

**The Eighty-First Annual Meeting of the  
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**ALMOST Everything You Always  
Wanted to Know About Evidence**

**Moderated By:**

**Hon. Michael G. Williamson**  
**United States Bankruptcy Court**  
801 North Florida Avenue, Ste. 1054  
Tampa, Florida 33602-3899  
813.301.5520  
Fax 813.301.5527  
[jwilliamson@flmb.uscourts.gov](mailto:jwilliamson@flmb.uscourts.gov)

**Panelists:**

**Jean R. Robertson**  
**CALFEE, HALTER & GRISWOLD LLP**  
1400 KeyBank Center  
800 Superior Avenue  
Cleveland, Ohio 44114-2688  
216.622.8404  
Fax: 216.622.0816  
[jrobertson@calfee.com](mailto:jrobertson@calfee.com)

**Coralie ("Cori") Lopez-Castro, Esq.**  
**KOZYAK TROPIN & THROCKMORTON, P.A.**  
2525 Ponce De Leon, 9th Floor  
Miami, Florida 33134  
305 372.1800  
Fax: 305 372.3508  
[clc@kttlaw.com](mailto:clc@kttlaw.com)

**Eric Terry**  
**HAYNES AND BOONE, LLP**  
112 East Pecan St., Suite 900  
San Antonio, Texas 78205  
210.978.7424  
Fax: 210.554.0430  
[eric.terry@haynesboone.com](mailto:eric.terry@haynesboone.com)

**Andrea S. Hartley**  
**AKERMAN SENTERFITT**  
One S.E. 3rd Ave.  
Miami, FL 33131  
305 374.5600  
Fax: 305 374.5095  
[andrea.hartley@akerman.com](mailto:andrea.hartley@akerman.com)

## **Select Evidentiary Issues for the Bankruptcy Practitioner**

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Honorable Michael G. Williamson  
United States Bankruptcy Court  
Tampa, Florida

### I. The “Basics.”<sup>1</sup>

A. Absent a “short cut,” i.e., a stipulation, judicial or evidentiary admission, judicial notice, or a presumption, there are generally four ways to establish a fact at an evidentiary hearing or trial: (1) real evidence (the thing itself, e.g., the murder weapon); (2) demonstrative evidence (a depiction of the thing, e.g., a picture or diagram); (3) testimonial evidence; and (4) documentary evidence.

B. As a predicate for the admissibility of evidence, the proponent must establish the following:

1. **Relevance.** The evidence must be relevant. That is, under Rule 402 the evidence must have “any tendency to make the existence of any fact that is of consequence more or less probable.”

2. **Personal Knowledge.** The witness must have personal knowledge about the matters about which the witness is testifying. Under Rule 602 a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter (with the exception of experts who may rely on inadmissible evidence in forming opinions).

3. **Not Subject to Rule of Exclusion.** Finally, the evidence must not be subject to a rule of exclusion. If the evidence is subject to a rule of exclusion, e.g., the hearsay rule, it must fall within an exception to the rule of exclusion, e.g., the business records exception.

### C. Applicable Rules.

#### 1. Rule 103--Rulings on Evidence.

(a) Effect of erroneous ruling.--Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

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<sup>1</sup> Included in these materials is (i) an appendix containing a “Quick Reference” to commonly cited Federal Rules of Evidence; (ii) Business Records Testimony Examples; (iii) Example Cross Examination of a Retained Expert; and (iv) Example Plaintiff’s Motion to Exclude the Expert Opinion Testimony of Expert ABC and Expert XYZ.

(1) Objection.--In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context;

(2) Offer of proof.--In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

*Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.*

\* \* \*

[Italicized text indicates Amendment effective Dec. 1, 2000.]

2. Rule 402--Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

3. Rule 602--Lack of Personal Knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

4. Rule 802--Hearsay Rule.

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

5. Rule 901--Requirement of Authentication or Identification.

(a) General provision.--The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations.--By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge.  
Testimony that a matter is what it is claimed to be.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

## II. The “Do’s” and “Don’t’s” of Effective Witness Examination.

### A. Direct Examination.

#### 1. Rule 611--Mode and Order of Interrogation and Presentation.

(c) Leading Questions. Leading question should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony. ... When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

2. A leading question is one that suggests the answer to the person being questioned. If a question can be answered by a mere “yes” or “no” it is generally considered leading. As a general proposition, questions containing the words, “Who, What, When, Where, Why, or How,” are not leading questions.

#### 3. Examples:

Leading question -- “Was Mr. Jones in the room with you?”

Non-leading question -- “Who was in the room with you?”

4. “[E]xcept as necessary to develop the witness’ testimony.” Rule 611(c) provides that even on direct examination leading questions are proper to the extent necessary to develop the witness’ testimony. Examples:

a. Undisputed preliminary or inconsequential matters may be brought out through leading questions. To lead a witness through questions on topics on which there

is absolutely no controversy is an efficient use of court time and is harmless to the opposing party.

b. A witness that has trouble communicating such as a child or an adult with a communication problem may be asked leading questions.

c. A witness whose recollection has been exhausted may under appropriate circumstances have his or her memory refreshed through the use of leading questions.

For a general discussion of this area *see* Russell, Bankruptcy Evidence Manual, 2003 Ed., § 611.4.

5. Hostile Witnesses. Of course, when an adverse party is called or a witness who is shown to be hostile to the examiner's questions, then leading questions become necessary to elicit the truth. The harm of having friendly witnesses respond to suggestive questions is not present. In such cases, examination may proceed as if on cross-examination.

6. Cross-Examination of a Friendly Witness. Oftentimes a party will call as a witness the opposing party or agent of the opposing party. The same dangers exist in permitting leading questions in such instances. While Rule 611(c) provides that "ordinarily" leading questions should be permitted on cross-examination, the general rule has no applicability when the witness is friendly. In such instances, the prohibition against leading questions applies. *See* Russell, Bankruptcy Evidence Manual, 2003 Ed., § 611.6, at 913.

## B. Cross-Examination.

### 1. Rule 611--Mode and Order of Interrogation and Presentation.

(b) Scope of Cross-Examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading Questions. ... Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

2. Scope of Cross-Examination. While the scope of cross-examination should generally be limited to the subject matter of the direct examination and matters affecting credibility, it is often expedient from the standpoint of court time and the convenience of witnesses to inquire in areas that are not covered on direct examination. This is particularly true in bankruptcy court where evidentiary hearings are often conducted on an

emergency basis and time is at a premium. Rule 611(b) in fact contemplates that the court has broad discretion to permit inquiry in additional areas. A simple request to the court to inquire outside the scope of direct accompanied by an explanation of the witness's personal needs will ordinarily be granted.

### 3. Practice Pointers.

a. More damage is done by attorneys to their client's cases in the area of cross-examination than any other area. All too often, gaps in an opposing party's prima facie case are filled by the other party on cross-examination.

b. It is important to understand the reason for a cross-examination in the first place. The reasons for a cross-examination generally fall into three categories: (1) to get information in evidence; (2) to attack the logic of the opponent's case; and (3) to attack the credibility of a damaging witness. This is not a mutually exclusive list and there may be more than one purpose in examining any particular witness. Nevertheless, understanding the goal will affect the manner of the cross. Generally, obtaining needed information from adverse witnesses should come before lowering the boom of impeachment.

c. Attorneys should rarely pass on cross-examination. Cross-examination is the attorney's right and the judge often expects to see it. Completely foregoing cross can itself be a distraction. Cross-examination can, however, be avoided when the subject matter for cross is plain for all to see.

d. It is usually a good idea at the end of the cross-examination to restate and summarize points made on cross. But, the short summary must be succinct and "bullet-proof." Trying to end an examination but getting mired in argument with the witness can lead to an ineffective finish.

e. Cross-examinations of retained experts raises unique issues. In examining any expert, it is important to be educated and knowledgeable about the subject matter. The examiner should have a working knowledge of the terminology commonly used in the expert's field. This advice should not be misunderstood. The purpose of knowing the subject matter is not so that the examiner can out-expert the expert. Most retained experts will have enough training and testifying experience to make the examiner appear silly if he attempts to argue on the expert's turf. The reason to know the subject matter is to gain credibility with the judge. Even if the cross-examination does not directly hurt the plaintiff's case, if the examiner uses and pronounces terminology correctly and acts like he knows what he is talking about, the judge will at least have a chance to buy into his theory of the case. See attached example cross-examination of a retained expert.

f. While cross-examination of an expert can be effective, at times it is a better idea to seek the exclusion of the expert's testimony altogether. For a discussion of the relevant issues under the standards of *Daubert* and *Kuhmo*, see Section VII below. For

an example motion to exclude expert testimony see attached Plaintiff's Motion to Exclude the Expert Opinion Testimony of Expert ABC and Expert XYZ.<sup>2</sup>

g. Here are Nine Rules to follow when considering whether and how to conduct cross-examination:

Rule #1: Be brief, short, and succinct. Use short questions with plain words. Avoid long complicated sentences containing clauses with subordinate clauses on subordinate clauses. On a good day, you may have three points to make. Make them and sit down. Remember--the shorter the time you're on your feet, the less damage you'll do.

Rule #2: Never ask anything but a leading question. (Go ahead, put words in the witness's mouth -- make the witness say what you want.)

Rule #3: Never ask a question to which you do not already know the answer. (Cross-examination is not a deposition – the time for discovery has passed!)

Rule #4: Listen to the answer!

Rule #5: Do not quarrel with the witness. (If you get a stupid answer, STOP. See Rule #7 below.)

Rule #6: Do not give the witness an opportunity to repeat what the witness said on direct examination. (This only reinforces the other party's case.)

Rule #7: Never permit the witness to explain anything.

Rule #8: When in doubt, stick to safe areas for cross, e.g., bias or lack of sincerity, faulty perception, faulty memory, and prior inconsistent statements.

Rule #9. Avoid the one question too many.

For an informative and entertaining lecture on this topic see the video recording by Irving Younger, titled: "The Ten Commandments of Cross-Examination," National Institute for Trial Advocacy, 1975 (video recording available from Stetson University College of Law, Law Library).

### III. The "ABC's" of Documentary Evidence.

A. Basic Requirements. As with all evidence, absent a stipulation, documents can only be admitted if a witness with personal knowledge establishes the predicate that the documents are relevant, authentic, and not subject to a rule of exclusion.

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<sup>2</sup> This motion is substantially similar to one that was actually submitted but the names have been redacted.

B. Authentication of Documents. If a document is being introduced through a witness's testimony, it must be authenticated by testimony of a witness with personal knowledge that it is what it purports to be. Rule 901(b)(1).

C. Sample Predicate Questions.

Q: Ms. Smith, I show you what I've marked as Movant's Ex. 1. Can you identify this document?

A: Yes I can.

Q: What is it?

A: It is the contract between my company and Acme Corporation.

Q: How do you know that?

A: I signed it. (OK)  
I negotiated it. (OK)  
I found it in the files. (NO)

D. Business Records Exception to the Hearsay Rule.

1. Fed. R. Evid. 803(6).

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

2. Qualified Witness. Rule 803(6) requires that the elements necessary to establish the document is a record of a regularly conducted activity be established by “the testimony of the custodian or other qualified witness.” What constitutes a “qualified witness” other than a custodian is not defined by Rule 803(6). Generally this requirement is met by establishing that the witness is familiar with the practices of the business in question at the time.

3. Elements:

- a. The exhibit being offered is a business **record**;
- b. It is a record of an **event**;
- c. The record was **made by**, or from information transmitted by, a person with knowledge of the transaction recorded;
- d. The record was **made at or near the time** of the acts or event recorded;
- e. The record is kept in the course of a **regularly conducted business activity**; and
- f. It was the **regular practice of that business activity to make the record**.

4. Example -- establishing that a check register in a preference action is within this exception:

- a. **Record**: check register.
- b. **Event**: payment of invoice.
- c. **Made by**: accounts payable clerk.
- d. **Made at or near time**: when check is written.
- e. **Regularly conducted business activity**: payment of invoices.
- f. **Regular practice of business to keep records of payments of invoices**: You betcha'!

5. Sample Qualifying Questions.

Q: Ms. Smith, what was your position with company at time of bankruptcy filing?

A: Central office manager.

Q: How long were you so employed?

A: One year.

Q: What were your responsibilities?

A: I oversaw different departments in Acme's headquarters.

Q: Did this include bookkeeping?

A: Yes, it did.

Q: As former manager, what, if any familiarity do you have with record keeping procedures employed by Acme during year prior to bankruptcy?

A: It was one of my areas of responsibility so I was very familiar with bookkeeping procedures and would do reviews and spot checks on a routine basis.

Q: Does this include the method used by the company for preparing check registers?

A: Yes.

Witness qualified? Sure. The witness was not the custodian or person who created the record, but the witness was certainly familiar with the process.

Now that we have a qualified witness, let's go through the elements:

Q: Let me show you what I've marked as Trustee's Ex. 1. What is it?

A: These are the check registers for Acme for the year before filing of the bankruptcy.

Q: What information do they reflect?

A: They list the check #, date of the check, invoice number, invoice date, payee, and the amount.

Q: When are they prepared?

A: On the day that the checks are mailed.

Q: Who prepares the check registry?

A: The accounts payable clerk.

Q: Does he or she actually mail the check?

A: No, it's done by a bookkeeper in one of the remote offices. They are the ones who actually prepared and mailed checks.

Q: What are these checks in payment of?

A: They are everyday A/P's owing to vendors.

Q: Was payment of A/P's in this manner a regularly conducted business activity of Acme?

A: Sure, if we wanted to stay in business.

Q: Was it the regular practice of Acme to make these records in this fashion?

A: Absolutely.

6. Pre-Trial Declaration Pursuant to Fed. R. Evid. 803(6) and 902(11) as Alternative to Witness.

a. Fed. R. Evid. 803(6) was amended effective December 1, 2000, to provide, as an alternative to introducing the evidence at trial through a "qualified witness," the filing and serving of a certification that complies with Fed. R. Evid. 902(11).

b. Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

\* \* \*

(11) Certified domestic records of regularly conducted activity - The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written declaration of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

c. Form of Declaration Pursuant to Fed. R. Evid. 902(11):

[CAPTION]

Declaration Pursuant To Fed. R. Evid. 803(6)  
To Authenticate Business Records

I, Joseph P. Smith, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. This declaration is being filed pursuant to Fed. R. Evid. 803(6) for the purpose of authenticating certain business records of the debtor, Acme Corporation (“Acme” or “Debtor”), as described in Exhibit “A” (“Business Records”).

2. I was employed by Acme Corporation from 1995 until the company went into bankruptcy in June of 1998. From June of 1997 until May 31, 2000, I was employed in the position of comptroller. My responsibilities as comptroller included authority over all of Acme’s financial matters to include responsibility for the bookkeeping department.

3. The Business Records are Acme’s check registers for March, April, and May of 1998.

4. As comptroller, I had overall custody and control of all of the financial records of Acme to include the Business Records.

5. I am also familiar with the process of preparation of the Business Records. This process is described as follows:

a. When Acme received invoices from vendors who supplied Acme with components used in its manufacturing, the invoices were sent to the purchasing department for verification of the amounts owed and corresponding purchase orders.

b. After the invoices were approved for payment by the Purchasing Department, they were then sent to the Bookkeeping Department and directed to the accounts payable clerk. The accounts payable clerk would then prepare a check and bring it to me for signature. After I signed the check, she would then immediately mail it to the vendor. She would also fill out a form on her computer in which she listed all the pertinent information needed to process the payment of the invoice. This included the check number, the date of the check, the date it was mailed, the payee, the amount, and the invoice number being paid. The check registers were then generated from this information.

c. The information that the accounts payable clerk input into the computer was based on her own personal review of the invoice and corresponding purchase order and her own actions in preparing and mailing the checks in payment of amounts owed to vendors.

d. The accounts payable clerk was required to input the information into the computer the same day she prepared and mailed the check and it was her regular practice to do so.

e. Preparation of check registers on a monthly basis was done as a regularly conducted activity of Acme on a regular basis.

f. The Business Records were kept by Acme in the course of its regularly conducted business activity.

g. It was the normal and regular practice of Acme to process the checks and record the information as described above during the entire time that I was employed by Acme.

6. This declaration is executed on \_\_\_\_\_, 2003, at Tampa, Florida.

d. Form of Notice Pursuant to Fed. R. Evid. 902(11):

[CAPTION]

Acme Corporation's Notice of Intent To  
Authenticate Business Records by Declaration

Acme Corporation, by its undersigned counsel, hereby gives notice of its intent to offer into evidence, in connection with the evidentiary hearing scheduled on the Acme Corporation's motion for relief from stay, the business records ("Business Records") described in the attached declaration, for the purposes of self-authentication of the Business Records as authorized by Fed. R. Evid. 803(6) and 902(11).

Copies of the Business Records are being delivered to counsel for Debtor contemporaneously with the service of this notice.

Signature/Certificate of Service

IV. Use of Depositions at Trial.

A. Fed. R. Civ. P. 32. -- Text of Rule:

(a) Use of Depositions.

At the trial or [evidentiary] hearing ... a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of ... impeaching the testimony of ... a witness, ....

(2) The deposition of a party or ... officer [of a corporate party] may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

B. Fed. R. Evid. 804 -- Text of Rule:

Rule 804. Hearsay Exceptions; Declarant Unavailable

\* \* \*

(b) Hearsay exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

\* \* \*

(a) Definition of unavailability.

"Unavailability as a witness" includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

C. Fed. R. Evid. 801(d) -- Text of Rule:

d) Statements which are not hearsay. --A statement is not hearsay if--

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition; or

\* \* \*

(2) Admission by party-opponent. The statement is offered against a party and is

(A) the party's own statement, in either an individual or a representative capacity or

\* \* \*

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship....

D. General Rule.

1. Fed. R. Civ. P. 43, which applies to all proceedings in bankruptcy courts pursuant to Fed. R. Bankr. P. 9017, provides that in every trial (which would include an evidentiary hearing under Fed. R. Bankr. P. 9014), testimony of witnesses shall be taken in open court unless a federal law, other provisions of the Federal Rules of Civil Procedure or Federal Rules of Evidence provides differently.

2. With respect to depositions, the exceptions to the requirement of live testimony that apply to depositions are contained in Fed. R. Civ. P. 32 and Fed. R. Evid. 801(d)(1) and (2), and 804(b)(1).

E. Fed. R. Civ. P. 32. -- In Application:

1. Under Fed. R. Civ. P. 32, a deposition may be used at an evidentiary hearing if three requirements are met:

a. The testimony must be admissible under the Federal Rules of Evidence as if the deponent were present and testifying at the hearing;

b. The party against who the deposition testimony is being offered must have been present or had the opportunity to be present at the deposition; and

c. One of the following circumstances must be present:

(1) The deposition is being used to impeach a witness;

(2) The deposition is of a party and it is being offered by an adverse party; or

(3) The witness is unavailable.

2. A witness is “unavailable” for purposes of Fed. R. Civ. P. 32 if the witness is:

a. Dead - Interestingly, the court has discretion over the admission of such testimony when the witness dies in the middle of a deposition preventing the opposing party from properly questioning the witness.<sup>3</sup>

b. Located outside the subpoena range of the court (the witness lives or presides more than 100 miles from the courthouse, or outside the United States).<sup>4</sup> However, if it is discovered that the party offering such evidenced procured the absence of the witness, than the use of deposition in lieu of live testimony will be barred. This is a fact intensive issue.<sup>5</sup>

c. Unable to attend due to age, illness, infirmity, or imprisonment; or

d. Exceptional circumstances exist. Counsel must submit proper application and notice<sup>6</sup> to the court in such circumstances.

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<sup>3</sup> See The Authors’ Commentary on Rule 32.

<sup>4</sup> For the purposes of this rule, the distance is usually measured “as the crow flies”, meaning the shortest distance from point A to point B. See *Chrysler Intern. Corp. v. Chemaly*, 280 F.3d 1358, 1359 (11<sup>th</sup> Cir. 2002) (where deponent resided outside of the United States.); *Ueland v. U.S.*, 291 F3d 993, 996 (7<sup>th</sup> Cir. 2002) (where deponent, fellow inmate, was incarcerated more than 100miles from the courthouse.) *Niver v. Travelers Indem. Co. of IL*, 430 F.Supp 2d 852 (N.D. Iowa 2006) (distance should be measured at the time the deposition is offered.); *Young & Associates Public Relations, L.L.C. v. Delta Air Lines, Inc.*, 216 F.R.D. 521, 524 (D. Utah 2004) (distance from the courthouse should be measured at all times throughout the hearing.)

<sup>5</sup> *Garcia-Martinez v. City and County of Denver*, 392 F.3d 1187, 1191 (10<sup>th</sup> Cir. 2004) (“We do not establish a per se rule that any plaintiff who procures his own absence from trial is not eligible to seek refuge in Rule 32”) *Wilson v. Philadelphia Detention Ctr.*, 986 F.Supp. 282, 291 (E.D.Pa. 1997) (“[Rule 32] evidentiary rulings are left to the sound discretion of the trial judge.”)

<sup>6</sup> *In re Hayes Lemmerz Intern., Inc.*, 340 B.R. 461, 468 (Bankr.D,Del. 2006)

i. “Courts are sharply split on the circumstances under which a physician's professional responsibilities may constitute ‘exceptional circumstances,’ justifying the admissibility of his or her deposition even when the witness is within the subpoena power of the court.” See *Hague v. Celebrity Cruises, Inc.*, 2001 WL 546519 (S.D.N.Y. 2001); *Compare Melore v. Great Lakes Dredge & Dock Co.*, No. 95-7644, 1996 WL 548142, at \*3-4 (E.D.Pa. Sept. 20, 1996) (extensive discovery deposition of busy doctor admitted); *Rubel v. Eli Lilly & Co.*, 160 F.R.D. 28, 29-30 (S.D.N.Y.1995) (deposition of physician admitted after reopening to allow for complete cross-examination); *Borchardt v. United States*, 133 F.R.D. 547, 548 (E.D.Wis.1991) (deposition admitted where live testimony of expert physician costly and credibility not at issue) *with Angelo v. Armstrong World Industries, Inc.*, 11 F.3d 957, 963 (10th Cir.1993) (deposition of “extremely busy” doctor excluded where court offered to accommodate his schedule); *Allgeier v. United States*, 909 F.2d 869, 876 (6th Cir.1990) (admissibility of physician depositions in state courts not exceptional circumstance); *Flores v. NJ Transit Rail Operations, Inc.*, No. 96-3237, 1998 WL 1107871, at \*2-5 (D.N.J. Nov. 2, 1998) (busy schedule of physician not exceptional circumstance; court offered to accommodate witness schedules).

3. The deposition of an unavailable deponent may be presented as videotape or it may be read from a transcript. The court usually prefers videotape.<sup>7</sup>

4. Depositions of adverse parties may be used for any purpose (provided it is within the scope of the F.R.E.)<sup>8</sup>

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<sup>7</sup>*Hague v. Celebrity Cruises, Inc.*, 2001 WL 546519 (S.D.N.Y. 2001) (“[V]ideotaped testimony prepared specifically for use at trial mitigates the concerns militating against the use of depositions in lieu of live testimony. First, although the witness is not physically present in the courtroom, the jury has the opportunity to observe his manner and hear his voice during the testimony. Second, the witness is questioned just as he would be at trial by counsel for both parties.”)

<sup>8</sup> *C.R. Bard, In. v. M3 Systems Inc.*, 866 F.Supp. 362 (N.D. Ill. 1994) A deposition of an adverse party may be used as substantive evidence or for impeachment purposes.

a. The rule applies to any person who is presented to testify on behalf of a corporation or government agency pursuant to 30(b)(6) or 31(a), such as an officer, director, or managing agent of the party organization.<sup>9</sup>

b. It makes no difference whether the depositions were taken for discovery or for use at trial.<sup>10</sup>

c. The rule provides that a statement is not hearsay if it is offered against a party and is “a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship.”<sup>11</sup>

5. Miscellaneous. Rule 32(a) contains numerous provisions, conditions and caveats to the use of depositions in court proceedings, most of which are highlighted below:

a. Once all other factors for the use of deposition in court proceedings have been fulfilled, the deposition still has to comport with the F.R.E.<sup>12</sup> The rules of evidence are applied as though the deponent were present and testifying.<sup>13</sup> Thus, the effect of Rule 32 is to negate the hearsay objection.<sup>14</sup>

b. If a party introduces part of a deposition at trial, any adverse party has the right to immediately ask to have additional parts of the deposition introduced in order to clarify, subject of course to evidentiary objections.<sup>15</sup>

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<sup>9</sup> *Shanklin v. Norfolk Southern Ry. Co.*, 369 F.3d 978 (6<sup>th</sup> Cir. 2004); *Palmer Coal & Rock Co. v. Gulf Oil Co. U.S.*, 524 F.2d 884 (10<sup>th</sup> Cir. 1975); *Niver v. Travelers Indem. Co. of IL*, 430 F.Supp 2d 852 (N.D. Iowa 2006).

<sup>10</sup> *Henkel v. XIM Prods., Inc.*, 133 F.R.D. 556, 557 (D.Minn.1991)

<sup>11</sup> Fed.R.Evid. 801(d)(2)(D). See generally *Mahlandt v. Wild Canid Survival & Research Center, Inc.*, 588 F.2d 626, 629-31 (8th Cir.1978); *Farner v. Paccar, Inc.*, 562 F.2d [518,] 526 [ (8th Cir.1977) ]

<sup>12</sup> *Reeg v. Shagnessy*, 570 F.2d 309 (10<sup>th</sup> Cir. 1978); *Haseotes and CM Acquisitions, Inc. v. Cumberland Farms*, 216 B.R. 690, 694 (D.Mass. 1997) (applying Rule 32 in bankruptcy adversary proceeding).

<sup>13</sup> *S.E.C. v. Franklin*, 348 F.Supp.2d 1159, 1162 (S.D.Cal. 2004) (holding that an unsigned transcript is the equivalent of a witness not sworn in under oath.)

<sup>14</sup> *Vandenbraak v. Alfieri*, 2005 WL 1242158 (D.Del. 2005) (holding that a hearsay objection to the admissibility of a deposition bears no scrutiny.)

<sup>15</sup> *Heary Bros. Lightning Protection Co., Inc. v. Lightning Protection Institute*, 287 F.Supp.2d 1038, 1065, n.10 (D.Ariz. 2003) (other parts of the deposition transcript should be admitted “in fairness.”); *Westinghouse Electric Corp. v. Wray Equip. Corp.*, 286 F.2d 491, 494 (1<sup>st</sup> Cir. 1961) (right to offer other part of testimony for clarification purposes arises immediately); *Heary Bros. Lightning Protection Co., Inc. v. Lightning Protection Institute*, 287 F.Supp.2d 1038, 1065, n.10 (D.Ariz. 2003) (other parts of testimony offered are subject to evidentiary objections.)

c. If a witness is unavailable for trial and his deposition had been taken in preparation for another trial and the adverse party (or the party's predecessor) had opportunity and similar motive to question witness, than the deposition may be admissible.<sup>16</sup>

d. A document attached to a transcript of a deposition may be used in the same manner as the transcript itself.

e. Transcripts of depositions may be introduced by any party to the proceeding.

f. A deposition cannot be used against a party who received less than 11 days notice and who has filed a motion for a protective order that was pending at the time of the deposition.<sup>17</sup>

g. Substitution of a party pursuant to FRCP 25 does not preclude the use of a previously taken deposition transcript, unless the nature of the claim itself is changed by the substitution.

h. A deposition transcript may be used in a motion for summary judgment pursuant to FRCP Rule 56, or in any supporting or opposing documents attached or related to such a motion.<sup>18</sup>

## 6. Objections to Admissibility – Rule 32(b)

a. Generally, if an objection is not made at the time the deposition is offered as evidence in a court proceeding, any objection to admissibility is deemed as waived from that point forward.

b. As with all evidentiary proffers, all depositions must comport with the FRE.<sup>19</sup> If opposing counsel suspects a deposition offered at trial does not comport with the FRE, in either its offering or its nature, than

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<sup>16</sup> F.R.E. 804(b)(1), Part X.

<sup>17</sup> *United States Securities Exchange Commission v. Talbot*, 430 F.Supp.2d 1029 (C.D.Cal. 2006) (amended notice does not trigger the 11 day provision where the original notice put the party on notice of the date of the deposition.)

<sup>18</sup> *Beiswenger Enterprises, Corp. v. Carletta*, 46 F.Supp.2d 1297, 1299 (M.D.Fla. 1999) (“General rule that any evidence which is admissible at trial can be used on summary judgment.”); *Cash Inn of Dade, Inc. v. Metropolitan Dade County*, 938 F.2d 1239, 1242 (11th Cir.1991).

<sup>19</sup> Interestingly, the FRE sometimes affords extra leeway to deposition testimonies. See *Marshall v. Planz*, 145 F.Supp.2d 1258, 1276-1277 (M.D.Ala. 2001) (“Rule 804(b)(1) allows the introduction of deposition testimony that would otherwise be inadmissible because it is hearsay. See Fed.R.Evid. 802. In other words, Rule 804 rehabilitates hearsay testimony.”)

opposing counsel may object to its use under the specific provision of the FRE.

c. Timing of objections:

i. Objections that are immediately curable, such as rephrasing a question, must be made at the taking of the deposition. Thereafter, all such objections are treated as waived.<sup>20</sup>

(1) The most frequent grounds for objecting to the form of a question are:<sup>21</sup>

(a) the question is too broad or calls for an excessive narrative answer,

(b) the question is compound,

(c) the question has been asked and responsively and completely answered ( *see* Guideline 5(d)),

(d) the question calls for conjecture, speculation or judgment of veracity,

(e) the question is ambiguous, imprecise, unintelligible or calls for a vague answer,

(f) the question is argumentative, abusive or contains improper characterization,

(g) the question assumes as true facts in dispute or not in evidence,

(h) the question misquotes a witness, earlier testimony,

(i) the question calls for an opinion from a witness not qualified to give one, and

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<sup>20</sup> *Whitehurst v. United States*, 231 F.R.D. 500,501 (S.D.Texas 2005) (a party who has not objected to a leading question at the deposition may not subsequently object to it when the deposition is introduced at trial); *Daubach v. Wnek*, 2001 WL 290181 (N.D.Ill. 2001).

<sup>21</sup> *Boyd v. University of Maryland Med. System*, 173 F.R.D. 143, 147 n.8 (D.Md.. 1997) (containing a list of the ten most common objections to the form of the question).

(j) the question is leading under circumstances where leading questions would not be permitted by Fed.R.Evid. 611(c). 1 Michael H. Graham, *Handbook of Federal Evidence* H 611.15-611.22 (4th ed.1996) (as to numbers 1-8 above).

(2) All other objections such as relevance, capacity, etc., are reserved until the deposition is offered as evidence at trial.<sup>22</sup>

(a) Federal Rule of Civil Procedure 32(d)(3) provides: "Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition unless the ground of the objection is one which might have been obviated or removed if presented at that time."

(b) In *Cordle v. Allied Chemical Corp.*, 309 F.2d 821 (6th Cir.1962), the Court concluded that the rule applied where the doctor improperly premised his expert testimony on statements made to him by the plaintiff, where (had the objection been made) the doctor could have framed his answer purely on the basis of a hypothetical. *Id.* at 825-26.<sup>23</sup>

(c) In *Schulz v. Owens-Corning Fiberglas Corp.*, No. 87-1412, 1990 WL 126158, 1990 U.S. Dist. LEXIS 11396 (E.D.Pa. Aug. 27, 1990), *aff'd in part, vacated in part*, 942 F.2d 204 (3d Cir.1991), the defendant objected to the admission of Dr. Freedman's testimony (by video deposition) where he failed to couch his

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<sup>22</sup> *In re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614, 618 (D.Nev. 1998) ("It is usually not necessary to make an objection based upon irrelevancy. 8A Wright, Miller & Marcus, *Federal Practice and Procedure* § 2113 (1994). It is difficult to conceive of the likelihood that a question which calls for irrelevant information can be 'cured' by restating the question, unless the question is changed to ask for relevant ( i.e., different) information. Accordingly, it would be rare that an irrelevant question could be cured. Thus, the objecting party may wait until trial (or just prior to trial) to make the objection when, and if, the deposition testimony is offered into evidence..")

<sup>23</sup> See *Cronkrite v. Fahrback*, 853 F.Supp. 257, 262 (W.D.Mich. 1994).

testimony as to medical causation in the “requisite degree of medical certainty.” The trial court determined that “the insufficiency of plaintiff’s expert testimony could not become an issue until after plaintiff rested her case.” Accordingly, the court concluded that the defect could not have been cured during the deposition and was thus not waived by the defendants’ failure to object at the deposition.<sup>24</sup>

(d) *Harvey v. Yellow Freight System, Inc.*, No. 87-1205-C, 1990 WL 171014, 1990 U.S. Dist. LEXIS 14761 (D.Kan. Oct. 24, 1990)), presented a nearly identical issue as that addressed in *Schulz*, except that plaintiff sought to have the testimony offered by defendant excluded. In *Harvey*, the defendant argued that his failure to lay a proper foundation could have been easily corrected had plaintiff made the proper objection. The court concluded that plaintiff’s failure to make the objection at the deposition did not waive the objection because “the issue of causation is a substantive requirement, not merely one of ‘form.’ ”<sup>25</sup>

d. In a non-jury trial, the court may admit the use of depositions subject to future rulings on objections.

## 7. Form of Presentation

a. Generally, deposition testimony may be offered as evidence in stenographic or non-stenographic form.

b. Any party planning on submitting a non-stenographic form deposition is required to provide opposing parties, as well as the court, with a transcript of the deposition prior to the start of trial pursuant to FRCP 26(a)(3)(B).<sup>26</sup> A party intending to use a deposition summary may not do so without submitting a transcript of the summarized deposition pursuant to Rule 32(c).<sup>27</sup>

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<sup>24</sup> *Id.* at 263.

<sup>25</sup> *Id.* at 263.

<sup>26</sup> *Tilton v. Capital Cities*, 115 F.3d 1471, 1479 (10<sup>th</sup> Cir. 1997) (a party intending to use videotape deposition must provide a transcript.)

<sup>27</sup> *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1117 (9<sup>th</sup> Cir. 2002)

c. In a jury trial, any party can require non-stenographic form, if available; unless the deposition is being used for impeachment or the court orders otherwise for good cause shown.

#### 8. Effect of Errors and Irregularities in Depositions

a. Objections to procedures at depositions must be made as soon as practicable otherwise they are waived.

b. Objections to notice must be made in writing to the party issuing notice,<sup>28</sup> unless there is no opportunity to object.

c. FRCP 28 objections to the qualifications of an officer/stenographer must be made prior to the start of the deposition or they are waived.

d. Objections as to the manner of the oath administered at the deposition must be made at the time of the deposition or else they are waived.

e. Objections to the form of written questions must be served in writing and within the time for serving succeeding questions and within 5 days of the last questions authorized.

f. Objections as to the manner of transcription must be made within a “reasonable promptness” after defect is discovered or should have been discovered, and made in the form of a motion to suppress.

#### F. Fed. R. Evid. 801(d) -- In Application:

1. This rule defines certain out-of-court statements as not being hearsay. Included among these are two that apply to the use of depositions at an evidentiary hearing:

a. A prior statement by the witness that is inconsistent with the witness’s testimony at the evidentiary hearing. Fed. R. Evid. 801(d)(1)(A).

b. An admission by a party opponent under Fed. R. Evid. 801(d)(1)(A). This can either be the party’s own statement or a statement made by the party’s agent concerning a matter within the scope of the agency or employment made during the existence of the relationship.

#### G. Fed. R. Evid. 804(b)(1) -- In Application:

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<sup>28</sup> *Bobrosky v. Vickers*, 170 F.R.D. 411, 415 (W.D.Va. 1997) (only objections to the form of the notice are waived by failure to promptly serve written objection.)

1. This rule creates an exception to the hearsay rule with respect to former testimony given by a witness in a deposition if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by direct or cross examination if the party offering the deposition testimony can show that the witness is “unavailable.”

2. “Unavailability” for purposes of Rule 804(b)(1) is broader than the same term as used in Fed. R. Civ. P. 32 and in addition to the circumstances described therein includes:

- a. A witness exempted from testifying on the ground of privilege;
- b. A witness who persists in refusing to testify; and
- c. A witness with a lack of memory.

V. Judicial Notice.

A. Defined.

A court’s acceptance, for purposes of convenience and without requiring a party’s proof, of a well-known and indisputable fact; the court’s power to accept such a fact, the trial court took judicial notice of the fact that water freezes at 32 degrees Fahrenheit.

Black’s Law Dictionary 851 (7<sup>th</sup> ed. 1999) (also termed *judicial cognizance*; *judicial knowledge*).

B. Rule 201--Judicial Notice of Adjudicative Facts.

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1930.)

#### C. Procedure.

1. Judicial notice may be taken at any stage of a proceeding, F.R.E. 201(f), including appeal. *Nantucket Investors II v. California Federal Bank (In re Indian Palms Associates)*, 61 F.3d 197, 204 (3<sup>rd</sup> Cir. 1995).

2. However, a party is entitled to be heard with respect to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken. F.R.E. 201(e). Thus, for example, if a bankruptcy court implicitly took judicial notice, sua sponte, in considering the debtor's schedules in arriving at a ruling, on appeal, the matter may be remanded to allow the disadvantaged party to be afforded notice and opportunity to respond. *Annis v. First State Bank of Joplin*, 96 B.R. 917, 920 (W.D. Mo. 1988).

3. Where judicial notice is taken without prior notice, the burden is on the disadvantaged party to make a request for a hearing to challenge the propriety of taking judicial notice. *Calder v. Job (In re Calder)*, 907 F. 2d 953, 955 fn. 2. (10<sup>th</sup> Cir. 1990).

#### D. Scope--Adjudicative Facts.

Judicial notice is limited to adjudicative facts. Adjudicative facts are ones that are not subject to reasonable dispute because they are either:

1. Generally known with the territorial jurisdiction of the trial court, or
2. Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

E. Examples of Requests for Judicial Notice.

1. Courts Records. Requests for judicial notice of court records typically fall into one of three categories:

(a) Establishing the genuineness of the documents without going through the steps normally needed to authenticate documents. This is the equivalent of a certificate regarding custody by a judge of a court of record of the district in which the record is kept. *In re Bestway Products, Inc.*, 151 B.R. 530, 540. The fact the document is genuine does not mean that the court can automatically accept as true the facts contained in such documents. Statements in the documents must be otherwise admissible under the Federal Rules of Evidence, for example, as an evidential admission offered against a party. F.R.E. 801(d)(2). *Id.*

(b) Taking as true the recording of the judicial acts contained in the record. Commentators suggest that the better practice is to admit the record under the official records exception to the hearsay rule so that evidence of any inaccuracy in the record may be established. *In re Bestway Products, Inc.*, 151 B.R. at 540 n. 33 (citing 21 Wright & K. Graham, Federal Practice and Procedure: Evidence § 5106 (1992 Supp.)).

(c) The third, “and widely criticized,” use of judicial notice of court records is to take as conclusively established the facts that are set forth in the records. *In re Bestway Products, Inc.*, 151 B.R. at 540 n. 33. A previously filed court document will generally not be competent evidence of the truth of the matters asserted therein solely because the court has taken judicial notice of its existence. *Nantucket Investors II v. California Federal Bank (In re Indian Palms Associates)*, 61 F.3d 197, 204 (3d Cir. 1995).

(d) That is, there is a crucial distinction between taking judicial notice of the fact that an entity has filed a document in the case, or in a related case, on a given date, i.e., the existence thereof, and the taking of judicial notice of the truth or falsity of contents of any such document for the purposes of making a finding of fact. *In re Earl*, 140 B.R. 728, 731 fn. 2 (Bankr. N.D. Ind. 1992). Accordingly, while a bankruptcy court may take judicial notice of its own records, it may not “infer the truth of facts contained in documents, unfettered by rules of evidence or logic, simply because such documents were filed with the court. *Staten Island Savings Bank v. Scarpinito (In re Scarpinito)*, 196 B.R. 257, 267 (Bankr. E.D. N.Y. 1996) (citing Russell, Bankruptcy Evidence Manual § 201.5 at 201 (West 1995)).

2. Plan Votes. To establish whether the plan has received the votes needed to confirm the court may take judicial notice of the proofs of claim and the presence in the schedules of amounts due to other claimants who have not filed proofs of claim. *In re American Solar King Corp.*, 90 B.R. 808, (Bankr. W.D. Tex. 1988) (“Whether the information contained in the schedules is true is immaterial to this inquiry.”) *Id.* citing Russell, Bankruptcy Evidence Manual, § 201. 5 (West 1987).

3. Omissions from Schedules. The court may take judicial notice of the debtor's statement of affairs and schedules as not listing certain assets alleged not to be disclosed in an action under Bankruptcy Code § 727(a)(4). *Calder v. Job (In re Calder)*, 907 F.2d 953, 955 fn. 2 (10<sup>th</sup> Cir. 1990) ("In this case, the bankruptcy court, consistent with Rule 201(b)(2), simply took judicial notice of the contents of ...[the debtor's] Statement of Affairs and Schedule B-1 and not the truthfulness of the assertions therein.").

4. Absence of Pending Adversary. The court may take judicial notice of the failure of a Chapter 7 trustee to have filed an action to set aside a fraudulent conveyance. *Pruitt v. Gramatan Investors Corp., (In re Pruitt)*, 72 B.R. 436, 440 (Bankr. E.D.N.Y. 1987).

5. Docket Sheets. The court may take judicial notice of the docket sheets in an adversary proceeding and the debtor's main case. *Muzquiz v. Weissfisch*, 122 B.R. 56, 58 (Bankr. S.D. Tex. 1990).

6. Debtor's Insolvency. Several opinions have held that a court may take judicial notice of the debtor's schedules in order to determine if the debtor was insolvent on the date of an alleged preferential transfer. *See, e.g., In re Trans air, Inc.*, 103 B.R. 322, 325 (Bankr. S.D. Fla. 1988); *Matter of Claxton*, 32 B.R. 219, 222 (Bankr. E.D. Va. 1983); *In re Blue Point Carpet, Inc.*, 102 B.R. 311, 320 (Bankr. E.D.N.Y. 1989). The better view, however, is that the schedules may not be used for that purpose since the schedules are reflective of the debtor's financial condition on the date of the petition and not on the date of the transfers. *In re Strickland*, 230 B.R. 276, 282 (Bankr. E.D. Va. 1999) (*citing* Russell, Bankruptcy Evidence Manual § 201.8 at 281 (West 1988)).

## VI. Judicial Admissions.

### A. Defined.

A formal waiver of proof that relieves an opposing party from having to prove the admitted fact and bars the party who made the admission from disputing it.

Black's Law Dictionary 49 (7<sup>th</sup> ed. 1999) (also termed *solemn admission*; *admission injudicio*; *true admission*).

### B. Distinguish Evidential Admissions.

#### 1. Fed. R. Evid. 801(d)(2).

(d) Statements which are not hearsay.--A statement is not hearsay if--

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(2) Admission by party-opponent.--The statement is offered against a party and is (A) the party's own statement, in either

an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

2. Even if a prior statement by a party is determined not to be a judicial admission and, therefore, not conclusive, it may still operate as an "adverse evidentiary admission..." properly before the court in its resolution of the factual issue. *White v. Arco/Polymers, Inc.*, 728 F.2d 1391, 1396 (5<sup>th</sup> Cir. 1983).

3. However, as evidentiary admissions, they may be controverted or explained by the party against whom they are being offered. Russell, *Bankruptcy Evidence Manual* (West 2001 ed.), § 801.22 at 814.

#### C. Effect.

1. A judicial admission is an admission made by a party in pleadings, stipulations, and the like and do not have to be proven in the litigation in which they are made. *Gianne v. United States Steel Corp.*, 238 F.2d 544, 547 (3<sup>rd</sup> Cir. 1956)

2. It is conclusively binding upon the party making the admission for purposes of the case in which made, provided that the admission is unequivocal. *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir. 1972).

#### D. Scope.

1. Judicial admissions are restricted in scope to matters of fact which otherwise would require evidentiary proof. *Id.*

2. Conclusions of law--e.g., that a party was negligent or caused an injury, do not lie within the scope of the doctrine of judicial admission. *Gianne v. United States Steel Corp.*, 238 F.2d 547. For example, the admission that an agreement is a "true lease" is a conclusion of law and cannot constitute a judicial admission. *In re Pittsburgh Sports Associates Holding Co.*, 239 B.R. 75, 81 (Bankr. W.D. Penn. 1999).

#### E. Examples of Assertions That Are Judicial Admissions.

1. Factual assertions in pleadings. *Myers v. Manchester Insurance & Indemnity Co.*, 572 F.2d 134 (5<sup>th</sup> Cir. 1978).

2. Contents of court orders. *In re Camp*, 170 B.R. 610, 612 (Bankr. N.D. Ohio 1994).

3. Statements in proofs of claim and in an objection to a proof of claim in a contested matter objecting to the claim are judicial admissions. *Jenkins v. Tomlinson (In re Basin Resources Corporation)*, 182 B.R. 489, 493 (N.D. Tex. 1995).

4. Matters set out in the debtor's schedules may constitute judicial admissions. Thus by failing to qualify the schedule's description so as to include the term "disputed," the debtor may have waived the right to contest a debt's existence. *Morgan v. Musgrove (In re Musgrove)*, 187 B.R. 808, 812 (N.D. Ga. 1995). On the other hand, because schedules are filed in the "main" case as opposed to a particular adversary proceeding or contested matter, they may simply be considered evidential admissions rather than judicial admissions. *In re Cobb*, 56 B.R. 440, 442 n. 3 (Bankr. N.D. Ill. 1985). As evidential admissions, they would not be conclusive. *Id. Contra In Larson v. Groos Banks*, 204 B.R. 500, 502 (W.D. Tex. 1996) (court granted summary judgment against the former Chapter 7 debtor in an action against a bank for violating the Fair Credit Reporting Act on the basis that the debtor's listing as "None" in response to the schedule category under which the debtor was required to list "Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims..." constituted a judicial admission that he had suffered no damages in the case).

5. Statements of counsel, although not evidence, Russell, *Bankruptcy Evidence Manual* (West 2001), § at 817, may be judicial admissions. *In re Stephenson*, 205 B.R. 52 (Bankr. E.D. Pa. 1997).

6. Concessions made by counsel in open court are binding as judicial admissions. *In re Menell*, 160 B.R. 524, 525 n. 3 (Bankr. D.N.J. 1993); § 801.22 at 819.

7. Contents of requests for admissions where no response is filed by the opposing party. *In re Tabar*, 220 B.R. 701, 703 (Bankr. M.D. Fla. 1998).

#### F. Examples of Assertions That Are Not Judicial Admissions.

1. Admissions made in another proceeding are not conclusive and binding judicial admissions. *Universal American Barge Corp. v. J. Chen., Inc.*, 946 F.2d 1131, 1142 (5<sup>th</sup> Cir. 1991). This includes admissions made in other motions or adversary proceedings, which were conducted in the same bankruptcy case. While these may be admissible as an admission of a party-opponent, they are not judicial admissions with conclusive effect because they were not made in the same proceeding. *Jenkins v. Tomlinson*, 182 B.R. at 491. *See also In re Cobb*, 56 B.R. at 442 n. 3 (schedules are filed in the "main" case as opposed to a particular adversary proceeding or contested matter and, accordingly, are evidential admissions as opposed to judicial admissions).

2. Admissions made in superseded pleadings are as a general rule considered to lose their binding force, and to have value only as evidentiary admissions. *Borel v. United States Casualty Co.*, 233 F.2d 385 (5<sup>th</sup> Cir. 1956). However, where the amendment only adds allegations, deleting nothing stated in prior pleadings, admissions

made in the prior pleadings continue to have conclusive effect. *Dussour v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 601 (5<sup>th</sup> Cir. 1981).

3. Statements of value in schedules relate to value and are matters of opinion as opposed to fact. Thus, they do not constitute judicial admissions but only evidential admissions. *In re Cobb*, 56 B.R. at 442 n. 3 (citing *Fairbanks v. Yellow Cab. Co.*, 346 F.2d 256 (7<sup>th</sup> Cir. 1965)).

## VII. Opinion Testimony.

### A. Rules.

#### 1. Fed. R. Evid. 701--Opinion Testimony by Lay Witnesses.

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, and (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.

#### 2. Fed. R. Evid. 702--Testimony by Experts.

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.*

#### 3. Fed. R. Evid. 705--Disclosure of Facts or Data Underlying Expert Opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

#### 4. Fed. R. Civ. P. 26(a)(2)--Disclosure of Expert Testimony.

...a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

...this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness.

B. Expert Opinion Testimony--Daubert/Kumho and Fed. R. Evid. 702 (as amended eff. Dec. 1, 2000).

1. FRCP 26(a)(2). Subdivision (A) of Fed.R.Civ.P. 26(a)(2) requires disclosure of "the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence." Subdivision (B) mandates a detailed written report from every "witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." One way or the other, everyone who will offer expert testimony is, therefore, subject to disclosure.

2. Fed. R. Evid. 702. If expert opinion testimony is to be introduced, then the reliability requirements of Rule 702 apply. These requirements are found in the new language added to Fed. R. Evid. 702 as part of the December 1, 2000 amendments which now includes the requirements that:

- i. the testimony is based upon sufficient facts or data,
- ii. the testimony is the product of reliable principles and methods, and
- iii. the witness has applied the principles and methods reliably to the facts of the case.

3. Historical Evolution.

(a) The Frye Test.

The "general acceptance" test for the admissibility of expert testimony was first adopted by the District of Columbia Circuit in a two-page opinion in 1923 in the case of *Frye v. United States*, 293 F. 1013. In *Frye*, the court examined the issue of whether a type of lie-detecting method was admissible in a criminal case and held that the proffered evidence was inadmissible because it had not gained general acceptance within the relevant scientific community.

Under the Frye test, proffered novel scientific evidence was admissible only if it was generally accepted within the relevant scientific community. Jeanne Wiggin, Casenote, *Kumho Tire Co. v. Carmichael: Daubert's Gatekeeping Method Expanded To Apply to All Expert Testimony*, 51 Mercer L. Rev. 1325, 1327 (2000). This was the sole criteria for admissibility under the Frye standard. This test was adopted by a majority of jurisdictions to determine the admissibility of novel scientific expert testimony. *Id.*

The difficulty in dealing with the issues as far back as 1923 is reflected in an often quoted passage from *Frye*:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

*Frye* at 1014.

(b) Rule 702.

The conflict among the circuits over application of the Frye test after the enactment of the Federal Rules of Evidence was indicative of the general confusion and growing disapproval of the test. Jeanne Wiggin, Casenote, *Kumho Tire Co. v. Carmichael: Daubert's Gatekeeping Method Expanded To Apply to All Expert Testimony*, 51 Mercer L. Rev. 1325, 1327 (2000).

The enactment of Rule 702 of the Federal Rules of Evidence in 1975 did little to reduce the confusion concerning the proper test that should be applied. Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 Colum. L. Rev. 1197, 1207 (1980). First, the Federal Rules of Evidence did not codify *Frye*. Giannelli, *supra* at 1229. In fact, the drafting history of Rule 702 does not give any guidance because it does not address *Frye*. *Id.* Finally, the Federal Rules of Evidence as a whole "adopted a liberal approach toward admitting relevant evidence." Wiggin, *supra*.

This led many commentators to the conclusion that *Frye* did not survive the adoption of the Federal Rules of Evidence. *Id.*

(c) *Daubert*.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993) ("*Daubert*"), the U.S. Supreme Court held that the Frye test for the admission of

expert testimony was displaced by the adoption of the Federal Rules of Evidence. Lawrence J. Zweifach, *The Impact of Daubert and Kumho Tire on the Expert's Deposition*, Practising Law Institute, PLI Order No. H0-0052 (July, 1999).

In rejecting the Frye test, the Supreme Court noted that the text of Fed. R. Evid. 702 does not set forth "general acceptance" as an "absolute prerequisite to admissibility." *Daubert*, 509 U.S. at 588. The Court stressed, however, that even though the Federal Rules of Evidence did not adopt *Frye*, that did not suggest that "the Rules themselves place no limits on the admissibility of purportedly scientific evidence." *Id.* at 589.

Rather, the Court stressed the obligations of the trial judge under the Rules to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* *Daubert* elaborates on the role of the trial judge as "gatekeeper," explaining that when faced with a proffer of expert scientific testimony, the trial judge must determine, under Fed. R. Evid. 104(a), whether the expert "is proposing to testify to:

- (1) scientific knowledge that
- (2) will assist the trier of fact to understand or determine a fact in issue."

*Id.* at 592.

This task, according to the Court, "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. While *Daubert* does not purport to provide a "definitive checklist or test" for this inquiry by the trial judge, it does list several factors to be considered (which it characterizes as "general observations"):

1. One "key question" is whether the theory or technique "can be (and has been) tested." *Id.*
2. Another consideration is whether the theory or technique has been subjected to peer review and publication. *Id.*
3. Moreover, in the case of a particular scientific technique, the trial judge "ordinarily should consider the known or potential rate of error." *Id.* at 594.
4. Finally, notwithstanding the rejection of *Frye*, *Daubert* states that "'general acceptance' can yet have a bearing on the inquiry." 509 U.S. at 594.

*Daubert* concludes by reminding us that the inquiry envisioned by Fed. R. Evid. 702 is a "flexible one." 509 U.S. at 594. The "overarching subject" of Rule 702 is "the scientific validity -- and thus the evidentiary relevance and reliability -- of the principles that underlie a proposed submission." *Id.* at 595. Thus, according to the Court, the focus of the inquiry must be "solely on principles and methodology, not on the conclusions that they generate." *Id.*

(d) *Joiner*.

In the case of *General Electric Company v. Robert K. Joiner*, 522 U.S. 136 (1997) (“*Joiner*”), the United States Supreme Court granted certiorari to determine what standard an appellate court should apply in reviewing a trial court's decision to admit or exclude expert testimony under *Daubert*.

The district court had held that the expert testimony offered by the plaintiffs in opposition to the defendants’ motion for summary judgment was inadmissible. The court believed that the testimony of plaintiff's experts did not rise above "subjective belief or unsupported speculation." 864 F. Supp. 1310, 1326 (N.D. Ga.1994).

The Court of Appeals for the Eleventh Circuit reversed. 78 F.3d 524 (1996). It held that "[b]ecause the Federal Rules of Evidence governing expert testimony display a preference for admissibility, we apply a particularly stringent standard of review to the trial judge's exclusion of expert testimony." *Id.*, at 529. Applying that standard, the Eleventh Circuit held that the district court had erred in excluding the testimony of plaintiff's expert witnesses.

The Supreme Court reversed the Eleventh Circuit holding that it had erred in its review of the exclusion of *Joiner*'s experts' testimony. In applying an overly "stringent" review to that ruling, it failed to give the trial court the deference that is the hallmark of abuse-of-discretion review. *Id.* at 143. As stated by the Supreme Court, “We believe that a proper application of the correct standard of review here indicates that the District Court did not abuse its discretion.” *Id.*

*Joiner* expresses the Supreme Court’s recognition that while *Daubert* noted that a court must focus on principles and methodology rather than the conclusions they generate, the two are not entirely distinct from one another. *Joiner* at 146. *See also In re Westminster Associates, Ltd.*, 2001 WL 849194 (Bankr. M.D. Fla. 2001)(Proctor, B.J.). That is, “trained experts commonly extrapolate from existing data. But nothing 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<sup>29</sup> of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”

(e) *Kumho*.

The *Daubert* decision dealt with scientific expert testimony. Accordingly, there was uncertainty as to whether it applied to non-scientific expert testimony. This question was answered by the Supreme Court in *In Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999) (“*Kumho Tire*”).

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<sup>29</sup> Something asserted but not proved. Latin for “he himself said it.” Black’s Law Dictionary (7<sup>th</sup> Edition) at 833.

In *Kumho Tire*, the U.S. Supreme Court confirmed the applicability of *Daubert* to non-scientific expert testimony. The Court held that the district court's "gatekeeping" function "applies not only to testimony based on scientific knowledge, but also to testimony based on technical and other specialized knowledge." *Id.* at 1171.

The Supreme Court also made clear that under *Daubert*, the four factors outlined for assessing the reliability of expert witness testimony do not constitute a definitive "checklist or test." *Id.* at 1175. Instead, these factors are meant to be illustrative. That is, a trial court has wide latitude to inquire into the reliability of the expert's testimony. *Id.* This is especially true for non-scientific testimony where the four factors listed in *Daubert* may not be as probative of the testimony's reliability. *Id.*

#### 4. Applying 702.

The amendments to Fed. R. Evid. 702 set forth three criteria that apply to expert testimony for motions filed on and after December 1, 2000. These prongs are:

(a) The testimony must be based upon *sufficient* facts or data. By its terms, according to the Committee Note, this is a "quantitative" test rather than a qualitative test. The issue is one of sufficiency.

(b) The testimony must be the product of reliable principles and methods. This requires a qualitative analysis. The principles and methods must be reliable.

(c) The witness must have applied the principles and methods reliably to the facts of the case. As with the second prong, this requires a qualitative analysis. The principles and methods must not only be reliable but must have been reliably applied by the expert in formulating the opinion.

The Committee Note to Fed. R. Evid. 702 makes it clear that the amendment is not intended to prevent a party from calling an industry expert to educate the judge about general principles without specifically applying those principles to the facts of the case. This would seem to be contrary to the wording of prong three. However, an expert of this type would still meet the requirements of prong three so long as the testimony is relevant and reliable, and the witness is qualified.

C. Examples of Bankruptcy Cases Holding That *Daubert/Kumho* Test was Not Satisfied.

1. Testimony Regarding Methodology for Determining Enterprise Value of the Chapter 11 Debtor's Business. The court in *In re Nellson Nutraceutical, Inc.*, 356 B.R. 364, 374 (Bankr. D. Del. 2006) held that a valuation expert's method of determining terminal value by subtracting capital expenditures from EBITDA was so unprecedented and unaccepted that it rendered the expert's opinion as to enterprise value inadmissible.

2. Testimony Regarding Discounted Cash Flow Analysis. The court in *In re Med Diversified, Inc.*, 346 B.R. 621, 631-32 (Bankr. E.D.N.Y. 2006) held that the expert's reliability was questioned due to the inferences he drew from a very small data sample size.

3. Testimony of Attorneys in Plan Confirmation. The District Court in *In re Dow Corning Corp.*, 255 B.R. 445 (E.D. Mich. 2000), upheld the bankruptcy court's decision to preclude the attorneys representing foreign claimants from Britain and Germany on whether plan of reorganization is fair when: (1) rules of ethics preclude testimony of participating attorneys and (2) they had financial interest in the outcome of confirmation of plan.

4. Testimony on Compensation in Chapter 7 Bankruptcy Case. The court in *In re Miniscribe Corp.*, 241 B.R. 729, 739-742 (Bankr. D. Colo. 1999), rejected Chapter 7 trustee's experts on reasonableness of fees because, in part, of their self-serving and perfunctory analysis.

5. Testimony on Sufficiency of Litigation Fund in Debtor's Plan. The court in *In re Dow Corning Corp.*, 237 B.R. 364 (Bankr. E.D. Mich. 1999) held a *Daubert* inquiry and determined that the expert testimony on the issue of whether the proposed Chapter 11 plan's litigation fund was sufficient did not meet the test in that the accountant's testimony was based on numerous unproven assumptions.

D. Examples of Bankruptcy Cases Holding That *Daubert/Kumho* Test was Satisfied.

1. Exclusion in Former Case Has No Bearing on Decision. The court in *In re Commercial Financial Services, Inc.*, 350 B.R. 559, 571 (Bankr. N.D. Okla. 2005) allowed the expert's testimony and held that the exclusion of the expert's testimony in a different case was not relevant because the expert had testified to different matters in the previous case.

2. Expert Testimony Regarding Value of Debtor as Going Concern. The court in *In re Zenith Electronic Corp.*, 241 B.R. 92, 102-03 (Bankr. D. Del. 1999) held that the investment bank expert may testify as to the value of the debtor as a going concern basis for plan confirmation purposes even when it has a contingency fee arrangement with the debtor and was eligible to be retained by the debtor under § 327.

3. Expert Testimony Regarding Solvency. The court in *In re Valley-Vulcan Mold Co.*, 237 B.R. 322, 335-336 (B.A.P. 1999) held that expert on solvency qualified under *Daubert* and *Kumho* to testify in an action on fraudulent transfer.

4. Expert Testimony on Rehabilitation Costs. The court in *In re Syed*, 238 B.R. 133, 141-143 (Bankr. N.D. Ill. 1999) held that the experts on the rehabilitation costs on debtor's property met the *Daubert / Kumho* test even though the court did not hold a full *Daubert* hearing.

E. Lay Opinion Testimony.

1. Amendment to Fed. R. Evid. 701. The December 1, 2000, amendment to Fed. R. Evid. 701 makes it clear that lay opinion testimony does not include opinions based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

2. Traditional Lay Opinions. The Rule 701 amendment was not intended to change the law concerning the traditional types of testimony properly offered as lay opinion. Most often this would be an owner testifying as to value. *See Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995).

3. FRCP 26(a)(2). The mandatory disclosure rules relating to expert witnesses do not apply to lay opinion testimony. Thus, the amendment to Fed. R. Evid. 701 is designed to ensure that “lay opinion” testimony which nevertheless deals with scientific, technical or other specialized knowledge will not qualify as lay opinion testimony for purposes of the rules.

5. 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. *Brown*, 244 B.R. at 611; *Russell*, Bankruptcy Evidence Manual, 2001 Ed., § 701.2 at 819.

6. 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.

7. 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.” *Brown*, 244 B.R. at 611; *Russell*, Bankruptcy Evidence Manual, 2001 Ed., § 701.2 at 819.

8. Alternatively, an owner may testify as to value as a lay witness under Rule 701. If testifying under 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.” *Russell*, *supra*. Such testimony will be given little, if any, weight. *Id.* 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.'" *Brown*, 244 B.R. at 612.

9. 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." *Id.*

9. In light of the 2000 amendments to Rule 702, it appears appropriate to determine whether the testimony of an owner is being offered as the opinion testimony of a lay witness or is being offered as a "skilled witness." Advisory Committee Note to Rule 702. In the first instance, the testimony would be admissible but may receive little weight. 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"). 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.

#### VIII. "Work Product" Rule.

##### A. "Work Product" Defined.

Tangible material or its intangible equivalent--in unwritten or oral form--that was either prepared by or for a lawyer or prepared for litigation, either planned or in progress.

The term is also used to describe the products of a party's investigation or communications concerning the subject matter of a lawsuit if made (1) to assist in the prosecution or defense of a pending suit, or (2) in reasonable anticipation of litigation.

Black's Law Dictionary 1600-01 (7<sup>th</sup> ed. 1999).

##### B. Fed. R. Civ. Proc. 26(b)(3).

(3) Trial Preparation: Materials. ... [A] party may obtain discovery of documents and tangible ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

C. Historical Basis--*Hickman v. Taylor*.

When the Federal Rules of Civil Procedure originally took effect in 1938, Rule 26 did not contain the Work Product Exception now found in Fed. R. Civ. Proc. 26 (b)(3). Whether the work product of an attorney was discoverable under the new rules engendered a great deal of divergence among the lower federal courts dealing with the issue. In light of this, the Supreme Court granted certiorari to deal with the issue in the case of *Hickman v. Taylor*, 329 U.S. 495 (U.S. 1947) ("*Hickman v. Taylor*").

The "basic question" before the court at stake was whether any of new discovery devices could be used to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation. *Hickman v. Taylor* at 505.

The type of information dealt with in *Hickman v. Taylor* were the memoranda, statements and mental impressions of counsel that fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis. That is, the "protective cloak" of the attorney client privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories. *Id.* at 508.

Notwithstanding the non-privileged and relevant nature of the information sought, the Supreme Court was concerned about "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." *Hickman v. Taylor* at 509-510.

This work is reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways--aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the 'Work product of the lawyer.'" *Hickman v. Taylor* at 511.

Accordingly, *Hickman v. Taylor* established that although absent from the literal terms of the Federal Rules as initially implemented, the general policy against invading the privacy of an attorney's course of preparation was "so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted." *Hickman v. Taylor* at 512.

D. Practical Application--Protecting Your Work Product.

1. Information compiled by an agent of the attorney in preparation for trial as well as the material prepared by the attorney falls within the Work Product Rule. *U.S.*

*v. Nobles*, 422 U.S. 225 (1975); *In re Southwest Florida Telecommunications*, 195 B.R. 504 (Bankr. M.D. Fla. 1996) (Paskay, C.B.J.) (documents prepared by investigator in anticipation of bankruptcy court litigation are protected).

2. The Work Product Rule applies only to documents created primarily to prepare for and assist in the defense or prosecution of identifiable, specific lawsuit which is either pending or threatened. *In re Hillsborough Holdings Corp.*, 132 B.R. 479, 481 (Bankr. M.D. Fla. 1991) (“*Hillsborough Holdings*”) (citing *In re Hillsborough Holdings Corp.*, 118 B.R. at 870; *U.S. v. Gulf Oil Corp.*, 760 F.2d 292, 296-97 (Temp.Emer.Ct.App.1985); *Southern Film Extruders, Inc. v. Coca-Cola*, 117 F.R.D. 559 (M.D.N.C. 1987)).

3. Accordingly, *Hillsborough Holdings*, in though some of the requested documents were listed with a description that indicated preparation of litigation, because it was apparent from the dates listed on the documents that there was no litigation existing or impending at the time of their preparation, they were not considered within the Work Product Rule. *Id.*

4. The attorney/client privilege or Work Product Rule can also attach to reports of third parties made at the request of the attorney or the client where the purpose of the report was to put into usable form as part of legal advice by attorney to the client. *United States v. Kovel*, 296 F.2d 918 (2nd Cir.1961). However, where the information is turned over to the third party for reasons unrelated to seeking or rendering legal advice, the attorney-client privilege is waived. *Eglin Federal Credit Union v. Cantor*, 91 F.R.D. 414, 418 (N.D. Ga.1981).

## IX. Trial Advocacy Tips.

### A. Witness Preparation.

1. Preparing and Reviewing Direct Examination. Go through direct testimony prior to trial as if your client were on the stand. Ask the questions the way you plan to at trial. Have the witness answer them. Listen to the answers.

2. Review of Deposition Testimony. Have your client read his or her deposition before coming to your office for the pre-trial preparation. You should also review your client’s deposition before trial and highlight the areas that you can anticipate some cross-examination on. Review these areas with your client and role-play how the questions from the opposing side might be framed and have the client answer the questions.

### B. Develop a Theme.

1. Concept-- Presenting your case in a thematic package is more effective than any other approach. It gets your message across in 30 seconds. It takes a complicated case and by relating it to a recognizable theme, you make your position instantly recognizable.

2. Examples:

a. “This is a case about a debtor who bought a car two and a half months before the petition date and now says he could have bought the same car on the petition date for three thousand dollars less.”

b. Cash collateral hearing representing the Bank: “This case is about our collateral being rapidly depleted by a hopelessly insolvent debtor that is still losing money and has no game plan to turn things around.”

c. Cash collateral hearing representing the Debtor: “This is a case about what Chapter 11 was meant to be -- a place where temporarily distressed but fundamentally strong companies can save their business to the benefit of hundreds of employees, a local community, and numerous trade creditors that continue to do business with the debtor.”

C. Try Your Case. Don’t fall into the trap of trying the other person’s case. Many times I’ve seen all of the energy in trying the weaker side’s case. Then if they prove that case, they win. Counter a theme with a theme and try that case.

D. Preparation of Exhibits for Trial. Please do it. That is, mark your exhibits prior to coming to court and list your exhibits on a separate sheet in the order marked. Provide the original exhibits to the courtroom deputy before trial. Have copies available for opposing counsel, the judge, and the witness stand. If you have more than ten exhibits put them in tabbed binders.

**- APPENDIX -**

**Federal Rules of Evidence--  
Quick Reference  
to Commonly Cited Rules**

**Rule 201. Judicial Notice of Adjudicative Facts**

(a) Scope of rule.

This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts.

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary.

A court may take judicial notice, whether requested or not.

(d) When mandatory.

A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard.

A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice.

Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury.

In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

**Rule 401. Definition of "Relevant Evidence"**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence  
Inadmissible**

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

#### **Rule 406. Habit; Routine Practice**

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

#### **Rule 602. Lack of Personal Knowledge**

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

#### **Rule 611. Mode and Order of Interrogation and Presentation**

(a) Control by court.

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination.

Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions.

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

#### **Rule 612. Writing Used to Refresh Memory**

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either--

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

#### **Rule 613. Prior Statements of Witnesses**

(a) Examining witness concerning prior statement.

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness.

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2) .

### **Rule 615. Exclusion of Witnesses**

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

### **Rule 701. Opinion Testimony by Lay Witnesses**

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, and (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 .

### **Rule 702. Testimony by Experts**

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.

### **Rule 703. Bases of Opinion Testimony by Experts**

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. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

### **Rule 705. Disclosure of Facts or Data Underlying Expert Opinion**

The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

### **Rule 801. Definitions**

The following definitions apply under this article:

(a) Statement.

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant.

A "declarant" is a person who makes a statement.

(c) Hearsay.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay.

A statement is not hearsay if--

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is

(A) the party's own statement, in either an individual or a representative capacity or

(B) a statement of which the party has manifested an adoption or belief in its truth, or

(C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

### **Rule 802. Hearsay Rule**

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

### **Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

### **Rule 807. Residual Exception**

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

### **Rule 901. Requirement of Authentication or Identification**

(a) General provision.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations.

By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

- (1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.
- (2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
- (6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
- (7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
- (9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

#### **Rule 902. Self-authentication**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

- (4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.
- (5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.
- (6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.

#### **Rule 1002. Requirement of Original**

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

#### **Rule 1003. Admissibility of Duplicates**

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

#### **Rule 1006. Summaries**

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

**Basics of Evidence**  
**Business Records Testimony Examples**

Sample No. 1: The first example involves a custodian of records providing testimony to introduce a registry of checks:

**Attorney:** Mr. Worthington, could you please tell the court what you do at ABC Corporation?

**Witness:** I maintain the records at ABC Corporation. My official title is “record keeper.”

**Attorney:** What do you do as the record keeper at ABC Corporation?

**Witness:** I collect, maintain and store all of the various business records generated by ABC Corporation.

**Attorney:** How are these business records organized and stored?

**Witness:** According the ABC Corporation’s filing system.

***Mark exhibit and approach witness.***

**Attorney:** Mr. Worthington, I am showing you what has been marked Plaintiff’s Exhibit A. Do you recognize it?

**Witness:** Yes. That is one of our check registries.

**Attorney:** Is this registry one of the records that you collect and maintain as part of your job at ABC Corporation?

**Witness:** Yes, it is.

**Attorney:** Was this registry prepared by you, or a person with knowledge of, or made from information transmitted by a person with knowledge of, the acts and events appearing on it?

**Witness:** Yes, it was prepared by Mr. Jones, in our finance department.

**Attorney:** Was this check registry made at or near the time of the checks listed on it?

**Witness:** Yes, that is my understanding.

**Attorney:** Is it the regular practice of ABC Corporation to make and maintain such a check registry?

**Witness:** Yes.

**Attorney:** Was this check registry kept in the course of regularly conducted business at ABC Corporation?

**Witness:** Yes.

Sample No. 2: The second example involves the introduction of a check registry by an employee that is *not* the custodian of record.

**Attorney:** Mr. Collins, can you describe your employment at Acme Corporation?

**Witness:** I am the Office Manager.

**Attorney:** What are your responsibilities as the Office Manager?

**Witness:** I oversee the management and operation of the local Cleveland office of Acme Corporation.

**Attorney:** In your duties overseeing the operations and management of the Cleveland office, have you become familiar with Acme Corporation's methods for maintaining its business records?

**Witness:** Yes I have; it is part of my job as the Office Manager in Cleveland to know the proper procedures.

**Attorney:** Does this include the procedures and protocols utilized by the company in creating and maintaining its check registry?

**Witness:** Yes it does.

**Attorney:** Are Acme Corporation's check registries created at the time the checks are written, or shortly thereafter by a person of knowledge of the checks prepared by Acme Corporation?

**Witness:** Yes, that is my understanding.

**Attorney:** Are these check registries prepared and maintained by Acme Corporation in the ordinary course of its business operations?

**Witness:** Yes.

#### ***Identify Exhibit and Approach Witness***

**Attorney:** Mr. Collins, I am handing you what has been labeled as Exhibit A. Can you tell me if you recognize it?

**Witness:** It is one of Acme Corporation's check registries for July, 2006.

**Attorney:** What information is reflected on this check registry?

**Witness:** The check number, the date of the check, the amount of the check, the account it was drawn upon, the payee of the check, and the payee's account number.

**Attorney:** When was this check registry prepared?

**Witness:** When the check was prepared and mailed to the payee, its information was entered into the check registry.

**Attorney:** Who prepared this check registry?

**Witness:** The accounts payable clerk, Ms. Smith. She updates the check registry for the current month at the times she prepares the check.

**Attorney:** Is it the regular practice at Acme Corporation to prepare check registry in this manner at the time that Exhibit A was prepared?

**Witness:** Yes.

**Attorney:** Are Acme Corporation's check registries created, maintained and stored in the ordinary course of Acme Corporation's business?

**Witness:** Yes they are.

Sample No. 3: The third example involves the introduction of a summary of employee evaluations prepared by the employees' supervisors and compiled by the human resources director.

**Attorney:** Mr. Lovecraft, what do you do at the VSI Corporation?

**Witness:** I am the human resources director at VSI Corporation.

**Attorney:** What are your responsibilities as the human resources director at VSI?

**Witness:** I am responsible for the management of our human resources department, including overseeing employee training, benefits, compiling our twice-yearly employee evaluations and preparing a summary of these evaluations.

**Attorney:** As the human resources director, are you familiar with VSI Corporation's employee evaluation process?

**Witness:** I should be, I designed it and oversaw its implementation.

**Attorney:** How often are these evaluations conducted?

**Witness:** Twice a year; at the beginning of March, and again at the beginning of September.

**Attorney:** Are these evaluations conducted as part of VSI Corporation's regularly conducted business?

**Witness:** Yes. They are part of our overall employee management system.

**Attorney:** How are these evaluations structured?

**Witness:** Each employee meets with his or her immediate supervisor and a representative of human resources department, usually my assistant, and they discuss any questions or concerns the employee may have. During the meeting, the employee's supervisor will complete a standardized evaluation sheet that rates each employee in various areas with regard to their work; productivity, attitude, that sort of thing. There are actually 25 different areas that each employee is rated in.

**Attorney:** What is done with these evaluations after the meeting?

**Witness:** There are sent to my office, where they are processed into an overall summary of each employee's performance.

**Attorney:** Who prepares these summary reports?

**Witness:** I prepare them based upon the employee evaluations I receive from each supervisor.

**Attorney:** Why are these summaries prepared?

**Witness:** So that the company can track and review each employee's work history and habits.

**Attorney:** Are these summaries prepared as part of VSI Corporation's employee management system as well?

**Witness:** Yes.

***Identify Exhibit and Approach Witness***

**Attorney:** Mr. Lovecraft, I am handing you what has been labeled as Exhibit A. Can you tell me if you recognize it?

**Witness:** Yes I do. It is a summary of Amy Blank's employee evaluation from March, 2007.

**Attorney:** What information is reflected in Exhibit A?

**Witness:** It summarizes the scores Amy's supervisor gave her in the various areas set for the in the evaluation sheets. It also compares her performance to that of Amy's co-workers in her department, and against all employees in general.

**Attorney:** When was this summary prepared?

**Witness:** Shortly after I received her evaluation.

**Attorney:** What does "shortly" mean?

**Witness:** Within two or three days of receiving her evaluation.

**Attorney:** Who prepared this summary?

**Witness:** I did.

**Attorney:** Was it your regular practice as the human resources director of VSI Corporation to prepare an employee's summary within two or three days of receiving an evaluation?

**Witness:** Yes.

**Attorney:** Was the summary of Amy's evaluation prepared according to VSI Corporation's procedures for preparing such a summary?

**Witness:** Yes.

**Attorney:** Was the summary of Amy's March, 2007 evaluation prepared, maintained, and stored in the ordinary course of VSI Corporation's business?

**Witness:** Yes. It was.

## **Example Cross Examination of a Retained Expert**

Often the best strategy is to attack credibility by demonstrating that the witness has a financial bias. Obvious subject matter to accomplish this purpose include:

- money earned on this case
- money earned in testifying
- previous experience with opposing counsel
- history of favoring one party or the other, e.g. plaintiff or defendant
- bias indicated on curriculum vitae.

Retained experts are nearly always biased in favor of the party who is paying them. Although it may be possible that the lawyer just got lucky and happened to find the expert who shared in detail his philosophy of the case, it is more common that the expert was first hired and then found the facts to support his client's case. It would be refreshing to encounter an examination like the following:

Q: Mr. Hired Gun, isn't it true that you are biased in favor of my opponent?

A: Of course I am, he is paying me isn't he? I am an advocate just like you are and I have been hired to find the best facts for my client. I assume that your expert will do the same thing and the jury will ultimately decide which set of facts wins.

Instead, retained experts staunchly maintain that they are completely objective. The examiner can take advantage of this tendency. The following is an example of an exchange that could take place in a bankruptcy preference case:

Q: Now I understand that expert testimony is not your primary way of making a living, correct?

A: That's correct.

Q: So when you are retained as an expert, I assume that your opinion does not depend upon who is paying you?

A: That's right.

Q: You try to provide an objective opinion?

A: Yes I do.

Q: And do you think that in providing an objective opinion it is important for you to examine both the good facts and the bad facts with respect to a case?

A: Yes.

Q: You are a lawyer, correct?

A: Yes.

Q: Would you agree with me that courts look at a variety of factors to determine if payment practices between the parties are in the ordinary course of business?

A: Yes.

Q: Your opinion that the transactions were ordinary here is entirely dependent upon the measurements used in your report?

A: Yes.

Q: Did you look at whether there was a change in credit terms between the parties?

A: No.

Q: Did you look at whether payments related to one invoice versus a batch of invoices?

A: No.

Q: Did you look at the amounts paid during the preference period versus the pre-preference period?

A: No.

Q: Please read the last sentence of the article that you wrote on preferences for me.

A: "Such battles will continue to be won by the litigant who presents the most compelling statistical analysis."

The rest can be saved for argument (and the argument will be compelling when the measurements that were not performed by this expert are really bad facts for the litigant that he is testifying on behalf of). When the retained expert professes to be entirely objective, he should be in a position to see both sides of any situation. The expert's "objectivity" should provide an opportunity to either admit that your position is at least plausible, or expose his bias.

The following are actual exchanges with an expert in a recent case involving a preference claim:

Q: Have you represented either a debtor or a creditor in any case in the fifth circuit before?

A: I don't know what states are in the fifth circuit.

Q: Okay. Louisiana, Mississippi, Texas?

~ ~ ~

A: Okay. A two-year baseline or for that matter a one-year baseline generally doesn't matter. But it gives us an opportunity to compare -- beyond two years I don't think it's relevant. Let's put it that way. Because you can have a history going back ten years, five years, six years, seven years. So we arbitrarily cut off our data request for the 24 months preceding the start date. And then we run an analysis of the historical weighted average based on that time frame.

Now, I happen to think that a two-year time line if the data is available will give you a comparison that looks at the entire relevant history. There are cases where we run an analysis where we exclude the three-month period before the preference start date, and/or we exclude the six-month period before the start date, and/or we otherwise limit the

baseline to when a credit term change was imposed in which case it's based on the date that the time credit term was changed. And we do all those things to compare different slices of history.

Now, on the plaintiff's side we run those different analyses and then as a plaintiff we would choose the baseline that in general will give us – well we choose a baseline that makes sense given the data and what will give us the clearest indication between the baseline and the preference period. And so that's what we do.

Q: You wouldn't do that on the defense side? You wouldn't do a baseline that would give you a clear indication of the difference between the pre-preference period and the preference period?

A: I looked at it in this case, and there wasn't any material difference between the historical weighted average using different slices of history. I did look at it. I can pull that material from my work papers. My recollection is that there was no significant difference.

However, when I'm called on as an expert, I give my opinion in a way that will assist the Court in evaluating the ordinary course of business defense. When I'm a plaintiff, I'm an advocate. You follow me?

Q: No. Why aren't you an advocate for a defendant?

A: Well, because it's not my job to advocate for the defendant. My job is to give the Court an objective opinion as to the ordinary course of business defense. I don't have an agenda to tilt the data one way or the other -- to tilt the statistics one way or the other.

Q: Okay. Let me go through that.

You're saying that when you're an expert for a plaintiff, you have an agenda to tilt the data?

A: No. Excuse me. When I said for the plaintiff, I meant -- you know, my firm predominantly does plaintiff's work recovering preferences. When I'm an attorney for a plaintiff and when I assess the data and I have different choices to make in terms of presenting reports that best advocate my position, then I will do that.

But when I'm an expert, whether I'm an expert for the plaintiff or an expert for the defense, my role is different. I'm no longer advocating a position one way or the other. My job is to formulate my best opinion as to what constitutes the ordinary course of business. So in my role as an expert I'm going to look at the historical baseline that makes sense in the case. In this case what made sense to me was to use the entire transaction history.

~ ~ ~

Q: Okay. Then let's go back to Exhibit C.

A: Now, if we go back to Exhibit C, Exhibit C are those invoices that remained at issue after we applied new value, and that's basically what it is.

Q: Okay.

A: It lists the invoices by invoice amount, the amount paid, and these invoices were not off set by new value or not fully off set by new value.

Q: Can you give me one minute.

A: Yes.

Q: Okay. Sorry. On Exhibit C then, the first check amount at issue was 58,373; right?

A: Yes.

Q: And you broke that check down by invoices; correct?

A: Yes, I did.

Q: Then certain amounts were paid on those invoices, and you have that column reflected; is that correct?

A: Yes.

Q: Then your last column is NNV amount.

How did you generate that figure?

A: Give me a moment. I want to look at something. We're going to have to take a two-minute break because the reporter has to put money in the meter.

Q: Okay. Let's take a five-minute break.

(recess)

THE WITNESS: All right. We're ready to proceed on this end.

SPEAKER 1: This Attorney Nnnnn. I just want to let you guys know that I'm back.

THE WITNESS: Okay. Is everybody back?

SPEAKER 1: Yeah. This is Attorney #1. I'm here.

THE WITNESS: I know you're there.

SPEAKER 1: Attorney #2, are you on?

SPEAKER 2: I'm ready when you all are.

THE WITNESS: All right. I'm ready. The question on the table was what is the NNV amount column reflect, or what does Exhibit C reflect or both.

I would have to go back to my Paradox program and my work papers to clarify for you what Exhibit C is, what it purports to be. It was not used in my analysis. What I used in my analysis was Exhibit D. But I would be happy to supplement my answer when I review the deposition transcript.

~ ~ ~

Q: Okay. So at the end of the day if you have a check which is a transfer, you're first applying new value, and then you're applying, if necessary, ordinary course?

A: That's the methodology reflected in this report.

~ ~ ~

Q: Okay. And so Exhibit C you're not really sure the methodology that was done to generate that exhibit, and you're saying that Exhibit C is not relevant to your opinion?

A: Exhibit C is not relevant to my opinion. Correct.

~ ~ ~

...Did you look at any other factors, for example, did you look at if payments were made on COD?

A: If I was aware of COD payments, I would have isolated as those contemporaneous exchange transfers.

Q: Okay.

A: So if there were some, I just didn't pick it up.

Q: Okay. Did you analyze in any of these analyses a change in credit terms that may have happened?

A: No. This is statistical data derived from invoice to payment patterns.

Q: Did you look at use of wire transfers?

A: Not specifically but the wire transfers are the transfers that are at issue after applying new value.

Q: Okay. What I'm saying is did you consider the wire transfer, meaning the mode of payment, the wire transfer as a factor to come to your opinion?

A: No, I did not.

Q: Did you consider the use of overnight checks as a factor to come to your opinion?

A: No, I did not.

Q: Did you consider batching or the payment of multiple invoices with one check as a factor to come to your opinion?

A: Not in this report, no.

**PLAINTIFF’S MOTION TO EXCLUDE THE EXPERT  
OPINION TESTIMONY OF EXPERT ABC AND EXPERT XYZ**

THE HONORABLE LEIF M. CLARK, UNITED STATES BANKRUPTCY JUDGE:

The Litigation Trust (the “Litigation Trust”) files this Motion to Exclude the Expert Opinion Testimony of Expert ABC and Expert XYZ (the “Motion”). In support thereof, the Litigation Trust would respectfully show the following:

**I. INTRODUCTION**

1. This case is similar to the *Med Diversified* case in which Judge Bernstein struck experts. See *Chartwell Litigation Trust v. Addus Healthcare, Inc. (In re Med Diversified, Inc.)*, 2006 WL 2242288 (Bankr. E.D.N.Y.). Judge Bernstein held:

[I]t is not the function of this Court to fix the errors in an expert’s report in order to save it for purposes admission. Either the expert properly applies the standard methodologies or he does not. If he does, the report may be admitted. If he does not, it cannot be admitted.

....

Under the totality of the circumstances, this Court does not believe that it falls within the sound exercise of its discretion to redo [the expert’s] patently unreliable report. This may be a stiff dose of medicine for the plaintiffs to swallow, but it should serve as a warning to other litigants in future [cases] to make sure that their experts apply the standard methods correctly lest they find their experts’ reports denied admission. For if they do not heed this stricture, they may not have evidence in the record to sustain their burden of proof ....

*In re Med Diversified*, 2006 WL 2242288 at \*15.

2. The report and the testimony of Expert ABC (“ABC”) must be excluded under Federal Rule of Evidence 702, *Daubert*, *Kumho Tire*, and their progeny because:

- his alleged new value analysis (i) does not contain any basis or reasons for his conclusions; (ii) does not establish any evidence with respect to the necessary

- elements of the affirmative defense; and (iii) does not explain how the calculation was performed;
- his ordinary course analysis is classic “double-dipping” prohibited by the Fifth Circuit and the Bankruptcy Code;
  - his ordinary course analysis does not consider “debt incurred;” and
  - his ordinary course analysis does not consider the factors that all courts consider.

3. The report and the testimony of Expert XYZ (“XYZ”) must be excluded under Federal Rule of Evidence 702, *Daubert*, *Kumho Tire*, and their progeny because:

- his ordinary course analysis does not consider “debt incurred;”
- his ordinary business terms analysis does not analyze similarly situated debtors and creditors; and
- he improperly compares DSO numbers taken from public documents (apples) to days-to-pay data (oranges).

## **II. BACKGROUND FACTS<sup>1</sup>**

4. Defendants, designated Expert ABC (“ABC”), an attorney, as an expert to testify about the Defendants’ affirmative defenses of contemporaneous exchange, ordinary course and new value. Defendants designated Expert XYZ (“XYZ”) as an expert to testify about the affirmative defense of ordinary course of business.

5. On April 23, 2007, the Defendants served the Plaintiff with the expert reports of ABC (the “ABC Report”) and XYZ (the “XYZ Report”).

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<sup>1</sup> All capitalized terms not defined herein refer to the definitions as provided in the Plaintiff’s Motion for Summary Judgment and Brief in Support.

6. The ABC Report was submitted on the issues of (i) the ordinary course of business defense, (ii) the new value defense, and (iii) the contemporaneous exchange defense. *See* Exhibit A-1, p. 2; Exhibit C-1, p. 3-5.

7. The XYZ Report was submitted on the issue of the ordinary course of business defense – under both the subjective test and the objective test as those terms are commonly referred to in the preference context. *See* Exhibit B-1, p. 12; Exhibit D-1, p. 15-16, 18.

### III. ARGUMENT AND AUTHORITIES

#### A. Standard to Admit Expert Testimony

8. The trial court has a gatekeeping obligation to ensure that all expert testimony is both **relevant and reliable**. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). As part of this obligation, the trial court must make sure that the expert testimony conforms with the requirements of Federal Rule of Evidence 702. *See id.* at 588-89; FED. R. EVID. 702.

9. Rule 702 provides that an expert’s opinion is **reliable** 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.” FED. R. EVID. 702. In other words, the expert’s opinion cannot be based on a “subjective belief or unsupported speculation.” *Daubert*, 509 U.S. at 590. Applying these factors to proffered expert testimony, the trial judge assumes a “gatekeeping” role to “ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Id.* at 589; *Amorgianos v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256, 265 (2d Cir. 2002). The court’s gatekeeping function applies not only to proffered scientific expert testimony, but also to “testimony based on ‘technical’ and ‘other specialized’ knowledge.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 119 S.Ct. 1167 (1999); *see Katt v. City of New York*, 151 F.Supp.2d 313, 353-57 (S.D.N.Y.

2001). In this role, the court has broad discretionary authority “to determine [the] reliability [of an expert’s testimony] in light of the particular facts and circumstances of the particular case.” *Kumho*, 526 U.S. at 158; *see Amorgianos*, 303 F.3d at 265; *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996); *see also McCullock v. H.B. Fuller Co.*, 981 F.2d 656, 657 (2d Cir. 1992) (“[T]he broad discretion of the trial court to determine the qualifications of witnesses will not be disturbed unless its ruling was manifestly erroneous.”) (internal quotations omitted).

**B. ABC’s Report Regarding New Value Must be Stricken**

10. The ABC Report regarding new value must be stricken because the Report (i) does not contain any basis or reasons for its conclusion regarding new value; (ii) does not establish any evidence with respect to the necessary elements of the affirmative defense; and (iii) does not explain how the calculation was performed.

11. ABC was designated an expert regarding the new value defense (presumably as to subsequent new value pursuant to section 547(c)(4)). *See* Exhibit A-1, p. 1; Exhibit A-1, exhibits D and E; Exhibit C-1, p. 4.

12. ABC report touches on “new value” only by the following:

- On the first page of the Report under section A, ABC states, “Of the total transfers of \$3.124 million, Defendant has “allowed” new value of \$2,4474, 392, which brings the net of new value amount at issue to \$650,536.”
- On the second page of the Report under section 3 of DATA, ABC states “Attached hereto as Exhibit “D” is my analysis of subsequent new value allowable under the bankruptcy code.”
- ABC attaches a chart as Exhibit D without further explanation.

*See* Exhibit A-1.

13. These conclusory statements are not sufficient to meet the requirement under Rule 26 of the Federal Rules of Civil Procedure. The Defendants, however, rely completely on this analysis for their legal argument on new value.

14. In addition, the conclusory statements on new value are not reliable because the ABC Report fails to establish the necessary elements of the new value defense.

15. Section 547(c)(4) provides that a trustee may not avoid a transfer—

To or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor.

11 U.S.C. § 547(c)(4).

16. In order to prove the affirmative defense of subsequent new value under section 547(c)(4), the Defendants must establish “(1) that the creditor gave new value; (2) that the new value was given subsequent to the preferential transfer; (3) that the new value given was not ‘secured by an otherwise unavoidable security interest,’ and (4) that the debtor did not make ‘an otherwise unavoidable transfer to or for the benefit of such creditor’ on account of the new value.” *Krafsur v. Scurlock Permian Corp. (In re El Paso Refinery, L.P.)*, 178 B.R. 426, 442-43 (Bankr. W.D. Tex. 1995) (quoting *Laker v. Vallette (In re Toyota of Jefferson)*, 14 F.3d 1088, 1091 (5th Cir. 1994)), *rev'd on other grounds*, 171 F.3d 253-54 (5th Cir. 1999).

17. Assuming *arguendo* that the ABC Report takes into consideration the first two elements above, the Report clearly **does not** address the following elements: (3) whether the new value given was not secured by an otherwise unavoidable security interest, and (4) whether the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor on

account of the new value. *See* Exhibit A-1; Exhibit C-1, p. 22; *In re El Paso Refinery, L.P.*, 178 B.R. at 442-43 (case in which this Court thoroughly analyzes these elements of the defense).

18. The chart on Exhibit D of the ABC Report does not state whether the new value remained unpaid or not. As this Court understands, although the new value does not need to remain unpaid, if it is paid and the Defendants want to use it, they must demonstrate that it was not paid by an otherwise unavoidable transfer. ABC does not, however, offer any analysis of whether the paid new value was paid by an otherwise unavoidable transfer. Thus, for example, ABC could have attempted to demonstrate that it was paid outside the ordinary course of business, but he failed to perform an ordinary course of business analysis *first* (before his alleged new value analysis) because he wanted to “double-dip” (in clear contravention of well-established Fifth Circuit law).

19. ABC also fails to consider whether the new value given was not “secured by an otherwise unavoidable security interest.” The Defendants’ Answer states that many of the Transfers were made on account of an otherwise unavoidable security interest. *See* Answer & Counterclaim, p. 4-5.

20. Finally, ABC wholly fails to explain how he calculates new value at all in his Report. But, this Court has explained the proper method. *In re El Paso Refinery, L.P.*, 178 B.R. at 442-43.

21. For these reasons, the ABC Report and his opinions regarding new value are meaningless and should be struck. *See G.H. Leidenheimer Baking Co., Ltd. v. Sharp (In re SGSM Acquisition Co., LLC)*, 439 F.3d 233, 240 (5th Cir. 2006) (upholding the striking of expert testimony).

C. **The ABC Report and the XYZ Report Regarding the Ordinary Course of Business Defense Must be Stricken**

22. To satisfy the requirements of section 547(c)(2), the Defendants must prove by a preponderance of the evidence that **either** (1) the **debt** was incurred in the ordinary course of business between the debtor and the transferee and the **payment** was incurred in the ordinary course of business between the debtor and the transferee (the “subjective test”), **or** (2) the **debt** was incurred in the ordinary course of business between the debtor and the transferee and the **transfer** was made according to ordinary business terms (the “objective test”). *See* 11 U.S.C. § 547(c)(2) as amended by Pub. L. No. 109-8, § 409 (2005) (“BAPCPA”), effective in cases commenced on or after October 17, 2005.

23. The “debt incurred” element under the previous version of the Bankruptcy Code was often stipulated to by the parties or subsumed in the subjective test. However, the language of the Bankruptcy Code still requires proof of this element. This requirement is especially important in cases such as this one in which the Defendants, in a striking manner, changed the way the Debtors would incur debt with them by dictating conditions of payment that had never before been placed on the Debtors.

(1) **The ABC Report is Unreliable because It Fails to Address whether the Debt was Incurred in the Ordinary Course of Business Between the Debtor and Defendants**

24. The ABC Report is unreliable because it fails to address whether the debt was incurred in the ordinary course of business between the Debtors and the Defendants. Thus, ABC opines as to whether the payments occurred in the ordinary course of business, but wholly fails to address whether the debt was incurred in the ordinary course of business. *See* Exhibit A-1, p. 2 (“My conclusion and opinion is that the exceptions to avoidance under former 11 U.S.C. 547(c) (2) (B) and (C) are satisfied for all but \$18,333”).

25. ABC provides *no supporting data* that the debt incurred in the Preference Period was incurred in the ordinary course of business between the parties. See Exhibit A-1, exhibit E; Exhibit C-1, p. 54 (“Q: Before I go on I want to make sure. You’re saying that this chart [exhibit E of ABC’s report] reflects your analysis, and then, I guess, ultimately your opinion on ordinariness in the subjective sense and the objective sense? A: In this case that’s correct.”).

(2) **The ABC Report on the Ordinary Course Defense is Unreliable Because ABC Admittedly Double-Dips**

26. ABC admittedly “double-dips” in violation of Fifth Circuit law.

Q: Okay, so at the end of the day if you have a check which is a transfer, you’re first applying new value, and then you’re applying, if necessary, ordinary course?

A: That’s the methodology reflected in the report.

See Exhibit C-1, p. 47.

Q: Okay. And you could, if we spent the time doing this, identify the invoices that were relate those resulting preference amounts?

A: Yes, I could.

Q: Are some of those invoices paid by checks where you also applied new value first?

A: Yes.

See Exhibit C-1, p. 68.

27. The ABC Report acknowledges the double-dipping. See Exhibit A-1, p. 2 (“B”), p.3 (“Conclusions and Opinions”).

28. The practice of double-dipping is not permitted in the Fifth Circuit. The Court in *In re SGSM Acquisition Co., LLC* explained the prohibition of the practice of double-dipping in this Circuit:

Still, it is important to note that the practice of “double dipping,” whereby a creditor attempts to apply a second § 547(c) defense to a particular

payment after having successfully invoked the subsequent advance defense as to the same payment, is prohibited in bankruptcy...Stated another way, if a payment is otherwise unavoidable under § 547(c), then the new value immediately preceding that payment cannot be used anywhere for the purposes of the subsequent advance defense; taking the subsequent new value deduction prior to a transfer defended under § 547(c) is double dipping. Appellants seemingly ignore this fact in arguing that they have no preference exposure.

A creditor is allowed to assert alternative defenses in attempting to ward off the bankruptcy trustee. However, with respect to an individual payment made by the debtor during the preference period, a creditor can only benefit from one § 547(c) defense; if the subsequent advance defense is utilized, a creditor cannot attempt to support part of the same payment as being in the ordinary course of business.

*In re SGSM Acquisition Co., LLC*, 439 F.3d at 242 n. 7.

29. Throughout his report, ABC states that after new value was applied, he went on to apply ordinary course of business to the remaining payments. That is double-dipping.

30. ABC did not do an analysis of ordinary course of business on **all** of the Transfers. He admittedly limited his analysis to those Transfers that were partially remaining after new value was applied, which is not permitted in the Fifth Circuit. As a result, the Defendants have no evidence of the subjective test for all of the Transfers.

(3) **The ABC Report on the Ordinary Course of Business Defense is also Unreliable Because ABC Fails to Consider the Required Factors**

31. Even if the Court were to consider ABC's ordinary course analysis (despite the double dipping), the analysis is nonetheless unreliable. ABC considered only days-to-pay and the amount of invoices as support for his conclusions regarding ordinary course of business. *See* Exhibit A-1, exhibit E. ABC admittedly did not review other factors that courts commonly review to determine if transfers were made according to the "ordinary course of business"

between the parties.<sup>2</sup> See Exhibit C-1, p. 70-71. For example, ABC did not look at method of payment, the use of COD payments, the batching of invoices, or the change in payment terms or credit terms between the parties. See *id.*

32. Furthermore, ABC did not exclude from the “baseline” certain months prior to the Preference Period, although that is also standard when conducting an analysis of the ordinary course of business between the parties.<sup>3</sup>

33. For these reasons, the Court should strike the expert opinion and testimony of ABC regarding the ordinary course of business defense under section 547(c)(2).

(4) **The XYZ Report is Unreliable because It Fails to Address whether the Debt was Incurred in the Ordinary Course of Business Between the Debtor and Defendants**

34. The XYZ Report offers conclusory opinions concerning only one of the two elements required under section 547(c)(2). Thus, XYZ opines only as to whether the payments occurred in the ordinary course of business, but wholly fails to consider whether the debt was incurred in the ordinary course of business. See Exhibit B, p. 12 As a result, the XYZ Report is unreliable and should be struck.

(5) **The XYZ Report on the Ordinary Course Defense is Unreliable Because the Methodology Utilized Fails to Consider Similar Debtor Entities and Similar Creditor Entities when Analyzing “Ordinary Business Terms”**

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<sup>2</sup> See, e.g., *Yurika Foods Corp. v. UPS (In re Yurika Foods Corp.)*, 888 F.2d 42 (6th Cir. 1989); *Payne v. Clarendon Nat'l Ins. Co. (In re Sunset Sales, Inc.)*, 220 B.R. 1005 (B.A.P. 10th Cir. 1998); *Kevco, Inc. v. Coastal Industries, Inc. (In re Kevco, Inc.)*, Memorandum Opinion, p. 18-19, Adv. Proc. No. 4-04-04239-bjh (Bankr. N.D. Tex., June 30, 2005); *In re Logan Square East*, 254 B.R. 850 (Bankr. E.D. Pa. 2000); *Krafsur v. Scurlock Permian Corp. (In re El Paso Refinery, L.P.)*, 178 B.R. 426, 440 (Bankr. W.D. Tex. 1995), *rev'd on other grounds*, 171 F.3d 253-54 (5th Cir. 1999); *In re Jerry-Sue Fashions, Inc.*, 91 B.R. 1006 (Bankr. S.D. Fla. 1988).

<sup>3</sup> See *In re Hancock-Nelson Mercantile Co. Inc.*, 122 B.R. 1006 (Bankr. D. Minn. 1991) (the baseline period must include the time *before* the debtors became financially distressed); *Kevco, Inc. v. Coastal Industries, Inc. (In re Kevco, Inc.)*, Memorandum Opinion, p. 19-20, Adv. Proc. No. 4-04-04239-bjh (Bankr. N.D. Tex., June 30, 2005); see *In re Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1032 (7th Cir. 1993) (stating that the baseline period should be “preferably well before” the preference period and before the debtor started experiencing financial problems); *In re Furrs Supermarkets, Inc.*, 296 B.R. 33, 41 (Bankr. D.N.M. 2003); *In re Pluma, Inc.*, 2001 WL 1699690, at \*4 (Bankr. M.D.N.C. April 11, 2001); Exhibit C-1, p. 24-26.

35. The XYZ Report fails to consider similar debtor entities and similar creditor entities when analyzing ordinary business terms. The Report is therefore unreliable and should be struck.

36. XYZ's methodology for consideration of "ordinary business terms" is limited to (i) performing a simple calculation on some of the information provided to and/or received from his client,<sup>4</sup> (ii) relying on public information posted on the internet and other websites rather than conducting a personal investigation into data,<sup>5</sup> and (iii) adopting the information provided by his client as his own.<sup>6</sup> As discussed below, this methodology does not satisfy the Fifth Circuit standard. Furthermore, XYZ's opinion regarding the subjective test is limited to the days to pay analysis and number of invoices paid by check, but fails to address the other factors commonly considered by the courts. *See* footnote 4, *supra*; Exhibit B-1, p. 8, 12; Exhibit D-1, p. 33-34, 74-75.

37. In order to establish the ordinary course of business defense under the "ordinary business terms" test, the Defendants must prove that the payments were ordinary in relation to the prevailing standards in the relevant industry. *See* 11 U.S.C. §§ 547(g) & 547(c)(2)(B); *Gulf City Seafoods, Inc. v. Ludwig Shrimp Co. (In re Gulf City Seafoods, Inc.)*, 296 F.3d 363 (5th Cir. 2002); *see also Katz v. Wells (In re Wallace's Bookstores, Inc.)*, 316 B.R. 254, 267 (Bankr. E.D. Ky. 2004) (citing *Gulf City Seafoods*); *In re Allegheny Health, Educ. & Research Found.*, 292

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<sup>4</sup> *See* Exhibit B-1, p. 10; Exhibit D-1, p. 53-55 (compares DSO numbers (obtained from internet sources and 10-K reports) to days-to-pay calculation based on Debtors and Defendants for 2005).

<sup>5</sup> *See* Exhibit D-1, p. 38 (use of public information for the calculation of DSO numbers); Exhibit D-1, p. 41 (not based on independent knowledge, so does not understand underlying data); Exhibit D-1, p. 39-49 (no information on whether companies are comparable to Debtors or Defendants' industries); *see also* Exhibit B-1, p. 10, 11; Exhibit D-1, p. 50, 52 (use of DSO numbers from two internet resources); Exhibit D-1, p. 44, 50-53 (cannot identify the sources the internet sites used to obtain the DSO number).

<sup>6</sup> *See* Exhibit D-1, p. 48-50 (utilizing DSO number provided by client without performing independent analysis; unable to determine timeframe of DSO or whether it was limited to specific debtor or was company wide).

B.R. 68, 83 (Bankr. W.D. Pa. 2003); *In re Molded Acoustical Products, Inc.*, 18 F.3d 217, 226 (3d Cir. 1994).

38. The Fifth Circuit stated the standard for determining “ordinary business terms” is:

[A] payment is “according to ordinary business terms” if the payment practices at issue comport with the standard in the industry....[T]he relevant inquiry is ‘objective;’ that is to say, we compare the credit arrangements *between other similarly situated debtors and creditors* in the industry to see whether the *payment practices at issue* are consistent with what takes place in the industry. By consistent, we do not necessarily mean identical.

....

Defining the industry for whose standard should be used for comparison is not always a simple task....In our view, for an industry standard to be useful as a rough benchmark, *the creditor should provide evidence of credit arrangements of other debtors and creditors in a similar market, preferably both geographic and product.*

*In re Gulf City Seafoods, Inc.*, 296 F.3d at 367-69 (emphasis supplied).

39. In making this determination, the Court should consider the practices in which businesses similar in some way to the creditor engage, including the length of the pre-insolvency relationship and whether that relationship, in terms of payment and credit history, changed during the period directly prior to the bankruptcy. See *In re Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1033 (7th Cir. 1993); *In re Contempri Homes, Inc.*, 269 B.R. 124, 129 (Bankr. M.D. Pa. 2001).

40. The industry standard must be established “not only by evidence of those practices in which Debtors’ engage vis-à-vis their own shippers, but also evidence of those practices in which firms generally similar to Debtors and Defendant engage.” *In re Gulf City Seafoods, Inc.*, 296 F.3d at 367-69; see also *Kevco, Inc. v. Coastal Industries, Inc. (In re Kevco, Inc.)*, Memorandum Opinion, p. 37-39, Adv. Proc. No. 4-04-04239-bjh (Bankr. N.D. Tex., June 30, 2005).

41. In this case, the collection practices initiated by the Defendants cannot be considered “ordinary” in any industry. *See Miller v. Perini Corp., (In re A.J. Lane & Co., Inc.)*, 164 B.R. 409, 415 (Bankr. D. Mass. 1994) (“As we have seen, the test under subparagraph (B) [of pre-BAPCPA Bankruptcy Code] is objective in that it excludes a relationship involving payment demands by the creditor.”) When business terms are dictated by the supplier (as in this case through the Defendants’ collection activities), they cannot be considered to be in accordance with “ordinary business terms.” *See In re El Paso Refinery, L.P.*, 178 B.R. at 441.

42. Although both ABC and XYZ were engaged to opine on the objective “ordinary business terms” test,<sup>7</sup> the Defendants rely only on the testimony of XYZ to satisfy the test. *See Defendants’ Response & Cross Motion for Summary Judgment*, ¶ 52.<sup>8</sup>

43. XYZ’s methodology in arriving at his ultimate conclusion that the payments were made according to ordinary business terms is unreliable. Specifically:

- a. XYZ cannot identify the competitors of the Debtors or the competitors of the Defendants.<sup>9</sup>
- b. XYZ gathered information only as to the general, broad category of the “lumber industry.”<sup>10</sup>
- c. XYZ does not have credit or collection experience with a company that was engaged in the manufacturing or sale of lumber products.<sup>11</sup> Thus, his testimony is

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<sup>7</sup> *See* Exhibit B-1, p. 12; Exhibit D-1, p. 15-16, 18; Exhibit A-1, p. 2; Exhibit C-1, p. 3-5.

<sup>8</sup> ABC’s opinion regarding the objective test is limited to a review of the “days past due in relation to the credit term.” *See* Exhibit C-1, p. 4. ABC’s opinion fails to compare the payment practices of the Debtors during the preference period with any other industry. *In re SGSM Acquisition Co., LLC*, 439 F.3d at 240-41.

<sup>9</sup> *See In re Kevco*, Memorandum Opinion, p. 37, Adv. Proc. No. 4-04-04239-bjh (Bankr. N.D. Tex., June 30, 2005) (“[The expert] could not identify any of [the debtor’s] competitors...Nor could he identify any of [the Defendant’s] competitors.”).

<sup>10</sup> *See In re Kevco*, Memorandum Opinion, p. 37, Adv. Proc. No. 4-04-04239-bjh (Bankr. N.D. Tex., June 30, 2005) (“Instead, [the expert] testified to the general manufacturing industry, which is far too broad.”).

based solely on his general experience as a credit manager and professional expert witness.

- d. XYZ did not do any research with respect to the specific collection practices of the Defendants' competitors as they related to the Debtors.<sup>12</sup>
- e. XYZ offers no testimony or analysis with respect to the credit and collection practices employed by the Defendants with the Debtors.<sup>13</sup>

44. In summary, XYZ defines the industry too broadly, fails to present evidence with respect to the credit/collection practices employed by the Defendants with regard to the Debtors, and improperly compares two different statistical analyses (DSO and days-to-pay) as a comparison to the industry standards. This is not sufficient. *See In re Kevco*, Memorandum Opinion, p. 39, Adv. Proc. No. 4-04-04239-bjh (Bankr. N.D. Tex., June 30, 2005).

45. The Defendants should have presented evidence of the credit and collection practices of *the Defendants' competitors* in the wholesale lumber industry. *See In re Gulf City Seafoods, Inc.*, 296 F.3d at 367-69; *see also Kevco, Inc. v. Coastal Industries, Inc. (In re Kevco, Inc.)*, Memorandum Opinion, p. 37-39, Adv. Proc. No. 4-04-04239-bjh (Bankr. N.D. Tex., June 30, 2005).

46. Specifically, the Defendants should have presented evidence of the credit and collection practices of the Defendants' competitors with respect to *this debtor*. This information was available to the Defendants. As part of the discovery process, the Defendants were given the

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<sup>11</sup> *See* Exhibit D-1, p. 83; *In re Kevco*, Memorandum Opinion, p. 37, Adv. Proc. No. 4-04-04239-bjh (Bankr. N.D. Tex., June 30, 2005) ("Instead, he testified to collection practices at O'Neal and general practices in the manufacturing industry."); *see also In re SGSM Acquisition Co., LLC*, 439 F.3d at 240-41.

<sup>12</sup> *See* Exhibit D-1, p. 83. *See In re Kevco*, Memorandum Opinion, p. 38, Adv. Proc. No. 4-04-04239-bjh (Bankr. N.D. Tex., June 30, 2005).

<sup>13</sup> *See In re Kevco*, Memorandum Opinion, p. 38-39, Adv. Proc. No. 4-04-04239-bjh (Bankr. N.D. Tex., June 30, 2005) ("Despite his general knowledge of collection practices in the general manufacturing industry, and his testimony with respect to what O'Neal does, [the expert] provided no insight with respect to many of the practices as issue in this case.").

Debtors' accounts payable records for all vendors for 2005. *See* Exhibit B-1, tab 6 (“Documents Reviewed”) & exhibit 6; *see also* Exhibit D-1, p. 18-19 (XYZ testified that a significant portion of his calculations were derived from the accounts payable records for 2005). The Defendants should have identified other vendors of similar size and product, and compared the accounts payable records for those vendors with that of the payment practices of the Defendants. *See In re Gulf City Seafoods, Inc.*, 296 F.3d at 367-69; *see also Kevco, Inc. v. Coastal Industries, Inc. (In re Kevco, Inc.)*, Memorandum Opinion, p. 37-39, Adv. Proc. No. 4-04-04239-bjh (Bankr. N.D. Tex., June 30, 2005). The Debtors 2005 accounts payable records contain the vendor, the check number, the check amount, the date of the check, the invoices paid by a particular check, the invoice date, the invoice amount, and any discount amount applied. With this information, the Defendants could have compared how other competitors were treating the Debtors in 2005.

47. Additionally, the Defendants should have presented evidence of the payment, credit and collection practices of *the Debtors' competitors*. *See In re Gulf City Seafoods, Inc.*, 296 F.3d at 367-69; *see also Kevco, Inc. v. Coastal Industries, Inc. (In re Kevco, Inc.)*, Memorandum Opinion, p. 37-39, Adv. Proc. No. 4-04-04239-bjh (Bankr. N.D. Tex., June 30, 2005). Again, however, they failed to do so.

48. Because the XYZ Report does not meet the Fifth Circuit standard for “ordinary business terms,” the Report is unreliable and should be stricken.