 11 debtor-in-possession involving assets of the estate, but the trustee could not waive the privilege as to post-conversion communications. *In re Eddy*, 304 B.R. 591, 598-600 (Bankr. D. Mass. 2004).

(iii) A committee asserting estate causes of action in the name of the debtor does not control the privilege. *Official Committee v. Comvest Group Holdings (In re HH Liquidation, LLC)* 2017 Bankr. LEXIS 1258 (Bankr. D. Del. May 8, 2017).

(iv) Courts are split on whether the trustee for an individual who has filed for chapter 7 may waive the privilege and obtain privileged documents and under what circumstances. *See, e.g., Moore v. Eason (In re Bazemore)*, 216 B.R. 1020, 1024 (Bankr. S.D. Ga. 1997) (discussing case law and finding privilege controlled by trustee if the inquiry is directed to privileged information about estate lawsuits or other assets, but not if there is potential harm to the debtor from waiver).

c. Joint Representation. Where two clients are represented by the same counsel (*i.e.*, a parent and a subsidiary with a common in-house legal department), any privileged communication can be waived only by a joint waiver, unless the two clients are in litigation against each other, in which case all communications are discoverable. But when an attorney errs by continuing to represent two clients despite their conflicts, the clients—who reasonably expect their communications to be secret—are not penalized by losing their privilege. *Teleglobe Communications Corp. v. BCE, Inc. (In re Teleglobe Communications Corp.),* 493 F.3d 345 (3d Cir. 2007).

d. Scope of the Waiver.

(i) Before F.R.E. 502, if information was disclosed outside of the attorney-client relationship, that waived not only the information that was disclosed but all privileges with respect to the subject matter of the information.

(ii) Under F.R.E. 502, there is no general subject matter waiver, if the disclosure was inadvertent and the holder of the privilege took reasonable steps to prevent disclosure and took reasonable steps to rectify the error, including making a request under Fed. R. Civ. P. 26(b)(5)(B) to claw the information back.

(a) Whether a key word computer search to prevent disclosure is reasonable is not clear. *Compare Victor Stanley, Inc. v. Creative Pipe, Inc.,* 250 F.R.D. 251, 259-63 (D. Md. 2008) (pre-Rule 502) with *Rhoads Indus., Inc. v. Building Materials Corp. of America,* 254 F.R.D. 216, 226-27 (E.D. Pa. 2008) (applying Rule 502) (attorney-client privilege not waived for over 800 privileged emails inadvertently produced after keyword search).

(b) Rule 502(b) "does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake." (Rule 502 Explanatory Notes). Instead, a producing party must "follow up on any obvious indications that a protected communication or information has been produced inadvertently." (Rule 502 Explanatory Notes). *See, e.g., Coburn Group, LLC v. Whitecap Advisors LLC,* 640 F.Supp.2d 1032 (N.D. Ill. 2009).

(iii) F.R.E. 502 also limits the extent of subject-matter waiver if the disclosure is intentional to that information which in "fairness" ought to be considered with the waived information. F.R.E. 502(a)(3).

e. Effect of F.R.E. 502 is that:

(i) F.R.E. 502 eliminates the risk that inadvertent waiver will lead to subject matter waiver. The Rule also limits the scope of waiver for voluntary disclosures.

(ii) The Rule enables one federal court to bind all other proceedings, both state and federal.

(iii) The Rule enables parties to establish discovery protocols governing claw-back agreements to avoid waiver. F.R.E. 502(d) enhances parties' ability to use tools provided by the 2006 amendments to FRCP 26. Including such agreements in court orders avoids the risk of F.R.E. 502(b) "reasonableness" analysis for inadvertent disclosure and instead the parties may consider defining their own reasonableness provisions, such as timing requirements imposed on requests to return documents. Such orders may also include agreements on document claw backs under Fed. R. Civ. P. 26(f)(3)(D) or might be included as part of a scheduling order under Fed. R. Civ. P. 16(b)(3)(B)(iv).

f. F.R.E. 502 does not change the law on strategic use of privileged information. "At Issue" waiver occurs where a party raises an issue the effective rebuttal of which requires inquiry into privileged communications. "At issue waiver" requires an affirmative act. Typically, merely denying allegations does not waive privilege. *See, e.g., Parker v. Prudential Ins. Co. of America,* 900 F.2d 772, 776 n.3 (4th Cir. 1990) (no waiver where plaintiff attempted to put advice of defendant's counsel at issue in the litigation).

B. Trial Preparation Materials (FRCP 26(b)(3), F.R.E. 502(g)(2)). F.R.E. 502(g)(2) defines "work product protection" as the protection that "applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial."

1. The majority view is that materials are work product if they were prepared "because of" of litigation; the minority view is that litigation must have been the primary motivating factor for the preparation of the materials and the 1st Circuit has adopted a "for use in litigation test."

a. Ordinary work product is any work product that is not opinion work product.

b. Opinion work product includes "mental impressions, conclusions, opinions, or legal theories of [an] attorney or other representative." *See* FRCP 26(b)(3)(B).

2. Rule 502, as set forth above, applies to work product.

3. Rule 26(b)(3)(A) provides that work product is normally not discoverable unless the party requesting the information can show a substantial need for the materials to prepare its case and that the party, cannot without undue hardship, obtain their substantial equivalent by other means.

C. Rule Against Self-Incrimination.

1. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. Amend. V. This privilege guarantees an individual's right "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for his silence." *Schmerber v. California*, 384 U.S. 757, 760-61 (1966).

a. The privilege may be "asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972).

b. The privilege not only extends to answers that would in themselves support a conviction but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute a claimant for a crime. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). "This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure." *Id.* at 486.

2. The Fifth Amendment is not without exceptions.

a. Exercise of a Fifth Amendment privilege "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer." *Id.* An individual does not have a free hand to refuse to answer any and all questions by virtue of the Fifth Amendment's self-incrimination clause. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 663 (7th Cir. 2002). Nor is an individual "exonerated from answering merely because he declares that in so doing he would incriminate himself-his say-so does not of itself establish the hazard of incrimination." *Hoffman*, 341 U.S. at 486. Once an individual has asserted the privilege, then "[i]t is for the court to say whether his silence is justified[.]" *Id* . (citing *Rogers v. United States*, 340 U.S. 367, 71 S. Ct. 438, 439, 95 L. Ed. 344 (1951)).

(i) Courts employ a two-part test to determine whether the privilege is properly invoked. "First, is [the party asserting the privilege's] fear of criminal prosecution sufficient to support an assertion of the privilege at all? Second, if so, does responding to inquiries in this proceeding present some real danger of incrimination?" *In re Connelly*, 59 B.R. 421, 432-33 (Bankr. N.D. Ill. 1986).

(a) "The protection of the Fifth Amendment applies so long as there is a possibility of prosecution, regardless of a judge's assessment of the likelihood of prosecution." *In re Corrugated Container Antitrust Litig.*, 661 F.2d 1145, 1150 (7th Cir. 1981) *aff'd sub nom. Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983). "Thus, an assertion of the privilege is only rejected as a threshold matter when the danger of incrimination demonstrated is not real and appreciable, but only imaginary, remote and speculative." *Connelly*, 59 B.R. at 433 (citing *Ueckert v. C.I.R.*, 721 F.2d 248 (8th Cir.1983); *McCoy v. C.I.R.*, 696 F.2d 1234 (9th Cir.1983)).

(b) Court declined to find first element met where debtor provided nothing other than his statement he was fearful of prosecution and waited to assert the privilege until responding to summary judgment. *Am. Eagle Bank v. Friedman (In re Friedman)*, 543 B.R. 833, 840-41 (Bankr. N.D. Ill. 2015).

(c) To satisfy the second prong of the test, the party claiming the privilege must show that "[s]ome nexus between the risk of criminal conviction and the information requested [exists]." *Martin-Trigona v. Gouletas*, 634 F.2d 354, 360 (7th Cir. 1980). The party asserting the privilege "need not establish that an answer to a question or an explanation why an answer cannot be given will in fact incriminate. He must, however, tender some credible reason why a response would pose a real danger of incrimination, not a remote and speculative possibility." *Id.* (citing *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972)).

b. The Fifth Amendment does not shield from discovery the contents of any documents an individual voluntarily created, even if the contents might incriminate him. *See United States v. Doe*, 465 U.S. 605, 610-12 (1984) (citing *Fisher v. United States*, 425 U.S. 391, 409-10 (1976)).

(i) If production of the voluntarily-created documents is both incriminating and testimonial, the Fifth Amendment may bar their production.

(ii) As the Supreme Court explained in *Fisher*, determining whether the production of a document is both incriminating and testimonial necessitates an inquiry focused on proof of the document's existence, possession, and authenticity:

> The act of producing evidence in response to a subpoena . . . has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by [their owner or the owner's agent.] It also would indicate the [owner or agent]'s belief that the papers are those described in the subpoena. . . . Compulsion [is] clearly present, but the more difficult issues are whether the tacit averments [made by the act of production] are both "testimonial" and "incriminating". . . . These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof.

Fisher, 425 U.S. at 410.

c. The Fifth Amendment privilege may be waived. The "Fifth Amendment privilege against compelled self-incrimination is not self-executing." *Roberts v. United States*, 445 U.S. 552, 559 (1980). To receive its benefits, an individual "*must assert the privilege* rather than answer if he desires not to incriminate himself." *Minnesota v. Murphy*, 465 U.S. 420, 429, 104 S. Ct. 1136, 1143, 79 L. Ed. 2d 409 (1984) (emphasis added). "But if he chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty as the result of his decision to do so." *Id.* Moreover, "[d]isclosure of a fact waives the privilege as to details." *Rogers v. United States*, 340 U.S. 367, 373 (1951). "Thus, if the witness himself elects to waive his privilege as he may doubtless do, since the privilege is for his protection and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure." *Id.* Additionally, the Fifth Amendment privilege, like other privileges, may not be relied upon unless invoked in a timely fashion. *United Auto. Ins. Co. v. Veluchamy*, 747 F. Supp. 2d 1021, 1026 (N.D. Ill. 2010) (collecting cases).

D. Accountant-Client Privilege. There is no accountant-client privilege. *See Couch v. United States,* 409 U.S. 322, 334 (1973). Rather, where the client, or the client's attorney, retains an accountant for the purpose of obtaining or providing legal advice, the attorney-client privilege may attach. *See United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961); *United States v. Alvarez*, 519 F.2d 1036, 1045 (3d Cir. 1975); *United States v. Fisher*, 500 F.2d 683, 691-92 (3d Cir. 1974). However, "[i]f what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists." *Kovel*, 296 F.2d at 922.

E. Spousal Privilege. "Federal courts have recognized two kinds of marital privilege: the privilege that protects confidential marital communications and the privilege that protects a witness from testifying against his/her spouse." *In re Grand Jury*, 111 F.3d 1083, 1085 (3rd Cir. 1997).

1. Courts have consistently recognized that the privilege against testifying against one's spouse only applies to testimony that is "adverse" to the other spouse. *See, e.g.*, *United States v. Van Cauwenberghe*, 827 F.2d 424, 431 (9th Cir. 1987) (refusing to recognize the spousal privilege where the witness failed to demonstrate that the testimony was adverse to her spouse's penal interests), *cert. denied*, 484 U.S. 1042 (1988); *In re Martenson*, 779 F.2d 461, 464 (8th Cir. 1985) (same); *In re Grand Jury Proceedings*, 664 F.2d 423, 430 (5th Cir. 1981) (same), *cert. denied*, 455 U.S. 1000 (1982).

2. These cases make clear that the privilege is "not available unless the anticipated testimony would in fact be adverse to the non-witness spouse." *Martenson*, 779 at 463 (internal quotations omitted). *Accord Grand Jury*, 111 F.3d at 1087.

F. Compromise and Settlement Discussions. F.R.E. 408 prohibits the admission of:

1. Offers of compromise;

2. Offers of acceptances of an offer of compromise;

3. Conduct or statements made during settlement negotiations;

4. That are offered to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction.

5. This evidence may be offered for any other purpose.

a. Evidence of rejection of settlement offer admissible in a dispute about reasonableness of fees to be awarded. *Lohman v. Duryea Borough*, 574 F.3d 163 (3d Cir. 2009).

VII. Laying the Foundation: Trial Advocacy Tips

A. Preparation from the Outset

1. **Elements Outline**. Counsel should prepare an elements outline before she drafts the complaint or contested motion and update that outline continually as the case progresses.

a. Preparing an elements outline and actually using it will assist counsel in drafting the complaint, planning and taking discovery, and determining what witnesses and exhibits to offer at trial. If counsel waits to prepare this outline until after discovery is completed, there may be areas of inquiry that counsel will have missed.

b. Preparing an elements outline that is useful will require counsel to research the applicable law at the start of the case.

c. An elements outline should include:

(i) Each ultimate fact that is necessary to prove your client's case in chief and any affirmative defenses on which your client bears the burden of proof. The outline should list which witnesses and what documents will prove each ultimate fact.

(ii) For any issue on which the client does not have the burden of proof, outline the ultimate facts the opposing side must prove and anticipate which witnesses or documents opposing counsel might use and which witnesses and documents your client will rely upon to rebut this evidence.

(iii) If counsel anticipates an evidentiary issue with any key documents, the outline should also lay out what facts need to be developed to lay a foundation or otherwise address the evidentiary issue that is anticipated.

2. **Chronology**. Prepare a chronology of key events that is annotated with citations to the discovery record and update that chronology continually. A chronology will be an invaluable resource as counsel takes depositions, addresses summary judgment, or prepares her case, including proposed findings, for trial.

3. **Tagging Documents**. In voluminous documents cases, it is important from the outset to set up a system of document tags so that counsel can retrieve documents easily. Reviewers should identify "hot" or important documents and keep a listing of such documents. Counsel's elements outline will assist in preparing these tags.

4. **Witness Files.** For each witness, counsel should prepare a file of all documents related to that witness (*i.e.*, documents the witness has authored or received, and testimony by the witness or about the witness). The witness file will be key in preparing the witness for depositions or trial testimony.

B. Witness Preparation

1. Deposition Preparation.

a. Be wary of the witness who says he has done this before and does not need to prepare. Even witnesses who have been deposed before need to prepare fully. In fact, those who resist preparation on the basis that they are "old pros" often make more mistakes than the novice deponent.

b. There is nothing wrong with preparing the witness for a deposition. By meeting with the witness and walking them through the process and expected questioning, counsel is assisting the deponent in presenting the facts.

c. Preparation should include:

(i) Counsel should provide an explanation of the process: who will be there, how questioning will proceed, and what to do if objections to questions are made.

(ii) Common pitfalls that counsel should instruct her deponent to avoid:

(a) Don't make jokes or be sarcastic. In a written transcript, a sarcastic "no" that really means "yes", will be a "no" that the deponent will have to explain later.

(b) A deposition is not a game show where answering quickly wins the deponent a prize. Witnesses often feel the pressure to respond quickly without thinking through what they are stating. Remind the witness to take a second to think about her answer — perhaps by repeating the question to herself before responding.

(c) If the deponent is shown a document, he or she should read it carefully. There are no prizes awarded for having the best memory or reading the most quickly. If the deponent knows the answer is in a document, he or she should say so and not answer from memory.

(d) It is okay to say "I don't know" if the deponent does not know the answer. Do not speculate because speculation will not be apparent from the transcript.

(e) It is okay to ask to have a question repeated if the deponent did not hear it or understand it.

(f) Witnesses often state "not that I can recall" when they mean "no." There is a difference between the two answers. If the witness does not remember if something occurred, then stating she does not remember is the correct answer. But using that phrase in place of a yes or no answer, implies the event could have happened and if the deponent knows otherwise he should state so.

(g) A deposition is not a friendly conversation. In a conversation, we pick up on verbal clues to assist the other party in providing them with the information they seek. The point of a deposition is typically either to discover facts that will hurt the deponent's case or to make the deponent appear incompetent or untruthful. In most circumstances, if the witness can be subpoenaed to testify for trial, volunteering information during the deposition that the witness believes is helpful to the case will only educate the other side and the court will never see that testimony. Thus, there is no reason to offer information. Respond truthfully to the question that is asked, but do not volunteer information. Walk the deponent through examples of questions where he might be tempted to volunteer and explain to him what part of the answer should await a follow-up question.

(h) The witness should not try to second-guess where the question is going. The witness should be told that defense counsel will have an opportunity to re-direct if that is necessary.

(i) If there have been other depositions in the case, counsel should explain any odd quirks or mannerisms of opposing counsel in asking questions so the witness is prepared.

(iii) Substantive Preparation. Deposition preparation should include a review of the questions/topics that counsel expects the other side to cover. A well-prepared witness file is key here. If the deponent has given testimony on the topic before or there are documents that are key to this subject, counsel should show the documents/testimony to the deponent, but it will be confusing to the witness and may lead to unhelpful speculative testimony if you cover the testimony of other witnesses or show the deponent documents that are outside of her own knowledge. Doing that could lead to answers such as "I didn't know that, but found out about in preparing for this deposition" and may suggest that the witness was coached to give a particular answer.

2. **Trial Preparation.**

a. **Direct Testimony**. The point of direct testimony is to let the court hear from counsel's client or the witnesses that support the client's case. Generally, the focus on direct should be on the witness and not on the attorney. Counsel's job is to ask questions that allow that to occur, which means generally that counsel wants to ask non-leading, open-ended questions. Laying a foundation, particularly for conversations or key documents, will make the testimony more credible and give the court necessary background. Counsel should prepare an outline of anticipated questions annotated with the expected answers. Including notes on what counsel expects the witness to state will assist in asking any necessary follow-up questions. Also annotate that outline with references to exhibits or deposition testimony. Counsel also should prepare an annotated outline of anticipated cross-examination and consider whether any unhelpful testimony should be addressed in the direct examination.

(i) Before meeting with the witness, counsel should prepare an outline of anticipated questions annotated with the expected answers. Including notes on what counsel expects the witness to state will assist in asking any necessary follow-up questions. Also annotate that outline with references to exhibits or deposition testimony. Counsel also should

prepare an annotated outline of anticipated cross-examination and consider whether any unhelpful testimony should be addressed in the direct examination.

(ii) At the witness preparation sessions, counsel should ask the witness the questions she plans to ask at trial. Counsel should listen to how the witness responds and rework her outline accordingly. Emphasize to the client that it is counsel's job to make sure the witness provides all of his testimony to the court and that counsel will follow up if any information is omitted from an answer. And then do that during the hearing. Listen to what the witness says and be flexible. If the witness outline is prepared and annotated correctly, counsel will know if any key information was omitted in an answer and will be prepared to ask a follow-up question.

(iii) Do no over-rehearse, but for complicated examinations, counsel may want to meet a second or third time after the outline is reworked so that the witness is comfortable with how the examination will proceed and will be comfortable that counsel will follow-up if he fails to include information in an answer.

(iv) Preparation also should explain the differences between testimony at a deposition and at trial, the fact that the Court may ask questions, how exhibits will be handled (*i.e.*, in a notebooks, or on a video screen *etc*.), and the process of cross-examination and re-direct examination.

(v) Counsel should practice cross-examination with the witness and explain that counsel will have an opportunity to re-direct and bring out helpful or explanatory information. After practicing cross-examination, counsel should also practice the re-direct examination so that the witness is comfortable that counsel will bring out helpful explanations and will not be tempted at trial to fight with the examiner for fear his complete testimony will not be heard.

b. **Cross-examination and examination of adverse witnesses**. The focus of cross-examination is on counsel. The questions that are asked should present the client's points and theme. Generally all questions should be leading questions and ideally the witness should be stating only yes or no. Counsel will only want to ask an open-ended non-leading question of an adverse witness if counsel is certain that any answer that is given is helpful to the client's case.

(i) Preparation of an annotated outline is key. Counsel will want to have the deposition testimony or documents which impeach an incorrect answer identified for each question asked so that if the witness answers other than as expected, counsel can easily impeach the witness without delay.

(ii) In framing questions, use exact language from the document or deposition testimony so that the witness cannot wiggle out of a prior bad answer by quibbling over terminology. Avoid questions with wiggle room – *i.e.*, questions that ask the witness to commit to a characterization of the facts unless the witness has already testified to that characterization.

(iii) Counsel should present the client's position through her questions. Break each point into bite size pieces which will make it easier for the court to follow and will prevent the witness from wiggling out of the answer.

(iv) Listening to the witness is key. If the witness states something that can be impeached or is damaging to the other side's case, counsel who knows the record will be able to take advantage of that statement and will be flexible enough to ask appropriate leading follow-up questions.

(v) Be wary of going too far. Cross-examiners sometimes are tempted to ask a concluding question that is one question too many. If all of the points that lead to the conclusion you want the court to draw have been made, it is not necessary to get the witness to agree with that conclusion. Trust the court to understood your point.

C. Develop a Theme. The theme you develop should tell the court what your client's case is about and why your client is entitled to the relief he requests. That theme should flow through your client's written pre-trial submissions, your examinations, and your closing submissions.

D. Try Your Case. If counsel has developed an elements outline and knows the record, she will avoid the pitfall of reacting only to the points raised by opposing counsel. Do not deter from your client's theme.

VIII. Laying the Foundation: Mechanics of Moving an Exhibit Into Evidence

A. Have the Exhibit Marked

B. Show the Exhibit to Opposing Advocate

C. Ask Permission to Approach the Witness

D. Show the Exhibit to the Witness

E. Lay the Foundation for the Exhibit

F. Move for Admission of the Exhibit into Evidence

G. Have the Witness Use or Mark the Exhibit