Trial Prep and Discovery

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Trial Preparation and Discovery: March Madness Best Practices for Advancing to the Final(e)

American Bankruptcy Institute
39th Annual Alexander L. Paskay Memorial Bankruptcy Seminar
March 5, 2015

Introduction of Panel and Overview of Scope of Discussion

PANELISTS:

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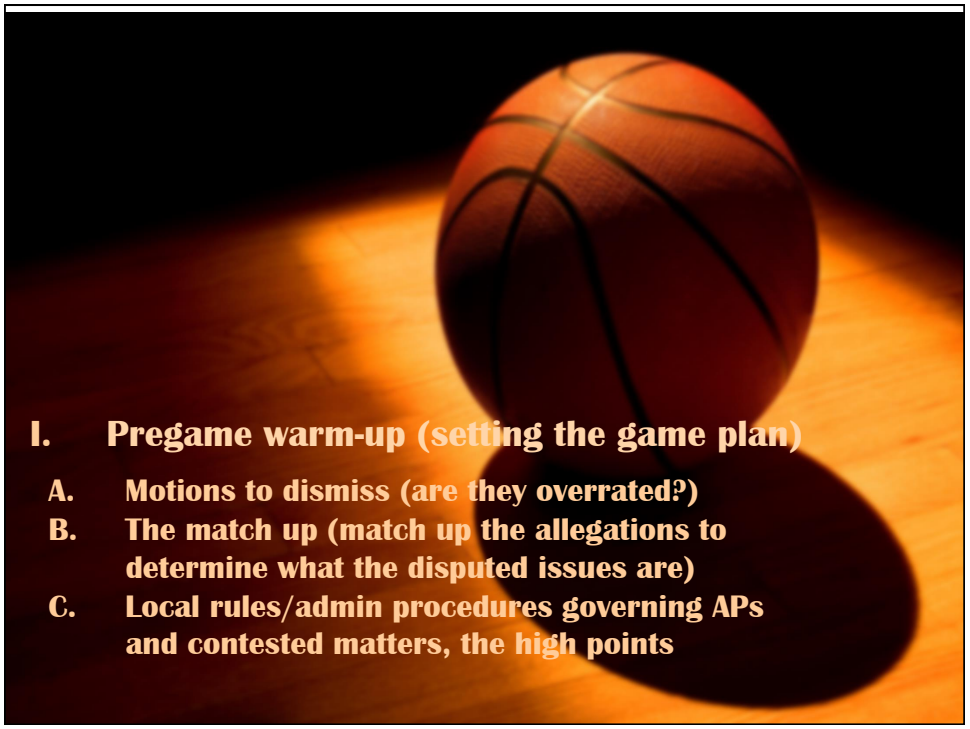
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B. The match up (match up the allegations to determine what the disputed issues are)
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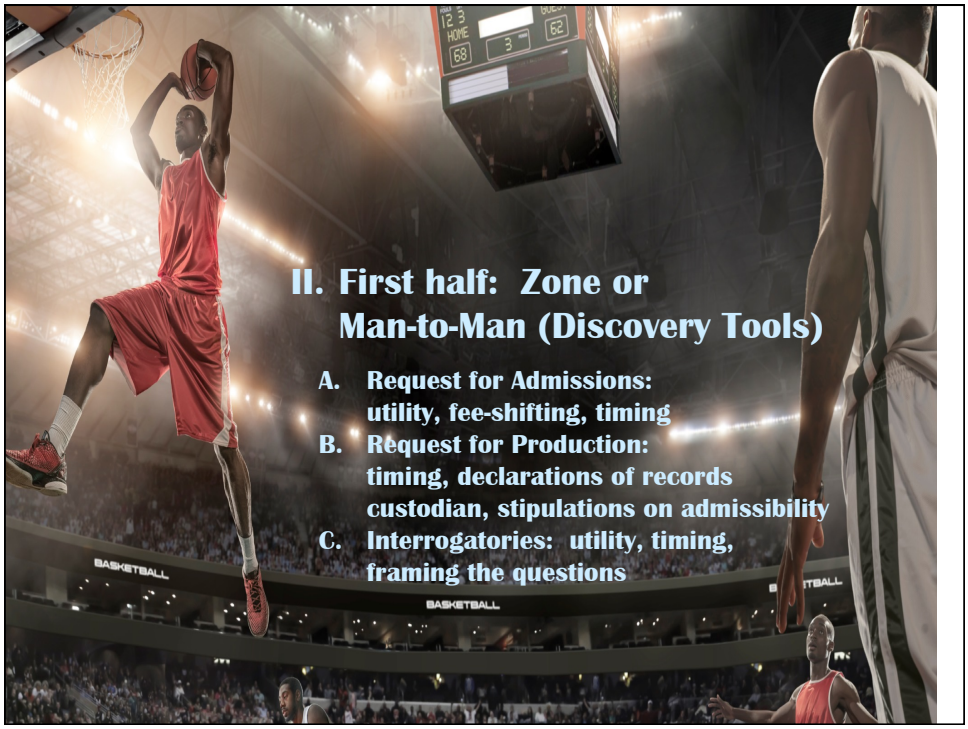

III. Half-Time Strategy (Review First Half Successes, Weaknesses)

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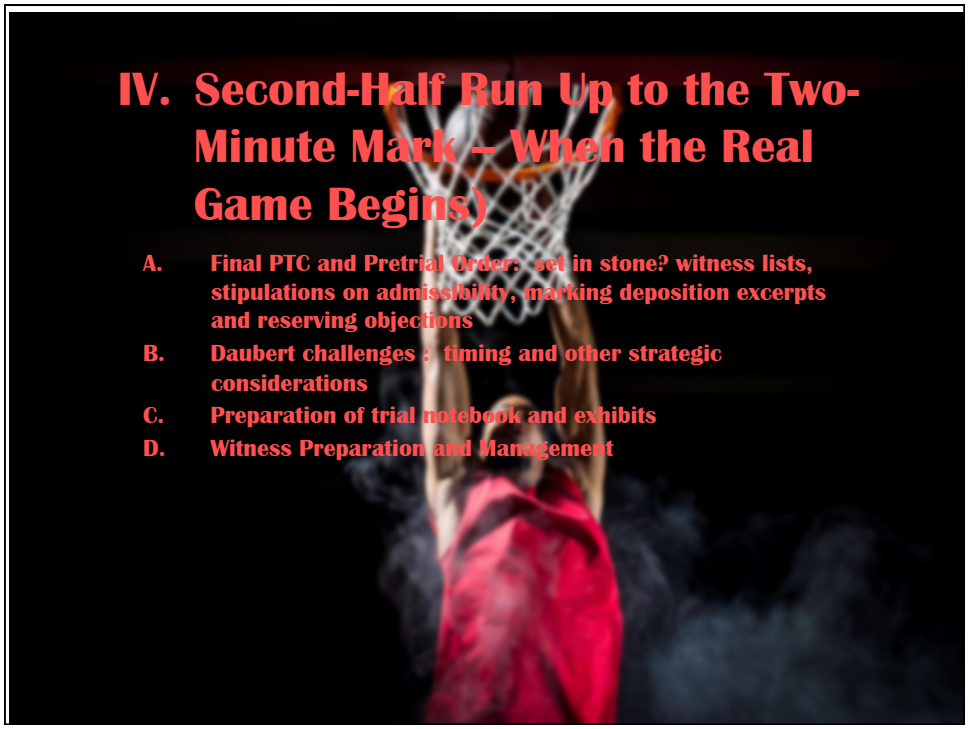
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Trial Preparation and Discovery in Bankruptcy

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Trial Preparation and Discovery in Bankruptcy: A Review of Key Issues

March 5, 2015

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In the pages below, we attempt to provide an overview of key issues that the bankruptcy litigator should consider and address as part of an overall case strategy. The issues discussed below are by no means exhaustive, but each, we believe, is critical both to preparing an effective case and to avoiding needless expense and inefficiencies.

I. Preliminary Considerations for the Bankruptcy Litigator

Two issues are worth noting at the outset: (A) understanding the distinctions between adversary proceedings and contested matters, and (B) being aware of and complying with standing orders applicable to your jurisdiction.

A. Adversary Proceedings and Contested Matters

Litigation in bankruptcy takes place in one of two formats: adversary proceedings or contested matters. The list of disputes that constitute adversary proceedings are listed in Federal Rule of Bankruptcy Procedure 7001. If a dispute is not an adversary proceeding, it is considered a contested matter.

As discussed further below, the applicable rules of procedure differ between these two dispute formats. The general assumption underlying the distinction is that contested matters are less complex and tend, often by necessity, to move more quickly than adversary proceedings. However, the nature of any given dispute and the degree of its complexity cannot always be determined simply by its general characterization as either an adversary proceeding or a contested matter. Occasionally, adversary proceedings may require only limited discovery while contested matters may demand an extensive amount. Plan confirmation, for instance, is a "contested matter," not an adversary proceeding. In complex cases in which confirmation of a plan is in dispute, the plan confirmation process can involve extensive discovery, depositions, competing expert opinions, motions in limine and other pretrial proceedings that are

indistinguishable from complex litigation in district court. Accordingly, it is a critical "early step" in bankruptcy litigation to evaluate the nature of the dispute and determine the rules and procedures applicable to the dispute.

For adversary proceedings, the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") largely incorporate the Federal Rules of Civil Procedure (the "Civil Rules"). The same is not so for contested matters. Bankruptcy Rule 9014 provides that only some of these rules apply in contested matters. For instance, Bankruptcy Rules 7026 through 7037 make Civil Rules 26 through 37 applicable in adversary proceedings. Unless the court directs otherwise, Bankruptcy Rule 9014 makes Civil Rule 26, in part, and Civil Rules 28 through 37 applicable to contested matters. However, Bankruptcy Rule 9014 explicitly excludes portions of Civil Rule 26 from its general applicability to contested matters. Specifically, subparagraphs 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony), 26(a)(3) (additional pre-trial disclosures) and 26(f) (mandatory meeting before scheduling conference/discovery plan) do not apply in contested matters, unless the court orders otherwise. Further, although Bankruptcy Rule 9014 does not adopt Bankruptcy Rule 7027, the rule expressly provides that any party needing to perpetuate testimony may proceed in the same manner as provided in Bankruptcy Rule 7027.

As noted above, the exclusion of certain discovery rules from contested matters is predicated on the distinct nature of these disputes, as contrasted with adversary proceedings. Whereas adversary proceedings typically more closely resemble non-bankruptcy district court litigation, contested matters may be considerably less complex and may need to be decided more expeditiously. Therefore, the lack of complexity and the need for prompt resolution makes portions of Civil Rule 26 ineffective and ill-suited for many contested matters. However, if the

dispute at issue requires processes and procedures not contemplated by Bankruptcy Rule 9014, counsel should seek a stipulation from the opposing party or an order from the court. Again, the key is to try to assess these issues as early as possible, and take action accordingly.

B. Standing Orders, Local Rules and other Particular Procedures of the Court

In addition to the Bankruptcy Rules, bankruptcy litigators must pay early and close attention the applicable local rules, standing orders, or other court or judge-specific procedures at issue. These rules and procedures must be accounted for in the context of your overall pretrial and trial strategy. Issues such as the content and timing of an early discovery planning conference, the format and timing of dispositive motions or pretrial motions, and the procedure for formulating a joint witness and exhibit list are frequently contained in standing orders in various jurisdictions or by individual judges.

II. Initial Planning and Determination of Disputed Issues

A. Identifying Critical Facts

A logical first step to preparing for an evidentiary hearing, whether it be an adversary proceeding or contested matter, is to determine what facts you will need to demonstrate to the court in order to prevail. A simple but helpful suggestion in this process is to write out a list of the facts that will be necessary to obtain a ruling in your favor—what could be called a "Critical Facts List." If you have filed a complaint or a motion that asserts the necessary facts in your favor, that document typically should recite those critical facts. Regardless, write out your Critical Facts List separately—and number each fact. Once you have determined your critical facts, you must then go down the list and decide how you will demonstrate each fact. Of course, some facts may not be in dispute and subject to stipulation (see Part B, below). Otherwise, each fact on your list should be annotated to describe how you propose to establish that fact with

admissible evidence—through testimony from a witness, through documents, through a combination of both, or through some other means. Over the course of discovery, your initial assessment of how you intend to prove each fact may change, and you should update your Critical Facts List accordingly. Keeping such a list, and updating it regularly, will serve as a constant checklist as the case moves through discovery.

B. Identifying What is In Dispute

As noted above, some items on your Critical Facts List may not be in dispute. For instance, the complaint and answer (in an adversary proceeding) may serve to eliminate many issues from dispute. Similarly, the admissibility of certain documents that might support some of your critical facts might also not be in dispute. If that appears to be the case, it is seldom that you should miss the opportunity to seek a stipulation with your opponent. It typically saves time and money; it allows you to focus on the aspects of your case that are truly in dispute; and your Judge will almost certainly appreciate it. Needless to say, if you don't make the request of your opposing counsel, you will not know.

Many bankruptcy courts require a pretrial procedure in which the parties must exchange exhibit lists and identify any objections in advance of trial. That procedure is typically reserved for lengthy evidentiary hearings or adversary proceedings. But in the absence of a mandated procedure, there is no reason why counsel cannot seek to implement a similar procedure themselves. It at least makes sense to ask. All too often, stipulations to the admissibility of evidence occur the morning of the hearing or during the hearing. By making the request for a stipulation earlier in the process, counsel can remove those issues "from their plate" and focus on the matters that are truly in dispute.

Once you have determined what can and cannot be the subject of stipulation, you can then focus on the critical elements of your case that you will need to establish, and the critical elements of your opponent's case that you will need to refute or rebut.

III. Timing Issues

A. Commencement of Discovery

Under Civil Rule 26(d), which applies in adversary proceedings by virtue of Bankruptcy Rule 7026, no formal discovery may take place until the parties have met and conferred on a discovery plan as required by Civil Rule 26(f). This limitation may be dispensed with by agreement of the parties or by court order, and it does not apply in contested matters (which are exempt from the requirements of Civil Rule 26(f) under Bankruptcy Rule 9014(c), unless otherwise ordered by the court).

B. Discovery Deadlines

Bankruptcy litigants must be mindful that most courts interpret the deadline for completion of discovery contained in a discovery plan or a scheduling order to mean just that—that discovery must be completed by the stated deadline. This means that written discovery requests must be served sufficiently in advance of the deadline to allow the responding party to take the maximum time allowed (e.g., 30 days for responding to written interrogatories and requests for production of documents, plus any additional time for service by mail) and still serve its responses before the discovery deadline.[1]

[1] *See NE Techs., Inc. v. Evolving Sys., Inc.*, CIV.A. 06-6061 (MLC), 2008 WL 4277668 (D.N.J. Sept. 12, 2008) (holding that discovery requests are only valid if they give the opposing party sufficient time to respond).

IV. Written Discovery

As with non-bankruptcy litigation, the primary mechanisms for written discovery in bankruptcy court are interrogatories, requests for production of documents and things, and requests for admission.

A. Interrogatories

A party may serve no more than 25 interrogatories, including "discrete subparts," on another party (unless otherwise stipulated or ordered by the court).[2] Judges differ in what they consider a "discrete subpart," so it is best to err on the side of caution and assume that any separate sentence (or part of a compound sentence) in an interrogatory which can logically be understood as a stand-alone question may be deemed a discrete subpart. A party that believes it has been served with an excessive number of interrogatories should object to all of the interrogatories or file a motion for a protective order, as some courts hold that answering some of the interrogatories (or subparts) waives any objection to the excessive number.[3]

One strategic limitation on the use of interrogatories is that, unlike oral answers given by witnesses in real time at a deposition, written responses to interrogatories are generally formulated by opposing counsel and carefully worded to be as narrow and unhelpful (if technically accurate) as possible. Nonetheless, interrogatories can be a useful tool for nailing down the alleged facts supporting a particular claim or defense (so-called contention interrogatories), as well as discovering (1) the identity of witnesses who may need to be deposed, (2) the identity and location of documents that may need to be inspected, (3) the basis for denial of requests for admission, and (4) the amount and basis for any claimed damages.

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[2] FED. R. CIV. P. 33(a)(1).

[3] *See, e.g., Allahverdi v. Regents of Univ. of N.M.*, 228 F.R.D. 696 (D.N.M. 2005).

Civil Rule 33(b) requires that each interrogatory be answered separately, unless it is objected to. Responses to interrogatories must be verified by the answering party. In the case of an organization, the interrogatories must be signed by a duly authorized officer or agent. If an interrogatory is not answered due to an objection, the reason for the objection must be separately stated.[4] Objections must be served with the answers, and failure to raise objections in a timely manner may be deemed a waiver.[5]

General objections set forth in the introductory section of a party's responses, while common in practice, will not excuse a party from answering (or objecting to) each interrogatory separately. Examples of general objections include that the interrogatories are unreasonably burdensome, that they are duplicative of requests made through other forms of discovery, or that the information sought is otherwise accessible to the requesting party. While some courts permit general objections to be incorporated by reference in responses to specific interrogatories, many do not. Accordingly, it is advisable to err on the side of repetition and assert all applicable objections separately in response to each individual interrogatory.[6]

Examples of specific objections to interrogatories include:

- the interrogatory is not reasonably calculated to lead to the discovery of admissible evidence (and is thus improper under Civil Rule 26(b));
- the interrogatory seeks disclosure of privileged communications or information subject to the work product doctrine;
- the interrogatory seeks disclosure of facts known and opinions held by non-witness (consulting) experts;

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[4] FED. R. CIV. P. 33(b)(4).

[5] *See In re Cont'l Capital Inv. Servs., Inc.,* BR 03-3370, 2011 WL 4624678 (Bankr. N.D. Ohio Sept. 30, 2011) (holding that objections to interrogatories, including attorney/client privilege objections, were waived by the responding party's failure to assert them in a timely manner).

[6] *See Johnson v. Kraft Foods N. Am., Inc.,* 236 F.R.D. 535, 538 (D. Kan. 2006) (holding that general objections which object to discovery requests "to the extent" that they require production of certain categories of documents or information are tantamount to asserting no objection at all, and deeming such objections to be waived).

- the interrogatory seeks disclosure of trade secrets;
- the interrogatory calls for purely legal conclusions;
- the information sought is unreasonably cumulative or duplicative; and
- the interrogatory is vague, ambiguous, overly broad, or unduly burdensome.[7]

B. Requests for Production of Documents and Things

Unlike interrogatories, there is no limitation on the number of requests for production of documents (or things) that a party may serve in an adversary proceeding or a contested matter under Bankruptcy Rule 9014. A request under Bankruptcy Rule 7034 (incorporating Civil Rule 34) may seek production of documents, electronically stored information, or other tangible things in the possession, custody, or control of another party to an adversary proceeding or a contested matter. A Civil Rule 34 request may not be used to obtain documents or things from non-parties, however. A subpoena under Bankruptcy Rule 9016 must be used in that situation.[8]

In responding to a request for production of documents, a party must either state the requested inspection/production will be permitted as requested, or object to the request (with the same level of specificity as required for objections to interrogatories). If an objection is made to only part of a request, then the non-objectionable production/inspection must be allowed.

Documents must be produced "as they are kept in the usual course of business" or organized and labeled to correspond with the categories in the request. If the requesting party

[7] It is insufficient for a party to object on the grounds that an interrogatory (or any other discovery request) is overly broad or unduly burdensome without explaining why that is so in the context of the litigation. *See Groupwell Int'l (HK) Ltd. v. Gourmet Express, LLC,* 277 F.R.D. 348, 360 (W.D. Ky. 2011) ("A responding party must show specifically how each discovery request is burdensome and oppressive by submitting affidavits or offering evidence revealing the nature of the burden." (internal quotation marks omitted)).

[8] Pursuant to FED. R. BANKR. P. 9016, FED. R. CIV. P. 45 applies in cases under the Bankruptcy Code.

fails to specify the form of production of electronically stored information, the information must be produced in a form in which it is ordinarily maintained or is reasonable usable.[9]

C. Requests for Admission

The primary purpose of requests for admission under Bankruptcy Rule 7036 (incorporating Civil Rule 36) is to simplify trial by eliminating matters about which there should be no legitimate controversy, such as uncontroverted facts or the genuineness of documents.[10] In the bankruptcy context, requests for admission can be particularly helpful in narrowing down the issues in cases like preference actions, where certain prima facie elements of a plaintiff's claim (such as the fact that a transfer was a transfer of an interest of the debtor in property, or was made on account of an antecedent debt) or a defendant's defenses (such as the fact that a transfer was made in payment of a debt incurred in the ordinary course of business) are often not subject to any bona fide dispute.

Like interrogatories, requests for admission must be answered within 30 days from service unless a longer time is stipulated or ordered by the court. Each request must be admitted or specifically denied unless the answering party cannot truthfully admit or deny it, in which event the answer must contain a detailed explanation of why that is the case.[11] An answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

If no response is served within the required time, the matter is deemed admitted and is conclusively established for purposes of the adversary proceeding or contested matter. However,

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[9] FED. R. CIV. P. 34(b)(2)(E)(i).

[10] It should be noted that FED. R. CIV. P. 36 specifically allows requests for admission regarding the application of law to facts, or opinions about either, within the scope of FED. R. CIV. P. 26(b)(1).

[11] FED. R. CIV. P. 36(a)(4).

a matter which is admitted (or deemed admitted based on a failure to respond in a timely manner) may be withdrawn or amended if it would promote the presentation on the merits of the action, and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits.[12]

If a party fails to admit a requested matter under Civil Rule 36 and the requesting party later proves the matter true, then on motion of the requesting party the court may order that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof unless:

> (A) the request was held objectionable under Civil Rule 36(a);
>
> (B) the admission sought was of no substantial importance;
>
> (C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or
>
> (D) there was other good reason for the failure to admit.[13]

Written Discovery Practice Pointers

- Always consult the local rules when propounding or responding to written discovery requests, as some include specific provisions dealing with written discovery.[14]
- Use targeted, focused requests (*i.e.*, avoid asking for "any and all documents that refer or relate to _____").
- Use succinct, plain language. Avoid overuse of legal jargon and defined terms.
- Be thoughtful and precise in objecting to discovery requests. Avoid "shotgun" objections and explain in reasonable detail why the request is objectionable in the context of the case (e.g., if the request is unduly burdensome, the objection should explain exactly what your client would have to do in order to respond to the request in a way that quantifies the burden for the court).

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[12] FED. R. CIV. P. 36(b).

[13] FED. R. CIV. P. 37(c)(2).

[14] *See, e.g.*, S.D.N.Y. LBR 7034-1 (dealing with objections to production of documents).

- Make every effort to resolve discovery disputes informally. Instead of succumbing to the temptation to document the file and impress your client with a strongly worded letter or email, pick up the phone and call opposing counsel. Judges despise discovery disputes and often find a way to punish both sides for wasting the court's time and their clients' (or, in a bankruptcy case, the creditors') money. However, if a showdown is inevitable you will want to ride into court wearing the white hat, and taking the high road will definitely enhance the merits of your position.

V. Depositions

When counsel wishes to depose a person in connection with an adversary proceeding or a contested matter (as distinguished from a Bankruptcy Rule 2004 examination), the requirements of Bankruptcy Rule 7030 (incorporating Civil Rule 30) must be followed. Counsel must give reasonable written notice to every other party, which notice must identify the deponent, state the time and place of the deposition, and specify the medium by which the deposition will be recorded (whether by video, court reporter, etc.).[15] A notice of deposition may name as the deponent a corporation, partnership, LLC, or other type of entity, and describe with reasonable particularity the matters for examination. In such event the named organization must designate one or more officers, directors, or managing agents to testify on its behalf.

The deponent or a party may object to the taking of a deposition by moving for a protective order under Civil Rule 26(c).[16] Most courts hold that that the mere filing of a motion for protective order does not excuse a deponent from appearing for his/her deposition unless the motion has been granted and a protective order entered before the scheduled time for the

[15] Some local court rules specifically define the timing element of "reasonable" notice. For example, DEL. BANKR. L.R. 7030-1(b) provides that "[u]nless otherwise ordered by the Court, 'reasonable notice' for the taking of depositions under FED. R. CIV. P. 30(b)(1) shall not be less than seven (7) days." In the absence of such a rule, what constitutes reasonable notice depends on the circumstances of each case. However, more than one week's notice generally is considered reasonable. *See, e.g., Charm Floral v. Wald Imps., Ltd.,* C10-1550-RSM, 2012 WL 424581 (W.D. Wash. Feb. 9, 2012) (holding that eight days' notice was reasonable); *Jones v. United States,* 720 F. Supp. 355, 366 (S.D.N.Y. 1989) (same).

[16] The deponent or a party may also move to terminate or limit a deposition during the deposition by filing a motion under FED. R. CIV. P. 30(d)(3), on the ground that the deposition is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or a party.

deposition.[17] However, some courts (notably Delaware) have local rules that excuse attendance if a properly filed motion for a protective order is pending.[18]

Examination and cross-examination of a deponent should generally proceed as they would at trial under the Federal Rules of Evidence. Any objections must be stated on the record. In general, the only permissible objections at a deposition are those involving invocation of a privilege or objections to the form of the question. Any statement of an objection should be concise, should not be argumentative, and should not suggest an answer or otherwise coach the deponent (so-called "speaking" objections).[19] Objections to the form of a question should be limited to the words "objection to form."[20] All other objections should be limited to the word "objection" and a brief identification of the grounds for the objection.

Counsel defending a deposition may not instruct a witness not to answer a question unless doing so would require the disclosure of privileged information, or counsel intends to move promptly to terminate or limit the examination.[21] When a privilege is claimed, the witness should answer questions relevant to the existence, extent, or waiver of the privilege, and must disclose information such as the date of the communication, who made the statement to whom and in whose presence, the names of other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement. Courts are split on whether defending counsel may confer with the witness during a deposition. Most courts (e.g., Delaware

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[17] *See, e.g., Girard v. Aztec RV Resort, Inc.,* 10-62298-CIV, 2011 WL 7946120 (S.D. Fla. Oct. 6, 2011) (holding that the mere filing of a motion for protective order does not discharge a deponent from appearing for his deposition); *In re Hollar,* 184 B.R. 243 (Bankr. M.D.N.C. 1995) (same).

[18] *See* DEL. BANKR. L.R. 7030-1(c) (excusing attendance as long as a motion under FED. R. CIV. P. 26(c) or 30(d) is filed at least one business day before the scheduled deposition).

[19] *Tuerkes-Beckers, Inc. v. New Castle Assocs.,* 158 F.R.D. 573 (D. Del. 1993).

[20] The form of a question may be objectionable on various grounds, including that it is vague, compound, argumentative, asked and answered, assumes facts not in evidence, misstates the evidence, or lacks foundation.

[21] FED. R. CIV. P. 30(d).

and New Jersey) prohibit such conferences except when necessary to discuss whether to assert a privilege, while other courts are split on the issue.[22]

Absent a stipulation or court order allowing a longer time, a deposition is limited to seven hours over the course of a single day.[23]

Deposition Practice Pointers

- Examining counsel should exhaust each topic that is discussed, following the familiar who, what, where, why, when, and how pattern. Each specific line of questioning should be followed up by appropriate catch-all questions (e.g., was there anyone else, anything else, etc.) to ensure that nothing relevant is missed or overlooked.
- Questions should be short and be phrased in simple, clear language. Use of pronouns should be limited, and documents should be clearly identified (and authenticated by the witness) before the witness is questioned about them.
- Cross-examination should be used sparingly at a deposition. Although it can be effective to pin down a witness on a discrete issue if you are confident you will get the answers you want on the record, you may lose a significant tactical advantage by giving a witness (and his/her attorney) a 'trial run" at your cross-examination prior to trial.
- If the form of a question is objected to, examining counsel should consider rephrasing the question rather than risk losing evidence at trial or a hearing.

VI. The Use of Depositions At Trial

Under Bankruptcy Rule 7032 (adopting Civil Rule 32), a party generally may use a deposition against another party to the same extent the testimony would otherwise be admitted as live testimony, provided (1) the opposing party was present or represented at the deposition and had reasonable notice of the deposition, and (2) one of the following apply: (a) the deposition is

[22] *See, e.g., Tuerkes-Beckers, Inc.*, 158 F.R.D. at 575 (counsel may not consult with the witness regarding subject matter of testimony while witness remains under examination by opposing party); *Deutschman v. Beneficial Corp.*, C.A. No. 860595 slip op. at 3, (D. Del. Feb. 20, 1990) ("It is improper for counsel during a recess to 'coach' a deponent off the record regarding deposition testimony already given or anticipated."); *Hall v. Clifton Precision, a Div. of Litton Sys., Inc.*, 150 F.R.D. 525 (E.D. Pa. 1993) (private conferences between witness and lawyer are prohibited both during the deposition and during recesses). *But see In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614 (D. Nev. 1998) (attorney/client conference permitted so long as attorney does not demand a break in the questions or demand a conference between question and answers).

[23] FED. R. CIV. P. 30(d)(1).

used for impeachment, (b) the deposition is used in lieu of live testimony of a witness that is unavailable, or (c) the deposition is offered against the party and is the deposition of the party or the party's officer, director, managing agent, or designee under Civil Rule 30(b)(6) or Civil Rule 31(a)(4).[24]

What this means is that if you depose your opponent or your opponent's officer, director, or managing agent (or any designee under Civil Rule 30(b)(6)), that deposition can be tendered as direct evidence, subject only to any objections to admissibility if the testimony had been offered in the form of live testimony. It doesn't matter if the witness is unavailable or readily available—or even present in the courtroom during the hearing. If offered, the deposition comes in under Bankruptcy Rule 7032(a)(3).[25] If the deposition at issue is not of the party opponent or one of its delineated representatives, and if the deposition is not being used for impeachment purposes, the deposition can be used only if the witness is "unavailable" as set forth in Bankruptcy Rule 7032(a)(4)(a) through (e).

VII. Documentary Evidence

In the world of bankruptcy cases and proceedings, documentary evidence is critical. Sometimes it is all you need. Sometimes it is all you have. In this section we will discuss a few must-know issues about documentary evidence.

A. Article X of the Federal Rules of Evidence and the "Best Evidence" Rule

Article X of the Federal Rules of Evidence (the "Evidence Rules") deals with the "Contents of Writings, Recordings and Photographs." For bankruptcy purposes, the "writings" element is the usual focus. Evidence Rule 1001 defines "writings" to broadly include everything

[24] *See generally*, FED. R. BANKR. P. 7032(a)(1)–(4).

[25] *See Lang v. Lang* (*In re Lang*), 293 B.R. 501, 511 (B.A.P. 10th Cir. 2003) (noting that "under Rule 32, a party may introduce as a part of his substantive proof, the deposition of his adversary, and it is quite immaterial that the adversary is available to testify at trial or has testified there" (internal quotation marks omitted)).

that you would think a "writing" might be.[26] It also defines the concept of an "original" writing.[27] This concept is modestly important in connection with what is known as the "Best Evidence Rule." In practice, this is less a "rule" than an aspiration. Evidence Rule 1002 states that to prove the contents of a writing, the original writing is required—but it goes on to say that the rule applies "unless these rules or a federal statute provides otherwise." As if on cue, Evidence Rule 1003 provides that "[a] duplicate is admissible to the same extent as the original" unless (1) there is a genuine question as to whether the original is authentic, or (2) the circumstances would make it unfair to allow the duplicate in lieu of the original. So there you have it—the rule is that you must have the original, but if you have a copy of the original, you can use that too. Further, Evidence Rule 1004, which governs the admissibility of any "other evidence" of the contents of writings, provides further flexibility. Under Evidence Rule 1004, a duplicate, or any other evidence of the writing, can be admitted if the original writing was lost or destroyed (so long as the original was not lost or destroyed by the proponent in bad faith).

So what exactly is left of the purported "Best Evidence Rule"? In practice, not much. While it makes practical sense to use the best and most persuasive evidence you can find, there is little support for the proposition that only the "best evidence" can be used. Unless there is a genuine issue about whether the contents of a document are what they purport to be, a copy of that document will do just fine. Similarly, unless you have essentially procured the absence of the document in bad faith, you can offer any evidence, including oral testimony, of the contents of documents that are demonstrated to be lost or otherwise unavailable.

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[26] FED. R. EVID. 1001(a).

[27] FED. R. EVID. 1001(d).

B. Admissibility of Business Records

Business records often provide the foundation of an evidentiary record in bankruptcy proceedings. Fortunately, a little-used provision in the business-records exception to the hearsay rule permits the admission of business records without the need for live supporting testimony.[28]

When offered to prove the truth of the matter asserted, a business record constitutes hearsay. However, Evidence Rule 803(6) provides that certain records of regularly conducted activity are not excluded under the hearsay rule even though the declarant may be unavailable as a witness. To be admitted under the business-records exception, the proponent must establish through the testimony of a "custodian or another qualified witness" that the record was: (1) made at or near the time of the event recorded; (2) made by a person with knowledge; (3) kept in the course of a regularly conducted business activity; and (4) made pursuant to the regular practice of that business activity. A record satisfying those four elements is presumed to be accurate because "the information is part of a regularly conducted activity, kept by those trained in the habits of precision, and customarily checked for correctness, and because of the accuracy demanded in the conduct of the nation's business."[29]

The custodian or other qualified witness that must attest to the four elements above need not have prepared the record at issue.[30] But the custodian "must be able to testify about 'the origination and compilation of the documents' or 'about the initial link in the chain producing the record.'"[31]

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[28] FED. R. EVID. 803(6).

[29] *United States v. Snyder*, 787 F.2d 1429, 1433-34 (10th Cir. 1986).

[30] *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1259 (11th Cir. 1983).

[31] *Samy Santa Flooring Depot, Inc. v. Kennebec Lumber Co. (In re Samy Santa Flooring Depot, Inc.)*, Case No. 09-6571, 2011 Bankr. LEXIS 762, at *6 (N.D. Ga. Feb. 24, 2011).

Prior to 2000, a litigant offering a business record into evidence had to establish the four elements of the business-record exception by providing live testimony from the document's custodian or some other qualified witness. In 2000, however, Evidence Rule 803(6) was amended to provide that, as an alternative to live testimony, the proponent may establish the four elements of the business-records exception "by a certification that complies with [Evidence] Rule 902(11) or (12) or with a statute permitting certification."[32] This permits business records to be admitted without the "expense and inconvenience of producing time-consuming foundation witnesses."[33]

Importantly, a party intending to offer a business record into evidence without live testimony must "give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them."[34]

Bankruptcy litigants using affidavits to support the admission of business records should carefully choose the appropriate person to establish the foundation for the business record. If the affiant does not have personal knowledge regarding the business's record keeping, courts will refuse to admit the document. For example, in *Samy Santa Flooring Depot, Inc. v. Kennebec Lumber Co. (In re Samy Santa Flooring Depot, Inc.)*, the Chapter 7 Trustee attempted to establish a payment date by submitting the debtor's bank statements.[35] The Chapter 7 Trustee was the custodian of the debtor's documents and submitted an affidavit pursuant to Evidence

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[32] FED. R. EVID. 803(6); *see Am. Express Travel Related Servs. v. Vinhnee (In re Vee Vinhnee)*, 336 B.R. 437, 447 (B.A.P. 9th Cir. 2005).

[33] FED. R. EVID. 803 Advisory Committee's Note.

[34] FED. R. EVID. 902(11); *see Official Comm. of Unsecured Creditors of Enron Corp. v. Martin (In re Enron Creditors Recovery Corp.)*, 376 B.R. 442, 457 (Bankr. S.D.N.Y. 2007) ("This notice provides the opponent an opportunity to challenge the adequacy of the foundation set forth in the declaration.").

[35] 2011 Bankr. LEXIS 762, at *5.

Rule 902(11) to establish that the bank statements were admissible under the business-records exception.[36] The court, however, concluded that the statements were inadmissible because the Chapter 7 Trustee, even though he controlled the debtor's records and was the custodian of the documents, did not have personal knowledge of the bank's recordkeeping process.[37] Without testimony or an affidavit from a person with such knowledge, the bank statements were not subject to the business-records hearsay exception and could not be admitted.

C. Self-Authenticating Documents

In addition to certified business records, commercial paper and related documents are another type of self-authenticating documents that are useful in bankruptcy proceedings. Typically, in order for a document to be admitted into evidence, the proponent must establish that the document in question is in fact what it claims to be. Authentication of a document is often established by the testimony of a witness with personal knowledge of the document. However, some documents possess on their face "indicia of authenticity sufficient alone to support a finding that the item is what it purports to be."[38] These types of documents have been recognized, over the years, and Evidence Rule 902 "collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify."[39] Evidence Rule 902 sets forth twelve types of self-authenticating documents: (1) domestic public documents under seal; (2) domestic public documents not under seal; (3) foreign public documents; (4) certified copies of public records; (5) official publications; (6) newspapers and periodicals; (7) trade inspections and the like; (8) acknowledged documents; (9) commercial

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[36] *Id.* at *8.

[37] *Id.*

[38] Berry Russell, BANKRUPTCY EVIDENCE MANUAL, § 902:1 (2008 ed.).

[39] FED. R. EVID. 902 Advisory Committee's Note.

paper and related documents; (10) presumptions under acts of Congress; (11) certified domestic records of regularly conducted activity; and (12) certified foreign records of regularly conducted activity. However, even if the document qualifies as self-authenticating, it must still meet the other admissibility requirements.

Under Evidence Rule 902(9), "[c]ommercial paper, a signature on it, and related documents, to the extent allowed by general commercial law" do not require extrinsic evidence of authenticity.[40] The phrase "general commercial law" refers to the Uniform Commercial Code.[41] Judge Barry Russell's *Bankruptcy Evidence Manual* summarizes the relevant commercial law as follows:

> The following provisions of the Uniform Commercial Code are relevant: (1) § 1-202 makes certain documents required by an existing contract "prima facie evidence" of their own authenticity; (2) § 3-307 presumes the genuineness of the signatures on negotiable instruments; (3) § 3-510 provides that a formal certificate of protest, a stamp by the drawee that payment was refused, or bank records are all admissible in evidence and create a presumption of dishonor; and (4) § 8-105(2) creates a presumption as to the genuineness of a signature on a negotiable instrument.[42]

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[40] FED. R. EVID. 902(9).

[41] See FED. R. EVID. 902 Advisory Committee's Note; *see also Mandalay Resort Grp. v. Miller (In re Miller)*, 310 B.R. 185, 193 (Bankr. C.D. Cal. 2004).

[42] Berry Russell, BANKRUPTCY EVIDENCE MANUAL, § 902:10 (2008 ed.) (citations and quotation omitted).

ADMINISTRATIVE ORDER PRESCRIBING PROCEDURES
FOR ADVERSARY PROCEEDINGS (MIDDLE DISTRICT)

ORDER SETTING FILING AND DISCLOSURE REQUIREMENTS
FOR PRETRIAL AND TRIAL (SOUTHERN DISTRICT)

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
www.flmb.uscourts.gov

In re	)	
	)	
ADMINISTRATIVE ORDER	)	Administrative Order
PRESCRIBING PROCEDURES FOR	)	FLMB-2014-10
ADVERSARY PROCEEDINGS	)	
	)	
	)	

ADMINISTRATIVE ORDER
PRESCRIBING PROCEDURES
FOR ADVERSARY PROCEEDINGS

This Administrative Order establishes uniform procedures for adversary proceedings filed in this district after February 1, 2015. Accordingly, it is

ORDERED:

1. Service of Summons, Complaint, and Administrative Order. Plaintiff shall serve the summons issued by the Clerk, a copy of this Administrative Order Prescribing Procedures for Adversary Proceedings, and the complaint initiating an adversary proceeding within seven days after the summons is issued as required by Fed. R. Bankr. P. 7004(e). If the initial summons and accompanying papers are not timely served, the Plaintiff promptly shall request and serve a new summons together with the Complaint and a copy of this Administrative Order. Parties must effect service on all defendants no later than 28 days after the complaint was filed, notwithstanding Fed. R. Civ. P. 4(m). If additional parties are added later, the plaintiff shall serve a copy of this order on each additional party within seven days of the date the additional party is added.
2. Proof of Service. Plaintiff shall promptly file a proof of service indicating service of each summons, the complaint, and this Administrative Order on each defendant.

3. Failure to Effect Service. If plaintiff does not complete timely and effective service of the summons and complaint, the Court may, without further notice or hearing, dismiss the adversary proceeding for lack of prosecution.
4. Defaults. Plaintiff shall seek entry of a Clerk's default and move for a judgment by default no later than 60 days after the complaint is filed if a defendant has not filed a timely response.
5. Extensions of Time. Plaintiff must file any motion for an extension of time to effect service or to apply for the entry of default no later than 60 days after the complaint is filed and must demonstrate good cause for the requested extension.
6. Motions. The negative notice procedures set forth in Local Rule 2002-4 shall apply to all motions other than motions for withdrawal of the reference that are governed by Local Rule 5011-1. The response time shall be 14 days, except for summary judgment motions for which the response time shall be 21 days. Parties may file a reply, if desired, no later than seven days after a response is filed.
    a. Format. All motions, responses, and replies shall comply with the Court's Style Guide, be double spaced, and where appropriate, include a legal memorandum containing argument and citations of authorities. Absent leave of Court, motions and supporting memoranda shall not exceed ten pages in length.
    b. Emergency Motions. The Court will consider emergency motions at any time in its discretion. Emergency motions shall comply with Local Rule 9004-2(d) and shall be filed using the Emergency Filings/Matters/Motions link on the Court's website, www.flmb.uscourts.gov/procedures.
    c. Summary Judgment. Parties shall file motions for summary judgment no later than 60 days prior to trial. The Court may or may not set a hearing on the motion for summary judgment. The trial will proceed as scheduled even if a motion for summary judgment is pending, absent order of the Court.

7. Motions to Determine Whether Case is Core. Not later than the date set for filing a response to the complaint, any party objecting to the entry of final orders or judgments by the Bankruptcy Court on any issue in the adversary proceeding shall file a motion requesting that the Court determine whether the proceeding is a core proceeding or otherwise subject to the entry of final orders or judgments by this Court. Failure of any party to file a motion on or before the deadline set forth in this paragraph shall be deemed consent by such party to the Bankruptcy Court entering all appropriate final orders and judgments in the proceeding subject to review under 28 U.S.C. § 158.
8. Meeting of Parties. At least 14 days prior to the initial status or pretrial conference, attorneys for represented parties or unrepresented parties shall meet (the "Meeting of Parties") to discuss:
    a. The claims and defenses;
    b. The possibility of settlement;
    c. The initial disclosures required in Paragraph 10 below; and
    d. A discovery plan as required by Fed. R. Civ. P. 26(f).
9. Commencement of Discovery. Discovery may not commence until the conclusion of the Meeting of Parties, absent leave of Court.
10. Initial Disclosures. Pursuant to Fed. R. Civ. P. 26(f), at or prior to the Meeting of Parties, and without any formal discovery requests, each party shall:
    a. Identify in writing each person with discoverable information relevant to the disputed facts;
    b. Provide copies of or a written description by category and location of all documents that are relevant to the disputed facts;
    c. Formulate a joint discovery plan, if possible; and
    d. Provide a written computation of any damages claimed.

11. Pretrial or Status Conference. The Court will conduct a status or pretrial conference at any time after a responsive pleading is filed but, in any event, no later than approximately 90 days after the Complaint is filed. Parties may not introduce testimony or documentary evidence at the status conference. The Court, however, will consider relevant undisputed facts, affidavits offered without objection from the opposing parties, judicial notice items, and admissions made during the status conference by parties either directly or through counsel.

12. Pretrial Disclosures and Exhibits.

a. Witness List and Use of Depositions. Fed. R. Civ. P. 26(a)(3) shall govern pretrial disclosures regarding witnesses and use of depositions. Parties shall file and exchange names, telephone numbers, and addresses for witnesses, any designations of depositions at least 28 days before trial. Objections to the use of depositions shall be filed within 14 days of the disclosure. Parties shall confer on any factual or evidentiary stipulations prior to trial.

b. Exhibits. Parties shall prepare exhibits in compliance with Local Rule 9070-1 and Administrative Order 2014-6 addressing Electronically Stored Exhibits and shall exchange exhibits no later than seven days before the date set for trial. Unless written objection to the admissibility of any exhibit is filed no later than the close of business on the second day before trial, any objection to admissibility (other than under Fed. R. Evid. 402 and 403) shall be deemed waived.

c. Self-Authentication of Records of Regularly Conducted Activity. If a party intends to rely upon the self-authentication procedures of Fed. R. Evid. 902(11) or (12) with respect to the introduction into evidence of records of regularly conducted activities pursuant to Fed. R. Evid. 803(6), the party shall file with the Court and serve on other parties the written declaration required by Fed. R. Evid. 902(11) or (12) and a copy of all records sought to be admitted at least 28 days before trial.

13. Expert Witness Testimony. As a condition of using expert testimony at trial, parties must comply with Fed. R. Civ. P. 26(a)(2) no later than 28 days before trial.

14. Stipulations. All stipulations of the parties shall be made in writing, signed, and promptly filed with the Court.

15. Supplementation of Disclosures. Parties are under a duty to supplement or correct their Initial Disclosures and their Pretrial Disclosures in accordance with Fed. R. Civ. P. 26(e).

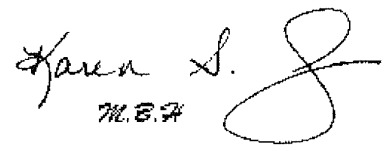
16. Discovery Deadline. Parties shall complete discovery no later than seven days before the trial date except that the parties may complete previously scheduled depositions up to the trial date.

17. Discovery Disputes. If a discovery dispute occurs, the parties shall first, as required by Fed. R. Bankr. P. 7037(a)(1), confer in good faith to attempt to resolve the issues. If unsuccessful, any party may request a telephone conference with the Court so that the Court may render an informal, preliminary ruling on the discovery dispute, without prejudice to the right of any party to file a formal motion.

18. Sanctions. Failure to comply with all requirements of this Administrative Order may result in the imposition of sanctions that could include the striking of a party's pleading or the denial of the right to introduce evidence or witness testimony.

19. Settlements. Pursuant to Local Rule 9019-1, parties immediately shall notify the Court of any settlement and promptly file a motion to approve the compromise in the Debtor's main case, not in the adversary proceeding, with one exception. If the adversary proceeding only asserts claims under 11 U.S.C. Section 523, a motion to approve the compromise is not necessary but, if the parties desire, they may seek approval of the settlement by filing a motion in the adversary proceeding.

DATED: December 18, 2014



KAREN S. JENNEMANN
Chief United States Bankruptcy Judge

United States Bankruptcy Court
Southern District of Florida
www.flsb.uscourts.gov

In re:

Name of Debtor(s) **Case Number:**

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Plaintiff(s)

VS. **Adversary Number:**

Defendant(s)
----------/

ORDER SETTING FILING AND DISCLOSURE REQUIREMENTS FOR PRETRIAL AND TRIAL

To expedite and facilitate the trial of this adversary proceeding, it is:

ORDERED as follows:

1(a). **RIGHT TO JURY TRIAL; WAIVER.** Unless each party has timely filed a statement of consent under Local Rule 9015−1(B), not later than ten (10) days before the date first set for the pretrial conference in the summons each party requesting a jury trial on any issue in this proceeding shall file with this court pursuant to Local Rule 5011−1 a motion for withdrawal of the reference. FAILURE OF ANY PARTY TO FILE A MOTION TO WITHDRAW THE REFERENCE ON OR BEFORE THE DEADLINE PROVIDED IN THIS PARAGRAPH SHALL CONSTITUTE WAIVER BY SUCH PARTY OF ANY RIGHT TO TRIAL BY JURY IN THIS PROCEEDING.

(b) **OBJECTION TO ENTRY OF FINAL ORDERS AND JUDGMENTS BY THE BANKRUPTCY COURT; CONSENT.** Not later than ten (10) days before the date first set for the pretrial conference in the summons each party objecting to the entry of final orders or judgments by this court on any issue in this proceeding, whether or not designated as "core" under 28 U.S.C. §157(b), shall file with this court a motion requesting that this court determine whether this proceeding is a core proceeding or otherwise subject to the entry of final orders or judgments by this court. Any such motion shall be treated as an objection to the entry of final orders or judgments by this court. FAILURE OF ANY PARTY TO FILE A MOTION ON OR BEFORE THE DEADLINE PROVIDED IN THIS PARAGRAPH SHALL CONSTITUTE CONSENT BY SUCH PARTY TO THIS COURT ENTERING ALL APPROPRIATE FINAL ORDERS AND JUDGMENTS IN THIS PROCEEDING. Nothing in this paragraph limits this court's ability to determine sua sponte whether this proceeding is a core proceeding under 28 U.S.C. §157(b)(3) or otherwise subject to entry of final orders or judgments by this court.

2. **DISCLOSURES.** Except as otherwise ordered by the court, Rules 26(d)(1) and 26(f), Fed.R.Civ.P., shall not apply to this adversary proceeding. The disclosure requirements of Rules 26(a)(1), 26(a)(2), and 26(a)(3)(A), Fed.R.Civ.P., shall apply, but according to the following deadlines:

   a. The initial disclosures required by Rule 26(a)(1), Fed.R.Civ.P., shall be made at least thirty (30) days before the pretrial conference.

   b. The disclosure of expert testimony under Rule 26(a)(2), Fed.R.Civ.P., shall be made (i) at least twenty (20) days before the pretrial conference or (ii) within ten (10) days after an opposing party's disclosure of evidence that gives rise to the need for the expert, whichever is later. The party disclosing an expert witness shall, within ten (10) days of the disclosure, but in no event less than five (5) days before the pretrial conference, provide to each opposing party a written report prepared and signed by the witness as required by Rule 26(a)(2)(B), Fed.R.Civ.P.

   c. The pretrial disclosures under Rule 26(a)(3)(A), Fed.R.Civ.P., shall be made no later than the pretrial conference.

   d. All disclosures under Rules 26(a)(1), 26(a)(2), and 26(a)(3)(A), Fed.R.Civ.P., shall be made in writing, signed, served, and, except for copies of exhibits and expert witness reports, shall be filed with the court.

3. **DISCOVERY.** All discovery shall be completed not later than ten (10) days before the pretrial conference. The court will allow discovery after that date only upon a showing of good cause.

4. **JOINT PRETRIAL STIPULATION.** If any party is not represented by counsel in this proceeding, this paragraph shall not apply. All parties to this proceeding shall meet not later than ten (10) days prior to the pretrial conference to confer on the preparation of a Joint Pretrial Stipulation in substantially the form of Local Form 63C. The plaintiff shall file the fully executed Joint Pretrial Stipulation no later than one (1) business day prior to the pretrial conference. The court will not accept unilateral statements and will strike *sua sponte* any such submissions. Should any of the parties fail to cooperate in the preparation of the Joint Pretrial Stipulation, any other party may file a motion requesting an order to show cause why such party or parties (and/or their counsel) should not be held in contempt for failure to comply with this order.

5. **TRIAL DATE.** At the pretrial conference, the court will set the trial of this proceeding.

6. **SPECIAL SETTINGS.** If the attorney(s) trying the case are from outside this district, or the parties or witnesses are from outside this district, or if some other reason exists that justifies a request to the court to specially set trial at a time or date certain, counsel shall request appropriate relief at the pretrial conference.

7. **DOCUMENTS REQUIRED BEFORE TRIAL.**

   a. Each party shall deliver to each opposing party (but not file), so as to be received no later than 4:00 p.m. four (4) business days prior to the pretrial conference, the following documents:

(1) A set of pre-marked exhibits (including summaries) intended to be offered as evidence at trial. Exhibits tendered by plaintiff(s) shall be marked numerically, and exhibits tendered by defendant(s) shall be marked alphabetically. Exhibits shall be bound in one or more notebooks or contained in one or more folders, with tabs marking each exhibit, and shall be accompanied by an Exhibit Register conforming to Local Form 49.

(2) With regard to any summary the party will offer in evidence at trial, a notice of the location(s) of the books, records, and the like, from which each summary has been made, and the reasonable times when they may be inspected and copied by adverse parties.

b. Unless otherwise ordered, each party shall file and deliver, so as to be received no later than 4:00 p.m. two (2) business days prior to the pretrial conference, any objection to the admissibility of any proposed exhibit, including any deposition transcript or recording (audio or video) or any summary. The objection must (i) identify the exhibit, (ii) state the grounds for the objection, and (iii) provide citations to case law and other authority in support of the objection. An objection not so made – except for one under Federal Rule of Evidence 402 or 403 – is waived unless excused by the court for good cause.

8. **SWORN DECLARATIONS.** At each party's option, the direct testimony of any witness, except adverse, hostile, or rebuttal witnesses, may be presented by sworn declaration consisting of a succinct written statement of the direct testimony that the witness would be prepared to give if questions were propounded in the usual fashion at trial. If a party offers a sworn declaration in lieu of direct testimony:

a. The statement shall substantially conform to Local Form 63B and shall be signed by the declarant under penalty of perjury;

b. Each statement of fact shall be separate, shall be sequentially numbered, and shall contain only facts that are relevant and material to the contested issue before the court, avoiding redundancies, hearsay, and other obviously objectionable statements;

c. The statement may be referenced as the witness's "sworn declaration of fact;"

d. The original sworn declaration of fact shall be marked as a proposed exhibit and filed and served as otherwise required by this order;

e. Objections to any portion of a sworn declaration of fact may be raised at the time the sworn declaration of fact is offered to the court. The witness shall then be sworn and asked if the sworn declaration of fact correctly reflects the testimony that would be given if the witness was asked the appropriate questions. Opposing counsel may then cross-examine the witness. At the conclusion of cross-examination, the party whose witness is on the stand may conduct redirect examination in the usual manner; and

f. The court may require that direct testimony be provided in the usual manner during trial even if a sworn declaration of fact is offered.

9. **FINAL ARGUMENT.** At the conclusion of the trial, in lieu of final argument, the court may request that each party submit (a) a written closing statement with supporting legal argument or (b) a proposed memorandum opinion with findings of fact and conclusions of law with a separate proposed final judgment, in word processing format, to an electronic mailbox designated by the court. The filer must include in the "subject" line the case name and number and the date of the relevant hearing.

10. **DISPOSITIVE MOTIONS.** All motions to dismiss and motions for summary judgment shall be filed and served not later than ten (10) days before the pretrial conference and shall comply with Local Rule 7056−1, if applicable. Absent good cause, failure to file and serve such a motion in a timely manner shall constitute waiver of the right to do so. Absent prior permission of the Court, no party shall file any motion to dismiss, motion for summary judgment, or response thereto, exceeding twenty (20) pages in length, and no party shall file any reply exceeding ten (10) pages in length. Title pages preceding the first page of text, signature pages, and certificates of service shall not be counted as pages for purposes of this paragraph.

    If a party submits affidavits, declarations, or other materials in support of or in opposition to a motion for summary judgment, then: (A) the movant must serve with the motion all such materials; and (B) the opposing party must serve with the response all such materials in opposition to the motion. Any reply shall be strictly limited to rebuttal of matters raised in the response. Absent prior permission of the Court, in connection with any motion for summary judgment no party shall file affidavits or declarations that exceed twenty (20) pages in the aggregate.

11. **COMPLIANCE WITH FEDERAL JUDICIARY PRIVACY POLICY.** All papers, including exhibits, submitted to the court must comply with the federal judiciary privacy policy as referenced under LR 5005−1(A)(2).

12. **MEDIATION.** Pursuant to Local Rule 9019−2, the court may order the assignment of this proceeding to mediation at the pretrial conference or at any other time, upon the request of a party or upon the court's own motion.

13. **SETTLEMENT.** If the proceeding is settled, the parties shall submit to the court a stipulation or proposed judgment approved by all parties prior to the date of trial. If a judgment or stipulation is not submitted to the court, all parties shall be prepared to go to trial. If the proceeding is removed from the trial calendar based upon the announcement of a settlement, the proceeding will not be reset for trial if the parties fail to consummate the settlement. In such event, the court will consider only a motion to enforce the settlement, unless the sole reason the settlement is not consummated is that the court did not approve the settlement, in which case the matter will be reset for trial at a later date.

14. **DEFAULT.** If any defendant fails to answer or otherwise respond to the complaint in a timely manner, the plaintiff(s) shall promptly seek entry of a clerk's default pursuant to Bankruptcy Rule 7055(a), and Local Rule 7055−1, and shall move for default judgment. Unless judgment has been entered or the court advises the plaintiff(s) that the pretrial conference has been continued or canceled, the plaintiff(s) shall appear at the pretrial conference.

15. **SANCTIONS.** Failure to comply with any provision of this order or failure to appear at the pretrial conference may result in appropriate sanctions, including the award of attorney's fees, striking of pleadings, dismissal of the action, or entry of default judgment.

16. **CONTINUANCES.** Continuances of the pretrial conference or trial or any deadlines set forth in this order must be requested by written motion. Any request for continuance or amendment to this order shall set forth the status of discovery, including exchange of disclosures required under this order, and shall state the reasons why the party or parties seek a continuance.

17. **SERVICE.** Plaintiff(s)' counsel shall serve a copy of this order on the defendant(s) with the summons and complaint.

# # #

PRACTICAL EVIDENCE

BY

JUDGE MICHAEL G. WILLIAMSON

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FOR FULL TEXT SEE:

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Practical Evidence

by

Judge Michael G. Williamson

* * *

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DAUBERT IN BANKRUPTCY PRACTICE:

DISPELLING SOME COMMON BUT QUESTIONABLE WORKING ASSUMPTIONS

Daubert in Bankruptcy Practice: Dispelling Some Common But Questionable Working Assumptions

Hon. Michael G. Williamson*

> [An] opinion has a significance proportioned to the sources that sustain it.[1] An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.[2]

Opinion testimony arises in bankruptcy courts in numerous circumstances ranging from a chapter 13 debtor's testimony on the value of the debtor's furniture and appliances in a contested plan confirmation hearing[3] to an accountant's testimony on the sufficiency of a fund to cover future personal injury claims in the context of confirmation of a chapter 11 plan of reorganization resolving mass tort claims.[4] One of the most important tools available to bankruptcy practitioners faced with the introduction of such opinion testimony is an objection

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*Michael G. Williamson sits as a bankruptcy judge in the Middle District of Florida, Tampa Division. Prior to his appointment to the bench on March 1, 2000, Judge Williamson practiced in the litigation section of Holland & Knight, Maguire, Voorhis & Wells (formerly Maguire, Voorhis & Wells, P.A.), in Orlando for over twenty years and was chair of the firm's litigation section for four years. In the last year he has spoken on evidence topics at the Southeastern Bankruptcy Law Institute in Atlanta, the Stetson University College of Law Annual Seminar on Bankruptcy Law, and Federal Judicial Center seminar programs for bankruptcy judges in Philadelphia, Cleveland, and San Diego. He was selected as a Fellow of the American College of Bankruptcy in 1993.

[1] Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank, 253 N.Y. 23, 34, 170 N.E. 479, 483 (1930) (Cardozo, J.).

[2] Mid-State Fertilizer Co. v. Exchange National Bank, 877 F.2d 1333, 1339 (7th Cir. 1989)(citing Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 829-32 (D.C. Cir. 1988)).

[3] *E.g., In re* Brown, 244 B.R. 603 (Bankr. W.D. Va. 2000).

under *Daubert*,[5] as implemented through the recent amendments to Rule 702[6] of the Federal Rules of Evidence.[7] Unfortunately, this tool is often neglected based on a misconception that it has little application to the routine types of opinion testimony that regularly occur within the context of a bankruptcy case.

This article will relate how *Daubert* is easily applicable in a bankruptcy setting. In doing so, the article will attempt to refute three common questionable working assumptions that are prevalent in bankruptcy practice. These are:

Questionable Working Assumption No. 1: The primary focus of the attorney in seeking to admit expert testimony is ensuring that the expert is qualified to give opinion testimony. Once an expert is qualified as an expert in an area, the opinions of that expert in that particular area then come into evidence and become part of the record

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[4] *E.g.*, *In re* Dow Corning Corp., 237 B.R. 364 (Bankr. E.D. Mich. 1999).
[5] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993).
[6] Rule 702 provides as follows (the amendments effective December 1, 2000, are italicized):

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, *if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*

subject to the court's giving those opinions appropriate weight.

Questionable Working Assumption No. 2: Because the judge is the trier of fact in the typical bankruptcy evidentiary hearing, the Daubert "gatekeeping" function of a trial judge has no practical applicability in bankruptcy cases.

Questionable Working Assumption No. 3: The prudent approach for a bankruptcy judge -- in anticipation of an appellate review -- is to first admit the proffered testimony (assuming the expert is qualified) over objection as to the expert's methodology, and announce that appropriate weight will be given to such evidence.

Before addressing these questionable working assumptions directly, it will be helpful to discuss the historical problems associated with expert testimony that led up to *Daubert* and how *Daubert* and Rule 702 are intended to address these problems.

Cranks and Paid Advocates

The case of *Chaulk v. Volkswagen*[8] provides a good example of the historical difficulties faced by trial courts prior to *Daubert* in dealing with expert testimony of

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[7] Hereafter, references to "Rule" are to the Federal Rules of Evidence unless otherwise indicated.
[8] Chaulk v. Volkswagen of Am., Inc., 808 F.2d 639 (7th Cir. 1986).

dubious soundness. In *Chaulk*, the jury returned a verdict for the plaintiff on her theory that the defendant car manufacturer's door latch system was negligently designed and inherently dangerous.[9] The plaintiff's case rested on the testimony of one expert witness, an engineer whose last involvement with door latches ended 13 years before the trial.[10] In the words of the dissenting Circuit Judge Richard A. Posner, the engineer later became "a professional expert witness against automobile companies in cases involving issues of door-latch design."[11]

Following the jury verdict in favor of the plaintiff, the trial judge directed a verdict against the plaintiff based on the judge's conclusion that the expert's testimony amounted to a wholesale condemnation of the automobile industry for failing to adopt safety precautions that "would not have prevented a single accident in the history of transportation."[12] The Seventh Circuit reversed the trial judge's directed verdict on the basis that it was "'clearly wrong'" because the expert's testimony was both "'credible'" and "substantially unopposed."[13] It is apparent that the trial judge was performing what has since become

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[9] *Id.* at 640.
[10] *Id.* at 644 (Posner dissenting).
[11] *Id.*
[12] *Id.* at 645 (Posner dissenting).
[13] *Id.* at 643.

widely referred to as a "gatekeeping"[14] function by determining that the testimony upon which the jury founded its verdict was inherently not reliable and therefore not admissible. As discussed by Judge Posner in his dissent, "no reasonable jury could have believed [the expert's] testimony that the design of the . . . door latch was defective in a sense relevant to products liability law."[15] As aptly summarized by Judge Posner regarding the historical problem and abuse that results from admitting this type of expert testimony:

> [The expert's] was the testimony of a crank or, what is more likely, of a man who is making a career of testifying for plaintiffs in automobile accident cases.... His testimony illustrates the age-old problem of expert witnesses who are often the mere advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot be proved by some so-called "experts."[16]

Rule 702, as originally promulgated in 1975, did little to help this problem. It allowed for the admission

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[14] The term "gatekeeping," as used in the context of expert testimony, can be traced back to a 1985 case decided by the noted author on the topic of evidence (and then Chief Judge), Hon. Jack B. Weinstein. *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1260 (E.D.N.Y. 1985) ("The uncertainty of the evidence in [toxic tort] cases, dependent as it is upon speculative scientific hypotheses and epidemiological studies, creates a special need for robust screening of experts and *gatekeeping* under Rules 403 and 703 by the court." (emphasis added)). As support for this proposition, he cites the February 1985 draft version of the "Manual for Complex Litigation 2d § 21.4.8 at 21-60-61 & nn. 117-20."

[15] Chaulk, 808 F.2d at 644.

[16] *Id.* at 644 (citing Keegan v. Minneapolis & St. Louis R.R., 76 Minn. 90, 95, 78 N.W. 965, 966 (1899)).

of such testimony simply if specialized knowledge would assist the trier of fact to determine a fact in issue if the witness was an "expert by knowledge, skill, experience, training, or education...."[17] This extremely broad language is consistent with the "liberal thrust" of the Federal Rules of Evidence and the general approach of former Rule 702 to relax "the traditional barriers to 'opinion testimony.'"[18]

The Fundamental Change Resulting from Daubert

Daubert rejected the notion that the Federal Rules of Evidence placed "no limits on the admissibility of purportedly scientific evidence."[19] It established the trial judge as the "gatekeeper" in determining whether the expert is proposing to testify about scientific knowledge that will assist the trier of fact to understand the issue.[20] As a gatekeeper, the trial court's inquiry must be "solely on principles and methodology, not on the conclusions they generate."[21]

Daubert listed several factors to be considered: (1) Can the theory or technique be tested? (2) Has the theory or technique been subject to peer review and publication?

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[17] Fed R. Evid. 702 (1975)(amended effective December 1, 2000).
[18] Daubert, 509 U.S. at 588 (citing Beech Aircraft Corp. v. Rainey, 488 U.S. at 169, 109 S. Ct. at 450 (citing in turn to, Rules 701 to 705)).
[19] Daubert, 509 U.S. at 589.
[20] *Id.* at 597.

(3) What is the known or potential rate of error? (4) Is the theory generally accepted?[22] While it is clear that *Daubert* stands for the proposition that Rule 702 (even prior to its amendment effective December 1, 2000) imposes a special obligation upon a trial judge to ensure that scientific evidence is not only relevant but reliable,[23] unfortunately, for bankruptcy practitioners and judges, these factors had little relevance to the typical experts who appeared daily in the bankruptcy courts to give non-scientific testimony. For example, what relevance do testing, peer review, error rates, and acceptability in the relevant scientific community have to a witness providing non-scientific testimony concerning the value of the debtor's 1999 Ford F150 pickup truck?

In *Kumho Tire Company v. Carmichael,*[24] the Supreme Court concluded that *Daubert's* "general holding -- setting forth the trial judge's general 'gatekeeping' obligation -- applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."[25] Recognizing that there are

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[21] *Id.* at 595.
[22] *Id.* at 593-595.
[23] Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147, 119 S. Ct. 1167, 1174 (1999), (citing Daubert, 509 U.S. at 589).
[24] Kumho, 526 U.S. 137.
[25] *Id.* at 141.

many kinds of experts,[26] the Court concluded that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[27]

While *Kumho* clarifies *Daubert,* making clear that all expert testimony should be subject to the trial judge's gatekeeping function, it gives little practical guidance on how the reliability of expert testimony should be tested in the context of routine expert testimony heard in the bankruptcy courts. This guidance finally came in the form of the recent revisions to Rule 702.[28]

Daubert Made Easy -- the Rule 702 Amendments

Rule 702, as amended effective December 1, 2000, now requires that a witness who is qualified as an expert by knowledge, skill, experience, training or education may give opinion testimony provided the testimony satisfies three criteria. These criteria are:

1. The testimony must be based on sufficient facts or data.[29] This is a quantitative rather than qualitative test -- i.e., the issue is sufficiency of data relied upon

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[26] The Court referenced "experts in drug terms, handwriting analysis, criminal *modus operandi,* land valuation, agricultural practices, railroad procedures, attorney's fee valuation, and others." *Id.* at 150.
[27] *Id.* at 152.
[28] *Supra,* n. 7.
[29] Fed. R. Evid. 702(1).

by the expert. For example, what data in the form of comparable sales did the automobile appraiser rely upon?

2. The testimony must be the product of reliable principles and methods.[30] This is a qualitative analysis. The principles must be reliable. Turning to the common example of an automobile appraiser -- the principle generally relied upon by such appraisers is that comparable sales are a good predictor of what a willing buyer will pay a willing seller, thereby indicating the fair market value of an automobile.

3. Finally, the witness must have applied the principles and methods reliably to the facts of the case. This is also a qualitative analysis. That is, the principles must not only be reliable, but also they must have been reliably applied to the particular facts relied upon by the expert.[31] For example, just because the witness has reviewed numerous other sales in determining the value does not mean the principle has been reliably applied. For example, are the other sales really comparable? What were the dates of the other sales? Is the condition of the subject automobile similar to the comparables? What market changes have occurred post-petition that make recent

[30] Fed. R. Evid. 702(2).
[31] Fed. R. Evid. 702(3).

comparables invalid as predictors of value as of the date of the petition?

We will now turn to dispelling the questionable working assumptions set out at the beginning of this article.

Qualification of the Expert Witness
Is Not the Focus of Daubert

A. The Unscientific Speculation of Genuine Scientists.

The first questionable working assumption set out above is that the primary focus of expert testimony is ensuring the expert is qualified to give opinion testimony. My experience years ago as a trial lawyer in the state courts was that if you could qualify the witness, something that was usually easy to do, then whatever the witness said in form of an opinion would come into evidence. Any questions as to reliability of the opinion went to weight, not admissibility.

That is changed with *Daubert* with the concept of the judge as a gatekeeper -- not as a gatekeeper to the witness -- but as to the opinion. As aptly put by the Seventh Circuit in *Rosen v. Ciba-Geigy Corp.*,[32] "Under the regime of *Daubert* ... a district judge asked to admit scientific evidence must determine whether the evidence is genuinely

[32] Rosen v. Ciba-Geigy Corp., 78 F.3d 316 (7th Cir. 1996).

scientific, as distinct from being unscientific speculation offered by a genuine scientist."[33] Put another way, "Judges should not be buffaloed by unreasoned expert opinions"[34] even from the most qualified of experts.

In fact, the qualification of the experts in *Daubert* and *Kumho* was not at issue. In *Daubert,* the Supreme Court noted that all the experts "possessed impressive credentials."[35] In *Kumho,* the Supreme Court noted that the district court, which excluded the expert's testimony, "did not doubt [the expert's] qualifications...."[36]

A case particularly illustrative of this point is *In re Brand Name Prescription Drugs Antitrust Litigation.*[37] At trial, the plaintiffs called as their expert a witness who had "eminent and distinguished credentials," who was a past recipient of the Nobel Prize in Economics, "an award without equal in recognition of scholarship and contributions in his chosen discipline," and who was affiliated with "indisputably one of the finest educational

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[33] *Id.* at 318.
[34] Mid-State Fertilizer Co. v. Exchange Nat'l Bank, 877 F.2d 1333, 1340 (7th Cir. 1989)(citing Paul Meier, *Damned Liars and Expert Witnesses,* 81 J. Am. Statistical Ass'n 269 (1986)).
[35] Daubert, 509 U.S. at 583.
[36] Kumho, 526 U.S. at 153.
[37] 1999 U.S. Dist. Lexis 550 (N.D. Ill. 1999). In Brand Names, the plaintiff alleged a price-fixing conspiracy in which the defendants agreed to eliminate price competition and to keep prices of brand name prescription drugs artificially high to retail pharmacies, in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.

institutions in the world."[38] However, as the court noted, the expert's "eminent credentials cannot serve to lessen or eliminate that settled requirement of admissibility."[39]

In concluding that the expert's opinions "failed every test of admissibility"[40] the court found that the witness was ignorant of material testimony and other evidence and that his opinions were offered without any scientific basis or having been the subject of economic methodological testing.[41] The court directed a judgment in favor of the defendants at the conclusion of the plaintiffs' case.[42]

Similarly, at the hearing on confirmation in the Chapter 11 case of *Dow Corning Corp.*,[43] certain claimants offered the expert testimony of a certified public accountant on the issue of the sufficiency of a fund to satisfy anticipated claims against the debtor. The bankruptcy court noted that accountants routinely estimate expenses that are expected to occur in the future so reserve funds can be established. In fact, the expert had performed such estimations in the past. If permitted to testify he would have opined that $400 million was "clearly

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[38] 1999 U.S. Dist. Lexis 550, at *28.
[39] *Id.* at *33.
[40] *Id.* at *34.
[41] *Id.* at *29.
[42] *Id.* at *48.
[43] Dow, 237 B.R. 364.

insufficient to satisfy all claims against the Litigation Facility."[44]

In response to the *Dow Corning* proponents' *Daubert* objection, the bankruptcy court noted that the accountant's "expertise in the field of accountancy is not disputed."[45] Rather, as an expert, his opinions "must be supported by reliable data and methodology."[46] In this regard, the party seeking to elicit the expert testimony bears the burden of establishing the testimony's admissibility by a preponderance of the evidence. Accordingly, because the party offering the expert testimony had failed to establish that the expert's opinions were based on reliable data and methodology, the evidence was not admitted.[47]

B. Daubert In Practice.

The following is an all too common example of the direct examination of an expert on automobile value. (The context is the debtor's motion to determine the secured status of a creditor's claim that is secured by a lien on the debtor's automobile.) Here's how the testimony goes:

> Debtor's Counsel: "Your Honor, I call Joseph Perrilli to the witness stand."
>
> Debtor's Counsel: "Mr. Perrilli, what experience do you have in the valuation of automobiles?"

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[44] *Id.* at 368.
[45] *Id.*
[46] *Id.* at 373.
[47] *Id.*

> Witness: "I've been in the car business for 40 years. During that time, I've bought and sold in the neighborhood of 10,000 cars."
>
> Debtor's Counsel: "At my request, did you perform an appraisal of the Debtor's 1997 Ford Taurus?"
>
> Witness: "Yes, I did."
>
> Debtor's Counsel: "Based on your years of experience in buying and selling automobiles, were you able to form an opinion as to its value?"
>
> Witness: "Yes, I was. In my opinion it has a fair market value of $9,700."
>
> Debtor's Counsel: "Thank you, Mr. Pirrelli. Your Honor, no further questions."

This scenario unfortunately arises frequently in bankruptcy courts. It is clear, however, that no matter how qualified Mr. Perrilli is, the testimony he has given fails to meet the criteria of Rule 702. Specifically, there is no evidence as to the types of data Mr. Perrilli relied upon for his opinion. Examples of such data may include: anecdotal experience of the witness or others that the witness has consulted with concerning sales of similar automobiles,[48] market reports and commercial publications

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[48] These examples may be derived by the expert from discussions with other dealers. See Fed. R. Evid. 703, which states in relevant part:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted . . . .

generally used and relied upon by the persons in the business of buying and selling used cars,[49] local auto auction reports, and advertisements.

C. *Daubert* and the Owner's Opinion.

In bankruptcy court, oftentimes, it is the owner that gives the opinion of value. It is generally accepted that an owner is competent to give opinion testimony about the value of the owner's property.[50] The advisory committee note to Rule 702 references that the types of witnesses who may provide expert testimony under Rule 702 are not limited to experts in the "strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values."[51] Alternatively, an owner may testify as to value as a lay witness under Rule 701.[52] As discussed in Russell,[53] if testifying under

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[49] Fed. R. Evid. 803(17) excludes from the hearsay rule market reports and commercial publications generally used and relied upon by the public or by persons in particular occupations (e.g., N.A.D.A., Kelley Blue Book, Edmunds.com).

[50] Brown, 244 B.R. at 611; Russell, Bankruptcy Evidence Manual, 2001 Ed., § 701.2 at 819.

[51] Advisory Committee Note to Fed. R. Evid. 702.

[52] Russell, *supra,* n. 50, § 701.2. Rule 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

[53] *Id.*

Rule 701, the owner "may merely give his opinion based on his personal familiarity of the property, often based to a great extent on what he paid for the property."[54] Such testimony will be given little, if any, weight.[55]

On the other hand, if the owner truly has "knowledge, skill, experience, training or education" that would qualify the owner as an expert, then it is appropriate to require that the owner's testimony otherwise comply with Rule 702 and be based on reliable principles applied to sufficient data. As noted in the *Brown* case regarding such testimony, "Even though [the debtor's] testimony as to valuation is admissible, it should be subject to the same type of critical analysis as would the testimony of an independent 'expert.'"[56] In *Brown,* the owner did not testify as to any specific values that she had found at "yard sales" for items similar in quality and condition to her property. In the court's view, her conclusion that her personal property had a value of $1,500 "was a figure just pulled out of the air."[57]

In light of the recent revisions to Rule 702, it appears appropriate to determine whether the testimony of an owner is being offered as the opinion testimony of a lay

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[54] *Id.*
[55] *Id.*
[56] Brown, 244 B.R. at 612.

witness or is being offered as a "skilled witness"[58] under Rule 702. In the first instance, the testimony would be admissible but may receive little weight.[59] In the latter instance, where the owner is testifying as an expert and given greater weight, the plain meaning of Rule 702 requires that the testimony should be subject to the rigors of a showing of reliability under Rule 702.

Gatekeeping Function Is Not Limited to Jury Trials

The second questionable working assumption is that because the judge is the trier of fact in the typical bankruptcy evidentiary hearing, the *Daubert* "gatekeeping" function of a trial judge has no practical applicability. That is, because bankruptcy cases do not typically involve juries, the approach ought to be "let it all in," and then the court (as the trier of fact) can give appropriate weight, if any, to otherwise unreliable opinion testimony.

Contrary to this working assumption, the gatekeeper function of a trial court does not depend on whether the case will be tried before a jury. In many instances, the issue may arise in a pre-trial procedural posture. In fact, the *Daubert* case itself was decided on summary judgment.

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[57] *Id.*
[58] Advisory Committee Note to Rule 702.

The plaintiffs sought damages for birth defects allegedly caused by Bendectin, a prescription antinausea drug marketed by the defendant. The defendant moved for summary judgment supported by an affidavit of "a well credentialed expert on the risks from exposure to various chemical substances."[60] The plaintiffs responded with the deposition testimony of eight equally credentialed experts of their own. The district court concluded that the plaintiff's scientific evidence was not admissible, and in the absence of such evidence, entered summary judgment for the defendant.[61]

Similarly, *Kumho* was decided on summary judgment.[62] The trial judge excluded, because of a lack of reliability, the expert's testimony of the plaintiff in a deposition filed in opposition to a motion for summary judgment. The court then granted the defendant's motion for summary judgment in the absence of evidence supporting the plaintiff's case.[63]

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[59] Russell, *supra*, n. 50, § 701.2 at 819 ("if [the owner] has very little or no real expertise, the testimony will be given little if any weight").
[60] Daubert, 509 U.S. at 583.
[61] The Supreme Court vacated the district court's decision because it relied on the "general acceptance" standard established by Frye v. United States, 54 App. D.C. 46, 47, 293 F. 1013, 1014 (1923). The Court held that Rule 702 assigned the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Daubert, 509 U.S. at 597. The case was remanded for further proceedings consistent with the court's holding as to the standard to be applied in determining whether the expert's testimony would be admissible.
[62] Kumho, 526 U.S. at 137.
[63] *Id.* at 146.

The trial court's gatekeeping function under *Daubert* and Rule 702 has contributed to an effective litigation technique useful against a party whose case depends on expert testimony. The case of *Downs v. Perstorp Components, Inc.*[64] is an example of this technique. Following the exchange of expert witness reports as required by Federal Rule of Civil Procedure 26(a)(2)[65] and the passing of the deadline for such reports to be obtained and furnished, the defendant moved to exclude the plaintiff's expert testimony under *Daubert*. The defendant also moved for summary judgment on the basis that once the expert witness's opinion was excluded, the plaintiff lacked evidence of a material element of its claim for relief.[66] The district court granted both motions and entered judgment for the defendant. The Sixth Circuit affirmed on appeal.[67]

This approach -- where the trial judge enters summary judgment based on the exclusion of an expert opinion essential to a party's case -- has been upheld in at least one case by every circuit court of appeals considering the

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[64] Downs v. Perstorp Components, Inc., 2002 WL 22000 (6th Cir. Tenn.)(unpublished opinion).
[65] Effective December 1, 2000, bankruptcy courts may no longer opt out of the applicability of the disclosure requirements set forth in Federal Civil Procedure Rule 26 in adversary proceedings. Rule 26 is also applicable to contested matters "unless the court orders otherwise." Fed. R. Bankr. P. 9014.
[66] Downs, 2002 WL 22000, *1.
[67] *Id.*

issue over approximately the last three years.[68] Thus, it is no less applicable to a bankruptcy court -- whether it be on summary judgment or in the conduct of a contested evidentiary hearing (such as in *Dow Corning*[69] where a "*Daubert*" objection was made to the introduction of expert testimony in the context of an objection to confirmation under the "best interest" requirement of section 1129(a)(7) of the Bankruptcy Code).

Appellate Courts Give Trial Judges Considerable Leeway on Daubert Objections

The final questionable working assumption to be dispelled is that the prudent approach for a trial judge (in anticipation of an appellate review or to preserve the record for appellate review) is to admit the proffered testimony once the expert is qualified. Objections to the methodology of the expert in arriving at the opinion must then necessarily go to the weight to be given to the expert opinion evidence rather than its admissibility. Attorneys

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[68] *See* Downs, 2002 WL 22000; Provident Life & Accident Ins. Co., 18 Fed. Appx. 554 (9th Cir. 2001); Cooper v. Smith & Nephew, Inc., 259 F.3d 194 (4th Cir. 2001); Glastetter v. Novartis Pharm. Corp., 252 F.3d 986 (8th Cir. 2001); Pride v. BIC Corp., 218 F.3d 566 (6th Cir. 2000); Washburn v. Merck & Co., Inc., 213 F.3d 627 (2nd Cir. 2000); Cipollone v. Yale Indus. Products, Inc., 202 F.3d 376 (5th Cir. 2000); Nat'l Bank of Commerce v. Associated Milk Producers, Inc., 191 F.3d 858 (8th Cir. 1999); Jaurequi v. Carter Mfg. Co., Inc., 173 F.3d 1076 (8th Cir. 1999); Heller v. Shaw Indus., Inc., 167 F.3d 146 (3d Cir. 1999); Mitchell v. Gencorp, Inc., 165 F.3d 778 (10th Cir. 1999).

[69] *Supra*, n. 5.

appearing before bankruptcy courts often accept this final working assumption with little, or no, argument.

Rather than accepting the status quo, practitioners should make *Daubert* objections, seeking the outright exclusion of the testimony. If successful, there is then no evidence in the record whatsoever on the issue for which the opinion testimony is offered. While a party may certainly appeal the ruling on admissibility of the opinion under *Daubert* -- the burden for an appellant in such an appeal is a high one. As the Supreme Court stated in *Kumho,* the "law grants the trial judge broad latitude to determine" whether the *Daubert* factors are, or are not, reasonable measures of reliability in a particular case.[70] In applying an abuse of discretion standard on appeal, appellate courts give trial courts "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."[71]

Abuse of discretion was first definitively held to be the proper standard by which to review a trial court's decision to admit or exclude scientific evidence in the

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[70] Kumho, 526 U.S. at 153.
[71] *Id. See also* Wilson v. Woods, 163 F.3d 935, 936 (5th Cir. 1999)(district courts are given wide latitude in determining the admissibility of expert testimony, and the discretion of the trial judge will not be disturbed on appeal unless manifestly erroneous).

Supreme Court case of *General Electric Company v. Joiner.*[72] In *Joiner,* the Supreme Court disagreed with the Eleventh Circuit's conclusion that a trial court should limit its role to determining the legal reliability of proffered expert testimony, leaving the jury to decide the correctness of competing, expert opinions.[73]

In the context of a *Daubert* objection, the Supreme Court referred to long-standing precedent for the proposition that an appellate court should not reverse a trial court's exercise of this discretion unless the ruling is "manifestly erroneous."[74] The Eleventh Circuit had erred in *Joiner* when it applied an "overly 'stringent' review to that ruling [and] failed to give the trial court the deference that is the hallmark of abuse-of-discretion review."[75] The Court went on to state that:

> ...[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit*[76] of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.[77]

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[72] General Electric Company v. Joiner, 522 U.S. 136, 146 (1997).
[73] *Id.* at 141.
[74] *Id.* at 142 (citing Spring Co. v. Edgar, 99 U.S. 645, 658 (1879)).
[75] *Id.* at 143 (citing Koon v. United States, 518 U.S. 81, 98-99).
[76] The term "i*pse dixit*" is latin for "he himself said it." It means something asserted but not proved. Black's Law Dictionary 833 (7th ed. 1999).
[77] Joiner, 522 U.S. at 146 (citing Turpin v. Merrell Dow Pharmaceuticals, Inc., 959 F.2d 1349, 1360 (6th Cir. 1992) *cert. denied,* 506 U.S. 826 (1992)).

Consistent with this mandate from the Supreme Court, a review of the approximately 43 circuit courts decisions over the last three years reviewing a trial court's exclusion of opinion testimony based on a *Daubert* analysis reflects great deference being given to trial courts on this issue. In these cases, the affirmance rate was approximately 74 percent,[78] with reversal occurring in 26 percent[79] of the cases reviewed.

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[78] Downs, 2002 WL 22000; Black v. M & W Gear Co., 269 F.3d 1220 (10th Cir. 2001); Dhillon v. Crown Controls Corp., 269 F.3d 865 (7th Cir. 2001); U.S. v. Langan, 263 F.3d 613 (6th Cir. 2001); Provident, 18 Fed. Appx. 554; Saldana v. Kmart Corp., 260 F.3d 228 (3d Cir. 2001); Glastetter, 252 F.3d 986; J.B. Hunt Transp., Inc. v. Gen. Motors Corp., 243 F.3d 441 (8th Cir. 2001); Nelson v. Tenn. Gas Pipeline Co., 243 F.3d 244 (6th Cir. 2001); Oddi v. Ford Motor Co., 234 F.3d 136 (3rd Cir. 2000); Bowe v. Consol. Rail Corp., 230 F.3d 1357 (6th Cir. 2000); U.S. v. Allerheiligen, 221 F.3d 1353 (10th Cir. 2000); Pride, 218 F.3d 566; Washburn, 213 F.3d 627; Gates v. City of Memphis, 210 F.3d 371 (6th Cir. 2000); Cipollone, 202 F.3d 376; Moisenko v. Volkswagenwerk Aktiengesellschaft, 198 F.3d 246 (6th Cir. 1999); *In re* TMI Litigation, 193 F.3d 613 (3rd Cir. 1999); Nat'l Bank of Commerce v. Associated Milk Producers, Inc., 191 F.3d 858; Allison v. McGhan Medical Corp., 184 F.3d 1300 (11th Cir. 1999); Thomas v. Washington Indus. Med. Ctr., Inc., 187 F.3d 631 (4th Cir. 1999); U.S. v. Salimonu, 182 F.3d 63 (1st Cir. 1999); Norris v. Ford Motor Co., 182 F.3d 909 (4th Cir. 1999); U.S. v. Paul, 175 F.3d 906 (11th Cir. 1999); Jaurequi, 173 F.3d 1076; *In re* Unisys Sav. Plan Litig., 173 F.3d 145 (3rd Cir. 1999); Heller, 167 F.3d 146; U.S. v. Hall, 165 F.3d 1095 (7th Cir. 1999); Wilson v. Woods, 163 F.3d 935 (5th Cir. 1999); Mitchell, 165 F.3d 778; *In re* Barnes, 266 B.R. 397 (8th Cir. 2001).

[79] Lauzon v. Senco Prod., Inc., 270 F.3d 681 (8th Cir. 2001); Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832 (9th Cir. 2001); U.S. v. Mathis, 264 F.3d 321 (3rd Cir. 2001); Alfred v. Caterpillar, Inc., 262 F.3d 1083 (10th Cir. 2001); Hardyman v. Norfolk & Western Ry. Co., 243 F.3d 255 (6th Cir. 2001); U.S. v. Vallejo, 237 F.3d 1008 (9th Cir. 2001); Jahn v. Equine Services, PSC., 233 F.3d 382 (6th Cir. 2000); Smith v. Ford Motor Co., 215 F.3d 713 (7th Cir. 2000); Walker v. Soo Line R.R. Co., 208 F.3d 581 (7th Cir. 2000); Curtis v. M&S Petroleum, Inc., 174 F.3d 661 (5th Cir. 1999); Nemir v. Mitsubishi Motor Sales of Am., 6 Fed. Appx. 266 (6th Cir. 2001).

Conclusion

Since its amendment, effective December 1, 2000, Rule 702 makes clear that expert opinion testimony is admissible only if it is based upon reliable principles applied to sufficient data. In light of *Daubert* and this change to Rule 702, counsel can no longer sit idly back and allow witnesses, even imminently qualified expert witnesses, to give opinion testimony without objection, where appropriate.

While there is often a tendency in a bench trial for the judge to let in the evidence and give it such weight as is appropriate, a thoughtful, focused objection by counsel conversant with *Daubert* may result in the outright exclusion of such testimony. Moreover, the appellate courts that may have previously been inclined to reverse a trial court's exclusion of such evidence are now constrained to affirm the trial court's discretion in light of *Daubert* and subsequent Supreme Court cases.

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Foreword

In 1993, the Executive Council of the Trial Lawyers Section of The Florida Bar (which represents over 6,000 trial lawyers in Florida) formed a professionalism committee to prepare practical guidelines on professional conduct for trial lawyers. After reviewing the numerous aspirational and model guidelines from Florida and around the country, the professionalism committee determined that, with minor modifications, the guidelines that had been prepared by the Hillsborough County Bar Association were the best model for the entire state. Therefore, in 1994, at the request of the professionalism committee, the Executive Council of the Trial Lawyers Section unanimously approved the Guidelines for Professional Conduct. The Trial Lawyers Section then sought the endorsement of the Guidelines from the Florida Conference of Circuit Court Judges; at its meeting held in September 1995, the Conference approved the Guidelines. In so doing, the Conference asserted that the Guidelines do not have the force of law and that trial judges still have the right and obligation to consider on a case-by-case basis issues raised by the Guidelines. Since their endorsement by the Conference, the Guidelines have been followed by lawyers throughout the state and have been endorsed by administrative order in many circuits.

Beginning in 1999, the Trial Lawyers Section undertook to rewrite the Guidelines to clarify certain provisions, to make certain provisions consistent with current law, and to eliminate certain provisions considered unnecessary because they were redundant of either a rule of civil procedure or a rule of professional conduct, which lawyers are expected to follow as minimum standards of professionalism. The 2001 edition of the Guidelines was the result of that effort, and the Section has updated and revised that initial edition. These revised Guidelines are promulgated jointly by the Conference of Circuit Court Judges, the Conference of County Court Judges, and the Trial Lawyers Section of The Florida Bar. It is hoped that dissemination of these Guidelines will give direction to both lawyers and judges concerning how lawyers should conduct themselves in all phases of trial practice. The adoption of the Guidelines by the Trial Lawyers Section also is intended to express support for trial judges who require that lawyers conduct themselves professionally.

For most lawyers, these Guidelines simply will reflect their current practice. However, it is hoped that the use of these Guidelines will continue to increase the level of professionalism in trial practice in Florida.

This 2008 edition supersedes the previous editions of the Guidelines.

Preamble

The effective administration of justice requires the interaction of many professionals and disciplines, but none is more critical than the role of the lawyer. In fulfilling that role, a lawyer performs many tasks, few of which are easy, most of which are exacting. In the final analysis, a lawyer's duty is always to the client. In striving to fulfill that duty, a lawyer always must be conscious of his or her broader duty to the judicial system that serves both attorney and client. To the judiciary, a lawyer owes candor, diligence, and utmost respect. To the administration of justice, a lawyer unquestionably owes the fundamental duties of personal dignity and professional integrity. Coupled with those duties is a lawyer's duty of courtesy and cooperation

with fellow professionals for the efficient administration of our system of justice and the respect of the public it serves. In furtherance of these fundamental concepts, the following Guidelines for Professional Conduct are adopted. It is recognized that these Guidelines must be applied in keeping with the advocacy of the interests of one's client and the long tradition of Professionalism among and between members of the Trial Lawyers Section of The Florida Bar. These Guidelines are subject to the Florida and Federal Rules of Civil Procedure, the Florida Rules of Professional Conduct, and the specific requirements of any standing or administrative order, local court rule, or order entered in a specific case. Although we do not expect every lawyer to agree with every guideline, these standards reflect our best effort to encourage decency and courtesy in our professional lives without intruding unreasonably on each lawyer's choice of style or tactics.

A. GENERAL PRINCIPLES

1. A lawyer is both an officer of the court and an advocate. As such, the lawyer always should strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court.

2. A lawyer's word should be his or her bond.

3. A lawyer should adhere strictly to all express promises and agreements with other counsel, whether oral or in writing.

4. A lawyer should be courteous and civil in all professional dealings with other persons. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others. Lawyers can disagree without being disagreeable. Effective and zealous representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks, or acrimony toward other counsel, parties, or witnesses.

5. Lawyers should require that persons under their supervision conduct themselves with courtesy and civility.

6. When consistent with their clients' interests, lawyers should cooperate with opposing counsel to avoid litigation and to resolve litigation that already has commenced.

7. A lawyer must not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or to unnecessarily prolong litigation or increase litigation expenses.

B. SCHEDULING, CONTINUANCES, AND EXTENSIONS OF TIME

1. Attorneys must, except in extraordinary circumstances, communicate with opposing counsel before scheduling depositions, hearings, and other proceedings -- to schedule them at times that are mutually convenient for all interested persons.

2. On receipt of an inquiry concerning a proposed time for a hearing, deposition, meeting, or other proceeding, a lawyer promptly should agree to the proposal or offer a counter suggestion that is as close in time as is reasonably possible.

3. As soon as they become apparent, a lawyer should call to the attention of those affected, including the court or tribunal, potential scheduling conflicts or problems.

4. Attorneys should cooperate with each other when conflicts and calendar changes are necessary and requested.

5. Counsel never should request a calendar change or misrepresent a conflict to obtain an advantage or delay. However, in the practice of law, emergencies will arise that affect our families or our professional commitments and create conflicts that make requests inevitable. We should be cooperative with each other whenever possible in agreeing to calendar changes, and should make requests of other counsel only when absolutely necessary.

6. Attorneys must, except in extraordinary circumstances, provide opposing counsel, parties, witnesses, and other affected persons sufficient notice of depositions, hearings, and other proceedings.

7. When scheduling hearings and other adjudicative proceedings, a lawyer should request an amount of time that is calculated to permit full and fair presentation of the matter to be adjudicated and to permit equal response by the lawyer's adversary.

8. A lawyer should accede to all reasonable requests for scheduling, rescheduling, cancellations, extensions, and postponements that do not prejudice the client's opportunity for full, fair, and prompt consideration and adjudication of the client's claim or defense.

9. First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery, or motions, ordinarily should be granted between counsel as a matter of courtesy unless time is of the essence.

10. After a first extension, any additional requests for time should be addressed by balancing the need for expedition against the deference one ordinarily should give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely that a court would grant the extension if asked to do so.

11. A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough."

12. A lawyer should not seek extensions or continuances or refuse to grant them for the purpose of harassment or prolonging litigation.

13. A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose conditions, such as preserving the right to seek reciprocal scheduling concessions. However, when granting extensions, a lawyer should not seek to preclude an opponent's substantive rights, such as the right to move against a complaint.

14. A lawyer should not request rescheduling, cancellations, extensions, or postponements without legitimate reasons and never solely for the purpose of delay or obtaining unfair advantage.

C. SERVICE OF PAPERS

1. Papers should not be served to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day before a secular or religious holiday. A "paper" is any written material that is to be filed with a court or other tribunal.

2. Service should be made personally, by facsimile transmission, or by electronic mail when it is likely that service by mail, even when allowed, will not provide the opposing party with adequate time to review the paper before a court appearance.

3. Facsimile equipment and email systems should not be turned "off" during counsel's usual working hours in order to prevent opposing counsel from communicating or serving papers.

D. WRITTEN SUBMISSIONS TO COURTS, INCLUDING BRIEFS, MEMORANDA, AFFIDAVITS, AND DECLARATIONS

1. Copies of any submissions to the court (correspondence, memoranda of law, case law, and so forth) should be provided simultaneously to opposing counsel by substantially the same method of delivery by which they are provided to the court. For example, if a memorandum of law is hand-delivered to the court, a copy should be hand-delivered or faxed to opposing counsel at the same time. If asked by the court to prepare an order, counsel should furnish a copy of the order, and any transmitted letter, to opposing counsel when the material is submitted to the court. Sending an additional copy by electronic mail also is encouraged, if possible.

2. Papers, including memoranda of law, should not be served at court appearances unless the proponent agrees to give opposing counsel reasonable time following the court appearance in which to respond to the papers. If papers, including memoranda of law, are served before a court appearance, those papers should not be served so close in time to the court appearance as to inhibit the ability of opposing counsel to prepare for that appearance or to respond to the papers.

3. Neither written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity, or personal behavior of one's adversary, unless those characteristics or actions are directly and necessarily in issue.

E. COMMUNICATION WITH ADVERSARIES

1. Counsel always should be civil and courteous in communicating with an adversary, whether in writing or orally.

2. Letters or electronic mail should not be written to ascribe to one's adversary a position that the adversary has not taken or to create "a record" of events that have not occurred.

3. Unless specifically permitted or invited by the court, letters and electronic mail, between counsel should not be sent to judges.

F. DEPOSITIONS

1. Depositions should be taken only when actually needed to ascertain facts or information or to perpetuate testimony. Depositions never should be used as a means of harassment or to generate expense.

2. When scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and deponents, when it is possible to do so without prejudicing the client's rights.

3. When scheduling depositions on oral examination, a lawyer should allow enough time to permit the conclusion of the deposition, including examination by all parties, without adjournment.

4. Counsel should not attempt to delay a deposition for dilatory purposes, but only if necessary to meet real scheduling problems.

5. Counsel should not inquire into a deponent's personal affairs or integrity when that inquiry is not relevant to the subject matter involved in the pending action.

6. Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment. Counsel should not conduct questioning in a manner that is intended to harass a witness, such as by repeating questions after they have been answered, by raising one's voice, or by appearing angry at the witness.

7. Counsel defending a deposition should limit objections to those that are well founded and permitted by the Florida or Federal Rules of Civil Procedure or applicable case law. Counsel should remember that most objections are preserved and need be interposed only when the form of the question is defective or when privileged information is sought. When objecting to the form of a question, counsel simply should state: "I object to the form of the question." The grounds should not be stated unless asked for by the examining attorney. When the grounds are requested, they should be stated succinctly.

8. While a question is pending, counsel should not coach the deponent nor suggest answers, through objections or otherwise.

9. Counsel should refrain from self-serving speeches during depositions.

10. Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer, including disparaging personal remarks or acrimony toward opposing counsel, and gestures, facial expressions, audible comments, or the like as manifestations of approval or disapproval during the testimony of the witness.

G. DOCUMENT DEMANDS

1. When responding to unclear document demands, receiving counsel should attempt to discuss the demands with propounding counsel so that the demands can be complied with fully or appropriate objections can be raised.

2. Document production should not be delayed to prevent opposing counsel from inspecting documents before scheduled depositions or for any other tactical reason.

3. A lawyer should never use document demands for the purpose of harassing or improperly burdening an adversary or to cause the adversary to incur unnecessary expense.

4. After becoming aware that an action has been initiated and to the extent practicable, a lawyer should become generally familiar with the client's records and storage systems, including electronic media, so that the lawyer may properly advise the client on production, preservation, and protection of relevant data, records, and the treatment of privileged or private information during litigation.

H. INTERROGATORIES

1. In responding to interrogatories whose meaning is unclear, receiving counsel should attempt to discuss the meaning with propounding counsel so that the interrogatories can be answered fully or appropriate objections can be raised.

2. Objections to interrogatories should be based on a good faith belief and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.

3. A lawyer should never use interrogatories for the purpose of harassing or improperly burdening an adversary or to cause the adversary to incur unnecessary expense.

I. MOTION PRACTICE

1. Lawyers should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with other counsel whenever practicable. For example, before setting for hearing a nondispositive motion, counsel shall make a reasonable effort to resolve the issue.

2. A lawyer should not force an adversary to make a motion and then not oppose it.

3. After a hearing, the attorney charged with preparing the proposed order should prepare it promptly, generally no later than the following business day, unless it should be

submitted immediately to the court. The order fairly and accurately must represent the ruling of the court.

4. Before submitting a proposed order to the court, attorneys should provide the order to opposing counsel for approval, either orally or in writing. Opposing counsel then promptly should communicate any objections. As soon as objections are made, the drafting attorney immediately should submit a copy of the proposed order to the court and advise the court whether the proposed order has been approved by opposing counsel.

J. EX PARTE COMMUNICATIONS WITH COURTS AND OTHERS

1. A lawyer should avoid ex parte communication on the substance of a pending case with a judge before whom the case is pending.

2. Before making an authorized ex parte application or communication to the court, a lawyer should make diligent efforts to notify the opposing party or a lawyer known or likely to represent the opposing party and to accommodate the schedule of that lawyer to permit the opposing party to be represented on the application. A lawyer should make an ex parte application or communication (including an application to shorten an otherwise applicable time period) only when there is a bona fide emergency that will result in serious prejudice to the lawyer's client if the application or communication is made on regular notice.

3. Attorneys should notify opposing counsel of all oral or written communications with the court or other tribunal, except those involving only scheduling matters.

4. A lawyer should be courteous and may be cordial to a judge, but should never show marked attention or unusual informality to the judge. A judge should be referred to by surname in court. A lawyer should avoid anything calculated to gain, or to have the appearance of gaining, special personal consideration or favor from a judge.

K. SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION

1. An attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.

2. Counsel should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

3. In every case, counsel should consider whether the client's interest could be served adequately and the controversy disposed of more quickly and economically by expedited trial, voluntary trial resolution, arbitration, mediation, or other forms of alternative dispute resolution.

L. TRIAL CONDUCT AND COURTROOM DECORUM

1. A lawyer always should interact with parties, counsel, witnesses, jurors or prospective jurors, court personnel, and judges with courtesy and civility, and should avoid undignified or discourteous conduct that is degrading to the court or the proceedings.

2. Counsel shall admonish all persons at counsel table that gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses or at any other time, absolutely are prohibited.

3. During trials and evidentiary hearings, the lawyers mutually should agree to disclose the identities and duration of witnesses anticipated to be called that day and the following day, including depositions to be read, and should cooperate in sharing with opposing counsel all visual aid equipment.

4. A lawyer should abstain from conduct calculated to detract or divert the fact finder's attention from the relevant facts or otherwise cause the fact finder to reach a decision on an impermissible basis.

5. A lawyer should not knowingly misstate, distort, or improperly exaggerate any fact or opinion nor permit the lawyer's silence or inaction to mislead anyone.

6. In appearing in his or her professional capacity before a tribunal, a lawyer should not:

   a. state or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence;

   b. ask any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person;

   c. assert a personal knowledge or opinions concerning the facts in issue, except when testifying as a witness;

   d. assert a personal opinion concerning the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused, but may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters at issue.

7. A question should not be interrupted by an objection unless the question is patently objectionable or there is a reasonable ground to believe that information is being included that should not be disclosed to the jury.

8. When a judge already has made a ruling about the inadmissibility of certain evidence, a lawyer should not seek to circumvent the effect of that ruling and get the evidence before the jury by repeated questions relating to the evidence in question, although the lawyer may make a record for later proceedings of the ground for urging the admissibility of the evidence in question. This does not preclude efforts by the lawyer to have the evidence admitted through other, proper means.

9. A lawyer scrupulously should abstain from all acts, comments, and attitudes calculated to curry favor with any juror, by fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience, or the like.

10. A lawyer never should attempt to place before a tribunal or jury evidence known to be clearly inadmissible, nor make any remarks or statements intended improperly to influence the outcome of any case.

11. A lawyer should accede to reasonable requests for waivers of procedural formalities when the client's legitimate interests are not affected adversely.