GETTING YOUR EVIDENCE ADMITTED

May 5, 2018
10:00a.m. – 11:00a.m.

Moderators: Honorable Duncan W. Keir

Honorable David E. Rice

Panelists: G. David Dean

David G. Sommer

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Hearsay – The Business Record Exception
(by G. David Dean and Brianne Lansinger)

Rule 803. Exceptions to the Rule Against Hearsay:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

. . . .

> **(6)** ***Records of a Regularly Conducted Activity*****.** A record of an act, event, condition, opinion, or diagnosis if:
>
> > **(A)** the record was made at or near the time by — or from information transmitted by — someone with knowledge;
> > **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> > **(C)** making the record was a regular practice of that activity;
> > **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12)[1] or with a statute permitting certification; and
> > **(E)** the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

FED. R. EVID. 803(6) (amended 2014).

A. Historical Basis for Exception:

The modern "business record" exception was derived from the common law "shop book rule." The American shop book rule was based upon the ground of necessity. State v. Miller, 144 P.3d 1052, 1058-60 (Or. App. 2006). Historically, small merchants kept their own books and did not employ clerks or a bookkeeper; and since at ancient common law the parties to lawsuits were

[1] ***Rule 902. Evidence That Is Self-Authenticating.*** The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:
(11) ***Certified Domestic Records of a Regularly Conducted Activity*****.** The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.
(12) ***Certified Foreign Records of a Regularly Conducted Activity*****.** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

disqualified as witnesses, merchants were without any available evidence to prove sales made by them on credit. Out of the necessity to give businesses the opportunity to present credible evidence, courts developed a rule permitting the use of a party's shop books as evidence of goods sold and services rendered. These are considered trustworthy because they are routine reflections of the day-to-day operations of the business. Although parties are now permitted to testify as witnesses, the business records exception has survived the test of time as a matter of convenience and efficiency rather than one of absolute necessary, given the general reliability of such records.

B. Practical Use:

In a perfect world, a business would present one witness at trial or a hearing who was involved in every aspect of the transaction at issue. It is not always the case, however, that one person was assigned responsibility for the account for its entire life, or that this person remains employed and able to attend the trial. It also may be more convenient to have someone other than the "point person" testify about the records at issue. The rules of evidence recognize that business records kept by an entity are admissible, despite the fact that the person who created that record or dealt directly with the substance of the matter in dispute is not the person providing testimony, either as a matter of convenience or complete unavailability.

A qualified witness must "demonstrate that he or she is sufficiently familiar with the operation of the business and with the circumstances of the preparation, maintenance, and retrieval of the record in order to reasonably testify on the basis of this knowledge that the record is what it purports to be, and was made in the ordinary course of business." State Farm Mut. Auto. Ins. Co. v. Anders, 197 Ohio App. 3d 22, 30, 965 N.E.2d 1056, 1062 (quoting Keeva J. Kekst Architects, Inc. v. George, 8th Dist. No. 70835, 1997 WL 253171 (May 15, 1997)).

However, the rule does not require this witness to have personally participated in the

creation of the document; to do so "would eviscerate the business records exception, since no document could be admitted unless the preparer (and possibly others involved in the information gathering process) personally testified as to its creation." State Farm Mut. Auto. Ins. Co. v. Anders, 197 Ohio App. 3d 22, 30, 965 N.E.2d 1056, 1062 (quoting United States v. Keplinger, 776 F.2d 678, 693-94 (7th Cir.1985)).

Attorneys should be mindful in sending a witness to trial who is prepared to testify that the records they are seeking to introduce meet the business records rule. They should be sufficiently familiar with the company's policies and procedures; not only that the record is kept in the ordinary course of business, but also to how and when it was created, retained and retrieved.

C. Emails as Business Records:

One issue involving the business records exception that is particularly prevalent (and somewhat unsettled) in this technology age is the extent to which e-mails may qualify as business records. Emails can qualify as a business records provided that the email was kept in the normal course of business and is trustworthy. See New York v. Microsoft Corp., 2002 WL 649951, at *2, n.4 (D.D.C. Apr. 12, 2002); LeBlanc v. Nortel Networks Corp., 2006 WL 839180, at *5 (M.D. Ga. Mar. 30, 2006).

However, in a 1997 case, the District of Massachusetts refused to admit an email, stating that it "is not the law" that "virtually any document found in the files of a business which pertain[s] in any way to the functioning of that business [is] admitted willy-nilly as a business record." United States v. Ferber, 966 F. Supp. 90 (D. Mass. 1997) (email not admitted where Merrill Lynch employee wrote the subject email to his supervisor describing a conversation with the defendant in which the defendant had admitted improper dealings with government officials).

A recent opinion from the Deepwater Horizon oil spill multidistrict litigation provides

further guidance. In re Oil Spill by the Oil Rig DEEPWATER HORIZON in the Gulf of Mexico, on Apr. 20, 2010, No. MDL 2179, 2012 WL 85447, at *3 (E.D. La. 2012). Like the government in Ferber, the plaintiffs in Deepwater Horizon argued that emails written by corporate employees about their work were admissible under the business records exception. In re Oil Spill, 2012 WL 85447, at *1. The Court disagreed, stating: "There is no across-the-board rule that all emails are admissible as business records." Id. at *3. Instead, the Court identified five requirements that a party has to satisfy to show that an email is subject to the business records exception:

> The email must have been sent or received at or near the time of the event(s) recorded in the email.
>
> The email must have been sent by someone with knowledge of the event(s) documented in the email.
>
> "The email must have been sent or received in the course of a regular business activity, . . . which requires a case-by-case analysis of whether the producing defendant had a policy or imposed a business duty on its employee to report or record the information within the email."
>
> It "must be the producing defendant's regular practice to send or receive emails that record the type of event(s) documented in the email."
>
> A custodian or qualified witness must attest that these conditions have been fulfilled.

Id. The upshot from Deepwater Horizon is that emails written in a business setting are not automatically admissible business records under Federal Rule of Evidence 803(6). Rather, the party seeking admission must show that the email was sent or received because of a business policy or duty to report or record the information contained in the email. If the proponent of the email cannot make this foundational showing, then the email is not a business record.

D. Common Issue: The record must be made by a person with knowledge.

The ability to demonstrate that the record should be admitted rests in large part upon the requirement that the record must be made by a person with knowledge. All persons who participate in the initial furnishing of information must possess personal knowledge of matters related thereto. See Fed. R. Evid. 602. Therefore, the records must be made by a person with knowledge or from information transmitted by a person with knowledge. In addition, all persons furnishing and recording information must be under a duty to do so. Bankr. Evid. Manual § 803:15 at 1 (2017 ed.).

If the supplier of the information does not act in the regular course of business, an essential link is broken. Id. (citing U.S. v. Blechman, 657 F.3d 1052, 86 Fed. R. Evid. Serv. 685 (10th Cir. 2011) (double hearsay in the context of a business record exists when the record is prepared by an employee with information supplied by another person; if the person who provides the information is an outsider to the business who is not under a business duty to provide accurate information, then the reliability rationale that underlies the business records exception ordinarily does not apply. Fed. R. Bankr. P. 803(6))). However, the assurance of accuracy does not extend to the information itself.

E. Case Law (Specific to Expert Reports):

The Third Circuit's holdings in ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012) and In re SemCrude L.P., 648 F. App'x 205 (3d Cir. 2016) are instructive as to expert reports. In ZF Meritor, the Third Circuit upheld the trial court's finding that it was unreasonable for a damages expert to rely on "a one-page set of profit and volume projections without knowing the circumstances under which such projections were created or the assumptions on which they were based." ZF Meritor, 696 F.3d at 292. As the Third Circuit explained, "[b]usinesses are generally well-informed about the industries in which they operate, and have incentives to develop accurate

projections [and] experts frequently use a plaintiff's business plan to estimate the plaintiff's expected profits in the absence of the defendant's misconduct." Id. It was unreasonable, however, for the expert to rely on "a one-page set of profit and volume projections" when the expert "was unaware of the qualifications of the individuals who prepared the document, or the assumptions on which the estimates were based." Id.

In contrast, in SemCrude, the Third Circuit upheld the trial court's finding that it was reasonable for an expert to rely on a valuation report prepared by Goldman Sachs in his determination that the debtors were insolvent at the time of an allegedly fraudulent transfer. SemCrude, 648 F. App'x at 213-215. The Third Circuit distinguished ZF Meritor on several grounds: the instant valuation report was (a) far more detailed and comprehensive, (b) prepared contemporaneously with the fraudulent transfers, (c) was not prepared in anticipation of litigation and (d) was the result of voluminous due diligence that was documented in the record. Id. at 213-14. The Third Circuit also noted that while the expert did not know the specific people who prepared the report, the evidence showed that the expert was familiar with methods and reasons used by Goldman Sachs in creating the report. Id. at 214. For all of these reasons, the Third Circuit held that ZF Meritor was distinguishable and that the trial court had not erred in admitting the expert's testimony. Id.

F. Case Law (Specific to Bankruptcy Trustees):

1. *Plan trustee who seized debtor's files and reconstructed them to verify their accuracy and method of preparation met his burden of proof as to debtor's records under Rule 803(6) that they were admissible business records.*

In re Int'l Mgmt. Assocs., LLC, 781 F.3d 1262 (11th Cir. 2015).

Background: Plan trustee brought strong-arm adversary proceeding to recover "fictitious profits" paid by chapter 11 debtor pursuant to alleged Ponzi scheme. The Bankruptcy Court entered an order for avoidance of $200,000 wire transfer to the defendants, recovery of the wire transfer, and

an award of prejudgment interest and costs. Defendants appealed. The District Court affirmed. Defendants appealed.

Facts: Kirk Wright operated IMA and its affiliates, which he claimed were hedge funds but which looked like a Ponzi scheme. The defendants invested $500,000 with IMA from 2002 to 2006. Over that same period, they received $621,000 in disbursements from IMA.

On March 16, 2006, the bankruptcy trustee, whom a Georgia state court had appointed as IMA's receiver, filed a voluntary petition to place IMA in bankruptcy. The trustee then filed a series of adversary proceedings against IMA's investors, including the defendants. He sought to avoid transfers that IMA had made to those investors shortly prior to the petition date. The bankruptcy court consolidated the proceedings for the sole purpose of determining whether IMA was a Ponzi scheme. It held a consolidated hearing to take evidence on that question.

The trustee was the only witness at that hearing. He gave few details about the state of IMA's finances at the time he took control of it. He focused almost entirely on laying the foundation for his documentary evidence. He testified how he had seized IMA's files and, using his training as a certified fraud examiner, had "reconstructed" them to verify their accuracy.

According to the trustee's testimony, the day after the state court appointed him as receiver, he took possession of IMA's documents from its offices. He immediately changed the locks and removed any means of remotely accessing IMA's electronic documents. He then worked with the FBI and the SEC to canvass national financial institutions for accounts in the name of either IMA or Wright. He subpoenaed the records of those institutions where he found IMA's accounts. He interviewed IMA's investors. With the help of an international accounting firm, he cross-checked IMA's own documents with those kept by the financial institutions and the investors. He also interviewed IMA's principals and its employees, including its office manager. From those

interviews, he learned about the procedures used to create IMA's documents. Satisfied as to their reliability, the trustee prepared detailed summaries of them.

The Court held that the underlying documents would have been admissible into evidence as business records. Accordingly, the bankruptcy court therefore did not abuse its discretion by admitting the trustee's Rule 1006 summaries based on the records into evidence.

2. Trustee did not qualify as "custodian" for purposes of Rule 803(6) where trustee discovered documents among debtor's records.

In re Bay Vista of Virginia, Inc., 428 B.R. 197 (Bankr. E.D. Va. 2010).

Background: Chapter 7 trustee brought adversary proceeding against law firm, seeking to avoid and recover alleged fraudulent transfer. The defendant objected to two documents: (1) the "First Account,"; and (2) the "Wilson Letter," each proffered as Plaintiff's exhibits. Neither the signatory on the First Account, nor the author of the Wilson Letter, testified at trial. The Trustee attempted to introduce these documents through his own testimony, stating that he found the First Account and the Wilson Letter among the records of the debtor upon his investigation in performance of his official duties as Trustee.

Facts: The defendant objected to the admission of the First Account and the Wilson Letter on the basis that the documents were hearsay and not subject to any of the hearsay exceptions. The Trustee agreed that the First Account contained hearsay statements but argued the document was admissible under the exceptions contained in Federal Rule of Evidence 803(6), (8), or (14).

The court discussed the trustee's argument that Rule 803(6) applied and the need for a "custodian":

> Rule 803(6) states that business records are not excluded under the hearsay rule if they are accompanied by a certification of their custodian or other qualified person asserting (1) that the records were "made at or near the time by, or from information transmitted by, a person with knowledge"; (2) that they were "kept in the course of a regularly conducted business activity"; and (3) that "it was the regular practice of

that business activity to make [them]."

Bay Vista, 428 B.R. at 213 (citing U.S. v. Santana, 352 Fed.Appx. 867, 871-72 (4th Cir. 2009) (unpublished per curiam decision)).

Holding: The Court held that the trustee failed to show that he qualified as a "custodian" and that Rule 803(6) did not apply, the court concluded:

> The Trustee here is not "the custodian or other qualified witness," whose testimony is required by Federal Rule of Evidence 803(6), of either the First Account or the Wilson Letter, both of which were apparently prepared by individuals or entities other than Bay Vista, its principal or employees, or by the Trustee. Further, the Trustee failed to show that both documents were "kept in the course of a regularly conducted business activity" by Bay Vista and that "it was the regular practice of [Bay Vista in the course of its] business activity to make" these records. Accordingly, the Court correctly sustained the objection of [the defendant] as to the admissibility of these documents under the "business records" exception to the hearsay rule.

Bay Vista, 428 B.R. at 215.

G. Takeaways:

- Records of a bankrupt debtor offered by a bankruptcy trustee, without more foundation, do not come within the business records exception.
- The record must be kept in the ordinary course of a regularly conducted business activity. The fact that a document is kept in the business file does not automatically make it a business record.
- Pursuant to Fed. R. Evid. 902(11), an affidavit can be used to authenticate business records.
- The custodian used to authenticate a business record need not be the same person who created it.

EXPERT EVIDENCE
(by David G. Sommer)

A. General Standards for the Admissibility of Expert Witness Testimony.

The principal rule governing the admission of expert testimony is Federal Rule of Evidence 702, which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

A "trial judge has broad discretion in the matter of the exclusion of expert evidence, and [her] action is to be sustained unless manifestly erroneous." Salem v. United States Lines Co., 370 U.S. 31, 34 (1962). Expert testimony is subject to exclusion under Fed. R. Evid. 403 on the grounds of unfair prejudice and waste of time, and the trial court may determine the limits and utility of expert witness testimony. See In re Webb Mtn, LLC, 420 B.R. 418 (Bankr. E.D. Tenn. 2009) (explaining that the bankruptcy court possesses wide discretion, when presented with vastly discordant appraisals, as to how property shall be valued and may largely accept the opinion of one party's expert or may be selective in determining what portions of each expert's opinion, if any, to accept.). "The proponent of the expert testimony bears the burden to establish its admissibility by a preponderance of the evidence." Coal. for Equity & Excellence in Maryland Higher Educ. v. Maryland Higher Educ. Comm'n, CV CCB-06-2773, 2017 WL 5171111, at *5 (D. Md. Nov. 8, 2017).

Under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), trial judges

have a "gatekeeping" function to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589. This "gatekeeping" role is not limited to evaluating scientific knowledge, but it also extends to "technical" and "other specialized" knowledge. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141 (1999). The gatekeeping applies in both jury and bench trials, although practically with less stringency in bench trials. The "Court's 'chief role when determining the admissibility of expert testimony under Daubert is that of a gatekeeper,' and there is little need for the Court to serve as a gate-keeper for itself." In re Wyly, 552 B.R. 338, 362 (Bankr. N.D. Tex. 2016) (quoting Seatrax, Inc. v. Sonbeck Int'l, Inc., 200 F.3d 358, 371 (5th Cir. 2000)).

"The touchstones for admissibility under Daubert are two: reliability and relevancy." U.S. v. Crisp, 324 F.3d 261, 268 (4th Cir. 2003). As to the relevance of the expert testimony, pursuant to Fed. R. Evid. 104(a), the trial judge must determine whether the expert is proposing to testify regarding scientific, technical, or specialized knowledge that will assist the trier of fact to understand or determine a fact in issue. See Daubert, 509 U.S. at 592; Wartsila NSD North America, Inc. v. Hill Intern., Inc., 299 F. Supp. 2d 400, 404 (D.N.J. 2003). Relevance also depends on the qualifications of the witness based on his or her knowledge, skill, experience, training, or education or some combination of them. Fed. R. Evid. 702(a); see Am. Strategic Ins. Corp. v. Scope Services, Inc., CV PX-15-2045, 2017 WL 4098722, at *3 (D. Md. Sept. 15, 2017). An expert's opinion testimony, whether based on specialized education, training, or experience alone, is "helpful to the trier of fact, and therefore relevant under Rule 702, to the extent the expert draws on some special skill, knowledge or experience to formulate that opinion" concerning the particular issue or product before the court. Shreve v. Sears, Roebuck & Co., 166 F. Supp. 2d 378, 393 (D. Md. 2001). An expert's specialized knowledge and experience and the issues before the

court need not fit exactly. Id. at 392. Rule 702 does not "create[ ] a schematism that segregates expertise by type while mapping certain kinds of questions to certain kinds of experts." Kumho Tire, 526 U.S. at 151–52. Specialized education and training is not required to qualify as an expert; a witness whose knowledge is based largely on experience may provide expert testimony under Rule 702. Coal. for Equity & Excellence in Maryland Higher Educ. v. Maryland Higher Educ. Comm'n, CV CCB-06-2773, 2017 WL 5171111, at *8 (D. Md. Nov. 8, 2017) ("An experiential expert may testify on the basis of either "experience alone" or "experience in conjunction with other knowledge, skill, training or education.") (citing U.S. v. Wilson, 484 F.3d 267, 274 (4th Cir. 2007) (quoting Fed. R. Evid. 702 advisory committee's note)); Robinson v. Watts Detective Agency, Inc., 685 F.2d 729, 10 Fed. R. Evid. Serv. 1333 (1st Cir. 1982). As to questions of law, however, expert testimony is generally unnecessary and inadmissible because such questions of law are within the province of the judge. See United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir. 1991); Marx & Co., Inc. v. Diners' Club, Inc., 550 F.2d 505, 510 (2d Cir. 1977) ("The special legal knowledge of the judge makes the witness' testimony superfluous.").

As to reliability, the expert must have "a reliable basis in the knowledge and experience of [the expert's] discipline." Daubert, 509 U.S. at 591-92; see also Fed. R. Evid. 702(c), (d). No one definitive "test" or "checklist" applies in determining the reliability of the expert's testimony, and the analysis must be "a flexible one." See Kumho, 526 U.S. at 141–42. However, a number of factors "bear" on reliability inquiry, including (1) whether a theory or technique "can be (and has been) tested," (2) "whether the theory or technique has been subjected to peer review and publication," (3) a technique's "known or potential rate of error," and "the existence and maintenance of standards controlling the technique's operation," and (4) whether a particular technique or theory has gained "general acceptance" in the relevant scientific community.

Daubert, 509 U.S. at 593-94; see also Crisp, 324 F.3d at 265-66 (4th Cir. 2003). Most fundamentally, the opinion cannot be "connected to existing data only by the *ipse dixit* of the expert." Kumho Tire, 526 U.S. at 157; see also, e.g., Zenith Elecs. Corp. v. WH-TV Broad. Corp., 395 F.3d 416, 418, 419 (7th Cir. 2005) (damages expert's "method, 'expert intuition,' is neither normal among social scientists nor testable - and conclusions that are not falsifiable aren't worth much to either science or the judiciary."); E.E.O.C. v. Bloomberg L.P., No. 07 Civ. 8383 (LAP), 2010 WL 3466370, at *15 (S.D.N.Y. Aug. 31, 2010) (excluding expert opinion "supported by what appears to be a 'because I said so' explanation"); Colony Ins. Co. v. Coca-Cola Co., 239 F.R.D. 666, 72 Fed. R. Evid. Serv. 281, 61 U.C.C. Rep. Serv. 2d 842 (N.D. Ga. 2007).

Rule 702 provides that expert testimony may be "in the form of an opinion or otherwise." Thus, the expert may, but need not, testify in the form of an opinion. The expert instead may offer an explanation of relevant scientific, technical, or specialized principles to assist the trier of fact in understanding a subject matter and drawing its own inference or conclusion from the evidence presented.

B. Expert's Report as Evidence.

Federal Rule of Civil Procedure 26 requires a party to "disclose to the other parties" the expert's identity, which "must be accompanied by a written report - prepared and signed by the witness." The report must contain "a complete statement *of all opinions the witness will express* and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i) (emphasis added). Testimony need not have verbatim consistency with the report; reasonable synthesis and elaboration is permitted. See nCUBE Corp. v. SeaChange Int'l, Inc., 809 F. Supp. 2d 337, 347 (D. Del. 2011).

The purpose of an expert report is notice, and the report itself is not intended to be evidence. The disclosing party must convey enough so that the opponent will be ready to rebut the opinion,

cross-exam the expert, and offer a competing expert if necessary. The core question is simply whether the opposing party had fair notice, and the disclosure requirement is intended to avoid unfair surprise. See Moore's Federal Practice § 26.23[2][b][ii]. See also Reed v. Binder, 165 F.R.D. 424, 429 (D.N.J. 1996); Olmstead, 606 F.3d at 271 (report must be sufficiently complete so that opposing counsel is not forced to depose the expert in order to avoid ambush at trial); Reese v. Herbert, 527 F.3d 1253, 1265 (11th Cir. 2008) (the expert disclosure rule is intended to provide opposing parties reasonable opportunity to prepare for effective cross examination and arrange for expert testimony from other witnesses) (citing to Sherrod v. Lingle, 223 F.3d 605, 613 (7th Cir. 2000)); Meyer Intellectual Properties Ltd. v. Bodum, Inc., 690 F.3d 1354, 1374 (Fed. Cir. 2012); Peter Sabin Willett, Philip Bentley, Hon. Barbara J. Houser, Martha E.M. Kopacz, & Wayne P. Weitz, Utilizing Expert Witnesses, 120116 ABI-CLE 265 (American Bankruptcy Institute December 1, 2016).

The Federal Rules do not contemplate that reports will be examined by the fact-finder before trial. See Fed. R. Civ. P. 26(a)(2)(A), (B) (providing that disclosure of trial expert's identity, accompanied by the expert report, must be made "to the other parties"). In fact, even during trial, there is no occasion for the fact finder to review the expert report, unless, for example, the report is used to impeach direct testimony as a prior inconsistent statement. See Fed. R. Evid. 613. A report offered by its *proponent* to persuade the fact-finder is hearsay. See Fed. R. Evid. 801(c). Hearsay is generally inadmissible, see Fed. R. Evid. 802, and thus the bankruptcy court, as fact-finder, should not consider it. "Although the Rules permit experts some leeway with respect to hearsay evidence, Fed. R. Evid. 703, a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony." Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 136 (2d Cir. 2013) (affirming

exclusion of expert report "undergirded by hearsay statements"). An expert report that serves as a mere "conduit" for hearsay likewise infringes the role of the factfinder because "the job[] of judging [the hearsay] witnesses' credibility and drawing inferences from their testimony belongs to the factfinder." Id.

As a practical matter, however, parties often "file" expert reports as pre-trial submissions, file them in connection with a motion *in limine* to exclude the expert, or submit them as exhibits in advance of a trial or hearing. In some jurisdictions, case management orders *require* the filing of expert reports before trial. See Utilizing Expert Witnesses, 120116 ABI-CLE 265. Particularly in preparation for a complicated or lengthy hearing or trial, such as a contested confirmation hearing, the bankruptcy judge may prefer to read the expert reports in advance to become familiar with the issues on which the experts will testify.

Understanding that the judge may be better prepared for the expert issues in the case and to promote a more efficient proceeding, parties may decide before trial to stipulate that the expert reports will be admitted in their entirety as direct testimony. This may cause problems and create confusion where the expert report contains evidence that itself would otherwise not be admissible. For instance, an expert may not offer "'factual narratives and interpretations of conduct or views as to the motivation of parties.'" Weisfelner v. Blavatnick (In re Lyondell Chem. Co.), 2016 WL 5900154, *3 (Bankr. S.D.N.Y Oct. 11, 2016) (quoting In re Rezulin Prod. Liab. Litig., 309 F. Supp. 2d 531, 541 (S.D.N.Y. 2004)). Courts should be wary about reviewing expert reports that are subject to an objection that their contents include inadmissible evidence. See Utilizing Expert Witnesses, 120116 ABI-CLE 265. Although the court has discretion to "exercise reasonable control over the mode and order of ... presenting evidence," see Fed. R. Evid. 611(a), and this often includes provision for direct examinations to be in writing, (with the witness present for live cross

examination), written direct testimony and an expert's report are not the same. An expert "report" is not subject to the standards for direct testimony: it need not be sworn, be supported by a sufficient foundation, or be based on the witness's personal knowledge. A pre-filed direct examination may include items that also were disclosed earlier in the expert reports, and it may also be supported or illustrated by charts, graphs, demonstratives, etc. Such written direct testimony, and the document and other materials that accompany it, should meet the pre-requisites for admissibility. However, unless the parties stipulate, expert reports—even ones that are "filed"—should not be reviewed by the court in the form they are presented to the opposing party pursuant to the requirements of Fed. R. Civ. P. 26(a).

C. Sources of Information Relied Upon by the Expert Witness.

Federal Rule of Evidence 703 (Bases of Expert's Opinion Testimony) governs the information upon which an expert may rely in forming an opinion. It provides:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Fed. R. Evid. 703 is explicit that the materials upon which an expert bases his or her opinion need not be admissible, much less admitted into evidence. The expert may rely even on hearsay and other evidence, including the opinions of others, that would not otherwise be admissible if experts in the field would reasonably rely on those kinds of facts or data in forming an opinion on the subject. The Rule relaxes for experts the requirements of Fed. R. Evid. 602, which requires that witnesses have personal knowledge of the matters about which they testify. Robert S. Hunter,

Federal Trial Handbook Civil § 51:11 (4th ed.). Therefore, the hearsay and best-evidence rules do not apply to the facts and data reasonably relied upon by the expert. Advisory Committee Notes to Fed. R. Evid. 703. This means that an expert witness may rely on data that she did not personally collect and on testing she did not conduct. Gussack Realty Co. v. Xerox Corp., 224 F.3d 85, 51 Env't. Rep. Cas. (BNA) 1257, 31 Envtl. L. Rep. 20035 (2d Cir. 2000). These relaxed requirements have a practical purpose.

> [E]xperts generally base their opinions on information which, to be admissible in court, would entail the expenditure of substantial time in producing and examining various authenticating witnesses. Because experts may use their past experience and professional judgment to make critical decisions on the basis of such information outside of court, Fed. R. Evid. 703 was intended to bring the judicial practice into line with the practice of the experts themselves when not in court.

Factory Mut. Ins. Co. v. Alon USA L.P., 705 F.3d 518, 90 Fed. R. Evid. Serv. 638 (5th Cir. 2013) (quotation marks omitted). See generally Barry Russell, Bankr. Evid. Manual § 703:1 (2017 ed.).

Experts may rely on inadmissible evidence, including hearsay, as the basis of their opinion, but the evidence must be of the type of data "reasonably" relied upon by experts in the field to make similar determinations. Charles E. Wagner, Fed. Rules of Evid. Case Law Commentary, Rule 703, pp. 798-799 (1999-2000 ed.) (quotations and some text omitted); see Kingsley Associates, Inc. v. Del-Met, Inc., 918 F.2d 1277, 31 Fed. R. Evid. Serv. 913 (6th Cir. 1990). An expert may not give an opinion that based on the type of materials that an expert would not normally rely upon in giving such an opinion. U.S. v. Kennedy, 890 F.2d 1056 (9th Cir. 1989).

Because an expert may reasonably rely on facts or data that would otherwise be inadmissible, the trial courts have an important role in determining what reliance is reasonable. In re James Wilson Assocs., 965 F.2d 160, 173 (7th Cir.1992). A trial court's inquiry as to whether the expert's reliance is based upon facts or data of a type reasonably relied upon by experts in a

particular field is made on a case-by-case basis. A trial court's determination in this regard will be reversed only if it constitutes an abuse of discretion. Soden v. Freightliner Corp., 714 F.2d 498, 14 Fed. R. Evid. Serv. 306 (5th Cir. 1983). "The trial court must scrutinize the specific facts relied upon by the expert to ensure that the expert's reliance is reasonable in the particular case. The more an expert relies on inadmissible facts that the court finds to be untrustworthy, the less likely it is that the reliance is reasonable. No precise formula exists, however, for determining when an expert's reliance becomes unreasonable." 31A Fed. Pract. and Proced., Rule 703, p. 268 (2016). The court will concentrate on the reliability of the opinion and its foundation rather than merely whether it was based on inadmissible evidence.

Fed. R. Evid. 703 is not an open door for the admission of inadmissible evidence disguised as expert opinion, and it does not abolish the hearsay rule. Therefore, the witness may not, under the pretext of giving expert testimony, become the mouthpiece of witnesses on whose statements or opinions the expert purports to base his opinion. Factory Mut. Ins. Co. v. Alon USA L.P., 705 F.3d 518, 90 Fed. R. Evid. Serv. 638 (5th Cir. 2013). For example, an economic expert can rely on price data even if the underlying data is not admissible, so long as experts in the field reasonably rely on it, and the underlying data itself is reasonably reliable. If providers of data relied upon by a testifying expert offer professional judgment beyond the testifying expert's area of expertise, the court must consider whether the testifying expert is genuinely formulating an opinion or serving as a "mouthpiece" for another. If the latter is the case, the hearsay rule prohibits the testimony unless the non-testifying individual also testifies. If that individual has not been disclosed under Fed. R. Civ. P. 26(a)(2), he should be excluded. In re Sulfuric Acid Antitrust Litigation, 446 F. Supp. 2d 910, 2007-1 Trade Cas. (CCH) ¶ 75592 (N.D. Ill. 2006).

In addition, for an expert to "reasonably rely" on data, the data must be accurate and

correct. Thus, an expert whose testimony depends on inaccurate or erroneous information should be excluded. U.S. v. City of Miami, Fla., 115 F.3d 870, 74 Fair Empl. Prac. Cas. (BNA) 447, 71 Empl. Prac. Dec. (CCH) ¶ 44806 (11th Cir. 1997).

The original source of the data upon with the expert relies can bear on the reliability of the data. Stan Bernstein, Susan H. Seabury, & Jack F. Williams, Squaring Bankruptcy Valuation Practice with Daubert Demands, 116 Am. Bankr. Inst. L. Rev. 161 (2007). Some courts have stated that an opinion offered by an expert based solely on the expert's client's data is not reliable and should be excluded. Pestel v. Vermeer Mfg. Co., 64 F.3d 382, 384 (8th Cir. 1995) (refusing to allow expert to rely on testing done by manufacturer because expert had not developed, participated in, nor supervised testing); see also Clay v. Ford Motor Co., 215 F.3d 663, 676 (6th Cir. 2000) (Ryan, C.J., dissenting) ("While there is a certain logical appeal to the notion that [a plaintiff's expert's] opinion must be reliable if it rests upon data produced by the defendant, the notion does not withstand close consideration."). However, other courts have determined such opinions to be sufficiently reliable to admit them based on the nature of the data but explained that its source goes to the weight or persuasiveness of the expert testimony. Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir. 1996) ("Although expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are 'so unrealistic and contradictory as to suggest bad faith' ... other contentions that the assumptions are unfounded 'go to the weight, not the admissibility, of the testimony.'") (citations omitted); Viterbo v. Dow Chemical Co., 826 F.2d 420, 422 (5th Cir. 1987) ("As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility ...."); In re Commercial Fin. Servs., Inc., 350 B.R. 520, 529 (Bankr. N.D. Okla. 2005) (discussing how flaws in facts assumed by expert in formulating opinion do not necessarily

render it unreliable because such flaws often go to weight of evidence).

In the context of a financial expert in a bankruptcy, the source information considered by the expert is generally available from the debtor or can be reasonably reconstructed. The question of its reliability turns on issues such as whether the source documents were already available or had to be reconstructed, whether there was fraud regarding financial statements or other documents generated by the company, the availability of third-party sources for the debtor's financial information calling into question its reliability, and the detail, precision, and accuracy of the information. If such information reveals that the underlying data is unreliable, the expert testimony may be excluded. But as a practical matter, because the fact-finder in a bankruptcy case is the judge, the judge may decide to admit the testimony even if the source of the data is suspect. This is so because the judge may consider the lack of reliable data as a basis for declining to give the opinion weight.

If an expert's opinion is admissible, the facts or data underlying that opinion are not automatically admissible. Engebretsen v. Fairchild Aircraft Corp., 21 F.3d 721 (6th Cir.1994) (explaining that Rule 703 does not permit admission of materials, relied on by an expert witness, for the truth of matters they contain if the materials are otherwise inadmissible). Instead, disclosure of otherwise inadmissible facts and data to the fact-finder is permissible only if "their probative value in helping [the fact-finder] evaluate the opinion *substantially outweighs* their prejudicial effect." Fed. R. Evid. 703 (emphasis added). Thus, for the information (documents, statements, data, etc.) forming the basis of the expert's opinion to be admitted into evidence, it must be independently admissible outside of the context of Rule 703. See Federal Trial Handbook Civil § 51:11. Or, if it is not, the information may be admitted as evidence unless the court first determines that the probative value of the information "substantially outweighs" its prejudicial effect.

FEDERAL RULE OF EVIDENCE 201 – JUDICIAL NOTICE

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Judicial Notice in Bankruptcy Cases
(by Hugh M. Bernstein)

A. Facts to Which Judicial Notice Applies.

Usually, in litigation, facts are established through the introduction of evidence – by the testimony of witnesses and the introduction of documents. In re Harmony Holdings, LLC, 393 B.R. 409, 412 (Bankr. D.S.C. 2008). Sometimes, however, a fact may be so indisputable that this process is rendered unnecessary. Id. In such situations, judicial notice may serve as a substitute for formal proof. See Fed. R. Evid. 201(b).

Rule 201 of the Federal Rules of Evidence provides that a court may take "judicial notice" of "adjudicative" facts that are "not subject to reasonable dispute" because either (1) they are "generally known within the trial court's territorial jurisdiction," or (2) they "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b).

Judicial Notice applies only to "adjudicative facts." Those are the "facts of the particular case." Fed. R. Evid. 201, Advisory Committee Notes. They are "who did what, where, when, how and with what motive or intent." Id. (quoting 2 Kenneth C. Davis, Admin Law Treatise, 353). These are to be distinguished from "legislative facts," which are those facts not peculiar to the case, but that "have relevance to legal reasoning and the law-making process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Id.

Despite its name, legislative facts can essentially be thought of as all the facts other than those particular to the case and its actors and that need not be proved by evidence. For example, as one commentator explained, "every case involves hundreds or thousands of non-evidence facts." Id. (quoting Kenneth C. Davis, A System of Judicial Notice Based on Fairness and

Convenience, Perspectives of Law 69, 73 (1964)). The advisory committee notes to Rule 201 provide the following example: When a witness to a car accident says "car," it is understood, without the need for further evidence, that the witness means an automobile as opposed to a railroad car, that the witness means something self-propelled, likely by a combustion engine, that has four wheels and tires, even though no evidence of those facts has been offered or admitted. Id. Legislative facts do not need to be supported by evidence and, thus, are not the subject of Rule 201 or any of the Federal Rules of Evidence. See id.

"A high degree of indisputability is an essential prerequisite for adjudicative facts to be judicially noted." 2 Michael H. Graham, Handbook of Federal Evidence, § 201:1 at 401 (8th Ed. 2016). Thus, the types of facts to which judicial notice is appropriate are those "that only an unreasonable person would insist on disputing." United States v. Jones, 29 F.3d 1549, 1553 (11th Cir. 1994). Judicial notice is appropriate only for facts that are indisputably known, or can be easily determined from incontestable sources such as almanacs, dictionaries or calendars. Walker v. Woodford, 454 F. Supp.2d 1007, 1022 (S.D. Cal. 2006). As such, it should be rare that a party needs to seek admission of evidence by judicial notice, because if the fact is the type for which judicial notice is appropriate, so long as opposing counsel is not an "unreasonable person" the matter should not be subject to dispute.

It is appropriate to take judicial notice of facts such as "Martin Luther King, Jr. Day is observed on the third Monday of January each year," Phillips v. Prince George's Community College, Case 17-1581, 2018 WL 835709 at *1 n.3 (D. Md. Feb. 12, 2018), or that "June 4, 2016, was a Saturday," Vanco v. J.P. Morgan Chase Bank., N.A., Case 16-3682, 2017 WL 1364757 at *1 n.5 (D. Md. April 14, 2017). It is also appropriate to take judicial notice of historical facts that can be easily and incontestably confirmed, such as price of a specific stock on a given day.

Greenhouse v. MCG Capital Corp., 392 F.3d 650, 655 n.4 (4th Cir. 2004). The internet may provide new sources for accurate determination of facts sufficient to support judicial notice. For example, Google Maps has been held to be a sufficiently indisputable source for determining the distance between two cities to allow for the taking of judicial notice. McCormack v. Heideman, 694 F.3d 1004, 1008 n.1 (9th Cir. 2012).

Judicial notice is not, however, an appropriate substitute for evidence with respect to scientific or economic theories or conclusions that would normally be presented through expert testimony, even if there is a great weight of authority supporting the proposition. See, e.g., U.S. v. Simon, 842 F.2d 552, 555 (1st Cir. 1988) (study showing that Rastafarians use marijuana as part of their religion is not a source "whose accuracy cannot be reasonably questioned" and would not support taking judicial notice of that proposed fact). Thus, the proposed fact that "asbestos causes cancer" was held to be inappropriate for judicial notice. Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 347-48 (5th Cir. 1982); but see Roysdon v. R.J. Reynolds, 849 F.2d 230 (6th Cir. 1988) (taking judicial notice of the fact that smoking is dangerous).

B. Judicial Notice of the Court's Records.

By its language, Rule 201 actually speaks only to the taking of judicial notice of "facts," not documents. However, because so much of the information relevant to bankruptcy proceedings can be found in the court records of a bankruptcy case, bankruptcy judges are often asked to take judicial notice of the court's records. It is well-settled that a bankruptcy court may take judicial notice of the contents of its own docket and pleadings and documents contained therein. In re Circuit City Stores, Inc., 439 B.R. 652, 659 (E.D. Va. 2010); In re Poffenberger, 471 B.R. 807, 821 (Bankr. D. Md. 2012). A bankruptcy court may even take judicial notice of the dockets of

other federal and state courts. Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989).

But what that really means is the court can take judicial notice of the fact that a particular document was filed. Taking judicial notice of a document in the court's files is not the same as admitting the document or, more importantly, admitting or accepting the contents of the document as fact. When a court takes judicial notice of its own docket or the documents contained in the docket, it essentially addresses only the authentication of the document – the court is taking notice that the particular document was filed with the court. The principle allowing judicial notice of court records does not allow the court to accept inadmissible hearsay, or evidence that would be inadmissible because it is privileged, irrelevant or overly prejudicial in violation of other rules of evidence. As one bankruptcy judge explains:

> There exists a mistaken notion that [taking judicial notice of the court's own records] means taking judicial notice of the truth of facts asserted in every document in a court file, including pleadings, and affidavits. However, a court may not take juridical notice of hearsay allegations as being true merely because they are part of a court record or file. It is difficult to understand why the filing of a document with a court should magically result in the contents of the document attaining a sufficient degree of relatability to overcome evidentiary objections such as hearsay to its admissibility in a trial before a bankruptcy judge.

2 Barry Russell, Bankruptcy Evidence Manual, § 201:5 at 55 (2012-13 Ed.) When a court takes judicial notice of a document filed in the case, it is "merely a way of simplifying the process of authenticating documents which would generally require certification under FRE 901 and 902, and overcoming FRE 1002 best evidence problems" but it does not "insure its introduction into evidence in the face of other objections such as hearsay." Id.; see also Harmony Holdings, 393 B.R. at 413 ("[a]dmission into evidence of facts contained within a pleading filed with a court must also be evaluated using the remaining evidentiary rules, such as hearsay and exceptions thereto").

For example, a debtor may oppose a secured lender's motion to lift stay by arguing the property securing the debt has a sufficient equity cushion to provide adequate protection to the secured lender. While the debtor, as the property owner, may be competent to testify to the value of his own property, he or she cannot successfully simply offer his or her own schedules as evidence of the value of the property. Although the court may take judicial notice of the schedules, it cannot admit the statement of value contained in the schedules because that statement is hearsay. In re Frasier, Case 14-06074, 2015 WL 1010761 at *1 n.2 (Bankr. W.D. Mich. Feb. 20, 2015).

On the other hand, if the secured lender were to offer the same schedules as evidence in the same case, the schedules would be admissible. The schedules could be authenticated by judicial notice and, as the statement of a party opponent, the contents of the schedules would not be hearsay. Fed. R. Evid. 801(d)(2).