

LITIGATION SKILLS
HOW TO WIN CASES AND INFLUENCE JUDGES

(IT'S EVIDENTIARY, MY DEAR WATSON)

Hon. J. Michael Deasy

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I. PRELIMINARY MATTERS (or Evidence 101).¹

A. “In a routinized area, such as bankruptcy motion practice, one easily loses sight of some of such basics as the need to make out a prima facie case by competent evidence. Bankruptcy litigation is no different than any other federal litigation practice in this respect. Although such evidentiary questions as the use of appraisals arise more frequently in bankruptcy courts than elsewhere because the issue of value of property is pervasive in bankruptcy, that does not excuse compliance with the Federal Rules of Evidence.” In re Roberts, 210 B.R. 325, 329 (Bankr. N.D. Iowa 1997) (quoting In re Applin, 108 B.R. 253, 262 (Bankr. E.D. Cal. 1989)).

1. The Federal Rules of Evidence apply in bankruptcy proceedings. Rule 101² of the Federal Rules of Evidence provides:

These rules govern proceedings in the courts of the United States and before United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101. [emphasis added]

2. The most common evidentiary problem in bankruptcy proceedings is the absence of admissible and/or admitted evidence. The application of three basic principles will solve the most common evidence problems in bankruptcy court.

B. **Argument is not evidence.** Many matters come before the bankruptcy court on short notice or by motion. The lawyers and the judge may talk about the matter in dispute. Such talk is not evidence.

1. Attorneys are not under oath when they present argument. Rule 43 of the Federal Rules of Civil Procedure,³ made applicable in bankruptcy cases by

¹ These materials include portions of “Evidence? It’s Attached To My Motion (Isn’t It?)” originally prepared by Judge Deasy and Jennifer A. Hayes, Esq. and David H. Kimelberg, Esq., current and former law clerks respectively, for the ABI 2000 Northeast Bankruptcy Conference and “Trial Practice: How to Win Cases and Influence Judges (It’s Evidentiary, My Dear Watson)” prepared by Judge Deasy for the ABI 2005 Northeast Bankruptcy Conference. These materials have been revised and updated with the assistance of Peter J. Keane, Esq., law clerk for Judge Deasy.

² All rule references hereinafter are to the Federal Rules of Evidence, unless noted otherwise. Such rules shall also be referenced as “Rule.”

³ The Federal Rules of Civil Procedure shall hereinafter be referred to as FRCP.

Rule 9017 of the Federal Rules of Bankruptcy Procedure,⁴ requires the testimony of witnesses to be taken under oath in open court.

2. Attorneys may present arguments or statements of fact outside of their personal knowledge. Rule 602 requires that the testimony of a witness rest upon a foundation of “personal knowledge of the matter.”
3. Parties frequently object to statements of counsel on the basis of an evidentiary rule. However, parties can’t object to argument. They can only object to evidence, and talk or argument is not evidence.
4. On appeal there will be no evidence in the record. The transcript will contain the arguments of counsel, but no admitted, or admissible, evidence.

C. **Schedules and exhibits attached to pleadings and motions are not evidence.** Documents attached to pleadings or offered in court without testimony are simply a written form of argument. (Refer to paragraph B above).

1. Documents are not admitted as evidence simply by filing them with a pleading. In re Holly’s, Inc., 190 B.R. 297, 301 (Bankr. W.D. Mich. 1995) (documents attached to a brief were not properly admitted into evidence and could not be considered by the court); see Sec’y of Labor v. DeSisto, 929 F.2d 789, 796-97 (1st Cir. 1991) (district court improperly relied upon document attached to summary judgment motion in post-trial judgment when document was not admitted at trial).
2. FRCP 43, made applicable in bankruptcy proceedings by FRBP 9017, allows the court to accept testimony by affidavit. See 28 U.S.C. § 1746 (permitting unsworn declarations made in writing, under penalty of perjury and dated, to be admissible in place of a sworn statement).
 - a. A document may be admitted as evidence if accompanied by an affidavit from a competent witness (Rule 602) that authenticates the document (Rule 901) and the document is otherwise admissible.
 - b. However, absent an agreement with the other parties, or a pretrial order, presentation of an affidavit by a witness without the presence of the witness for cross examination may not overcome an objection based upon hearsay. See In re Roberts, 210 B.R. 325, 329 (Bankr. N.D. Iowa 1997) (affidavits on the value of an automobile excluded as hearsay where witnesses were not present

⁴ The Federal Rules of Bankruptcy Procedure shall hereinafter be referred to as FRBP.

to authenticate the documents or for cross examination); Barry Russell, Bankruptcy Evidence Manual § 803.18, at 1430-31 (2007-2008) (“The most frequent type of opinion evidence encountered in bankruptcy proceedings is in the form of an appraisal, which generally will not qualify as a business record for the purposes of Rule 803(6) [T]he report of an appraiser is not admissible by merely showing that the appraiser is in the business of making appraisals. There must be the opportunity to ascertain the qualifications of the appraiser and to otherwise cross-examine him.”).

D. **Stipulations are evidence.** Parties may stipulate that statements by counsel, affidavits or documents attached to pleadings may be treated as evidence.

1. Where a party stipulated that the debtor was the purchaser of a cashier’s check, it was bound by that stipulation and the bankruptcy court’s inference that the debtor was in possession and control of the funds used to purchase the check. See Hall-Mark Electronics Corp. v. Sims (In re Lee), 179 B.R. 149, 157 (B.A.P. 9th Cir. 1995).
2. The state was bound by the terms of a previous court-approved stipulation and order that compelled the conclusion at the confirmation hearing that it had waived any tax lien against the debtor’s property. See In re Holly’s, Inc. 190 B.R. 297, 302 (Bankr. W.D. Mich. 1995).
3. A stipulation and confession of judgment in a pre-petition state court proceeding that established a claim was admissible as evidence of intent in an action to except the claim from discharge under § 523(a)(6). See Solar Systems and Peripherals, Inc. v. Burress (In re Burress), 245 B.R. 871, 881 (Bankr. D. Colo. 2000).

II. LAYING A FOUNDATION.

- A. **Competency.** Before a witness may testify, it must be shown that he or she is competent. Rule 601 provides that any person is competent to testify except as provided otherwise in the Federal Rules of Evidence.
- B. **Personal Knowledge.** A witness is not competent to testify regarding a matter unless it can be shown through evidence that he or she has personal knowledge of the matter. Rule 602. Whether a witness has the requisite personal knowledge to testify is a matter for determination by the trial judge under Rule 104.
 1. “Evidence is inadmissible under [Rule 602] only if in the proper exercise of the trial court’s discretion it finds that the witness could not have actually perceived or observed that which he testified to.” Hallquist v. Local 276 et al., 843 F.2d 18, 24 (1st Cir. 1988); M.B.A.F.B. Fed. Credit

Union v Cumis Ins. Soc’y, Inc., 681 F.2d 930, 932 (4th Cir. 1982), but see dissent citing United States v. Borelli, 336 F.2d 376, 392 (2d Cir. 1964), cert. denied sub. nom. 379 U.S. 960 (1965).

2. However, beyond such a minimal requirement, “[t]he extent of a witness’ knowledge of matters about which he offers to testify goes to the weight rather than the admissibility of the testimony.” Hallquist, 843 F.2d at 24.
3. Where a witness was competent to testify about procedures in a Paris office, the plaintiff had failed to establish that the witness knew enough about procedures in the Tokyo office to knowledgeably testify about communications from that office. Trigano v. Bain & Co., Inc., 380 F.3d 22, 33 (1st Cir. 2004).
4. Testimony of broker of used printing equipment was admissible in an action in which the broker sought to recover lost profits under a breach of contract claim where testimony was based on broker’s personal knowledge of compensation arrangements for his participation in completed sales of two used printing presses. Interstate Litho Corp. v. Brown, 255 F.3d 19, 30 & n.12 (1st Cir. 2001).
5. Evidence that a long term employee had experience operating chemical plants and had reviewed and provided input into the design of a new chemical plant, provided a sufficient foundation for him to identify a design defect and to infer that the defendant was responsible. Sheek v. Asia Badger, Inc., 235 F.3d 687, 695 (1st Cir. 2000).
6. Testimony by a custodian of records who had been on the job only two weeks before trial and did not claim direct personal knowledge of the prior demise of a bank and the appointment of the FDIC as receiver could testify to authenticate business records, but could not testify about the receivership and the transfer of notes held by the failed bank to the FDIC. FDIC v. Houde, 90 F.3d 600, 606 (1st Cir. 1996).
7. “A witness may testify to the contents of business records kept in the regular course of business without having personal knowledge of the facts reported therein,” so long as the entries in the records were made by persons with personal knowledge of the facts and a business duty to report them. The witness’ lack of personal knowledge merely affected the weight of the testimony, not its admissibility. Cities Service Oil Company v. Coleman Oil Company, Inc., 470 F.2d 925, 932 (1st Cir. 1972).

III. ADMISSIBILITY OF DOCUMENTS.

- A. **Necessity For Authentication.** Rule 901(a) provides: “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.”
1. Something is found to have been authenticated when a “court discerns enough support in the record to warrant a reasonable person in determining that the evidence is what it purports to be” United States v. Mulinelli-Navas, 111 F.3d 983, 990 (1st Cir. 1997); United States v. Collado, 957 F.2d 38, 39 (1st Cir. 1992); United States v. Nolan, 818 F.2d 1015, 1017 (1st Cir. 1987).
 2. A document’s authenticity may be confirmed by appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances. See Rule 901(b)(4); United States v. Gonzalez-Maldonado, 115 F.3d 9, 20 (1st Cir. 1997).

B. **Authentication of Documents With a Foundation Witness.**

1. A document may be authenticated by the testimony of a person with personal knowledge. See Rule 901(b)(1); Mulinelli-Navas, 111 F.3d at 990 (“Authentication can be provided by, among other things, testimony of a custodian or percipient witness”).
2. Before a witness may testify for the purpose of authenticating a piece of evidence, it must be shown that he or she is competent. See section II above.
3. Who may authenticate business records? To authenticate business records, a witness need not be the actual person who prepared the records: “a qualified witness is . . . one who can explain and be cross-examined concerning the manner in which the records are made and kept.” Moulder v. City Investing Co. Liquidating Trust (In re The National Trust Group, Inc.), 98 B.R. 90, 92 (Bankr. M.D. Fla. 1989) (quoting Wallace Motor Sales, Inc. v. Am. Motor Sales Corp., 780 F.2d 1049, 1060-61 (1st Cir. 1985). See also Capital Marine Supply, Inc. v. M/V Roland Thomas, II, 719 F.2d 104 (5th Cir. 1983) (account manager who had direct control over a business account could authenticate business records prepared under his direction or supervision, even though he did not actually prepare the records).

C. Authentication of Records Without a Foundation Witness.

1. Rules 902(11) and (12) permit parties to authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness.
2. The procedures for self authentication apply to records of regularly conducted activity that are admissible under Rule 803(6). The intent is to establish a procedure in civil actions similar to the procedure provided under 18 U.S.C. § 3505 for certifying foreign records in criminal cases. See section IV.C below regarding business records under Rule 803(6).

D. Self Authentication of Documents.

1. Rule 902 contains several exceptions to the general rule that extrinsic evidence of authenticity is required before evidence is deemed admissible. Rule 902 provides in relevant part:

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

(1) Domestic Public Documents Under Seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, . . . or of a political subdivision, department, officer, or agency thereof, and signature purporting to be an attestation or execution.

(2) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(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.

(6) Newspapers and Periodicals. Printed materials purporting to be newspapers or periodicals.

(8) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in a manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

Rules 902(1), (2), (4), (6), and (8).

2. Public Records. Rules 902(1), (2) and (4).

- a. Acosta-Mestre v. Hilton Int'l of Puerto Rico, Inc., 156 F.3d 49, 57 (1st Cir. 1998) (stating that a notarized document does not constitute a copy of an official record or report or a document authorized by law to be recorded or filed and actually recorded or filed in a public office as required by Rule 902(4) and further stating that self-authenticating documents are not necessarily admissible).
- b. United States v. Robinson-Munoz, 961 F.2d 300, 305 (1st Cir. 1992) (“[T]he certification, bearing a Department of State seal and the signature of a Department of State official authorized to authenticate such documents, was a self-authenticating document pursuant to Fed. R. Evid. 902(1).”).
- c. Crossley v. Lieberman, 868 F.2d 566, 568 (3d Cir. 1989) (a certified record of the state court was self-authenticating as it contained a raised seal and the signature of the prothonotary).
- d. McLellan Highway Corp. v. United States, 95 F. Supp. 2d 1, 7 (D. Mass. 2000) (certified copies of letters from the National Archives and Records Administration satisfied the authentication requirement).

3. Newspapers and Periodicals. Rule 902(6).
 - a. Price v. Rochford, 947 F.2d 829, 833 (7th Cir. 1991) (noting that newspaper articles are generally self-authenticating).
 - b. Goguen ex rel. Estate of Goguen v. Textron, Inc., 234 F.R.D. 13, 17-19 & n.2 (D. Mass. 2006) (noting that newspapers and periodicals are generally self-authenticating; discussing definition of “periodical” under Rule 902(6) and striking admission of a metalworking serial number reference book published by a national machinery association).
 - c. Wyandotte Indus. v. E.Y. Neill & Co. (In re First Hartford Corp.), 63 B.R. 479, 483 n.2 (Bankr. S.D.N.Y. 1986) (explaining that articles from periodicals may be admitted into evidence because they are self-authenticating under Rule 902(6)).

4. Acknowledged Documents. Rule 902(8).

- a. Trinity Nat’l Bank v. Bobby Boggs, Inc. (In re Bobby Boggs, Inc.), 819 F.2d 574, 581 (5th Cir. 1987) (stating that notarized performance and payment bonds may be self-authenticating under Rule 902(8)).
- b. First Security Bank of Utah, N.A. v. Styler, 147 B.R. 248, n.2 (D. Utah 1992) (“Acknowledging an instrument provides benefits beyond the right to record the document. For example, the Federal and Utah Rules of Evidence provide that acknowledged documents may be admitted into evidence without any other confirmation of their authenticity.”).

D. **Best Evidence Rule**. Rules 1001 through 1007.

1. Original Document. Rules 1002 and 1004.

- a. With respect to original documents, the Federal Rules of Evidence provide:

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 1002.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if —

(1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral Matters. The writing, recording or photograph is not closely related to a controlling issue.

Rule 1004.

- b. The Tenth Circuit Court of Appeals has held that divorce counsel could testify as to his recollection of a deposition even though no written transcript or divorce counsel's notes were produced because an event may be proved by non-documentary evidence even though a written report of it was made. Lang v. Lang (In re Lang), 106 F.3d 413, 1997 WL 26585, at *3 (10th Cir. 1997) (unpublished opinion).
- c. Courts have emphasized that testimony as to a witness's independent knowledge of facts is not barred by the "best evidence rule" where the testimony is not regarding the contents of any

document but rather of the events that the witness has observed. In other words, the rule is not applicable when a witness testifies from personal knowledge even though the same information is contained in a writing. Miner v. Sharp Ford-Mercury, Inc. (In re United Tractors, Inc.), 13 B.R. 239, 244 & n.11 (Bankr. W.D. Mo. 1981).

- d. The optimal proof of the contents of a document is the original document. However, the original is not required, and other evidence of the contents of a writing is admissible if all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith. “Unless someone testifies that he or she personally destroyed or witnessed the destruction of a document, such proof will ordinarily be circumstantial Rule 1004 does not contain an independent requirement that a search be conducted; rather the concept of a diligent search is an avenue by which the larger issue of the document’s destruction may be proved.” United States v. McGaughey, 977 F.2d 1067, 1071 (7th Cir. 1993).
- e. The First Circuit Court of Appeals has held that the transcript of a conversation is inadmissible where a tape of the conversation is available as evidence. United States v. Bizanowicz, 745 F.3d 120, 123 (1st Cir. 1984).
- f. “The mere negligent destruction of original evidence is insufficient to establish bad faith on the part of the proponent [within the meaning of Rule 1004(1)].” Sicherman v. Diamoncut, Inc. (In re Sol Bergman Estate Jewelers, Inc.), 225 B.R. 896, 902 (B.A.P. 6th Cir. 1998).
- g. The summation of financial transactions drafted by the debtors was inadmissible “as the document was a summation of other documents and not the original.” Barrows v. Internal Revenue Service, 231 B.R. 446, 450 (D.N.H. 1998).
- h. A copy of a letter written by a Chapter 7 debtor in his capacity as settlor of a trust, in which the debtor purports to extend irrevocability of the trust for an additional ten years, was not admissible to show that the irrevocability period had been extended, and that the Chapter 7 trustee, as successor in interest to the debtor’s rights under the trust instrument, was unable to revoke

the trust for the benefit of the estate, where the debtor failed to produce an original or to satisfactorily explain how a copy of the letter suddenly appeared during litigation over the trustee's right to terminate the trust. Osherow v. Porras (In re Porras), 224 B.R. 367, 371 (Bankr. W.D. Tex. 1998).

- i. In In re Mullins, 125 B.R. 808, 811 (Bankr. E.D. Cal. 1990), the court held that a photocopy of a faxed loan agreement which bore the original signature of the debtor was a duplicate, and not the original document, and was inadmissible to prove the debtor's lack of equity, even though there existed no "original" document signed by the debtor.
 - j. "[A] computerized record may be admitted into evidence as an 'original' only after the court has made a fact-specific determination as to the intent of the drafters and the accuracy of the documents. . . . [W]here a written record, prepared prior to the computer record, contains a more detailed and complete description of the transaction than that contained in the computer record, the proponent of the evidence should be required to produce the more detailed record, or account for its nonproduction under F.R.E. 1004." In re Gulph Woods Corp., 82 B.R. 373, 377-78 (Bankr. E.D. Pa. 1988) (holding that the computerized business records of the debtor's loan account were not admissible, over the debtor's best evidence objection, absent a showing that the computerized records were prepared within a reasonable time of the prior written reports and accurately reflected the loan transactions at issue).
2. Admissibility of Duplicates. Rule 1003 provides that a duplicate is admissible unless: (1) a genuine question is raised regarding the authenticity of the original; or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.
 - a. Rule 1001(4) defines a "duplicate" as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original."

- b. Ball v. A.O. Smith Corp., 451 F.3d 66, 71 (2d Cir. 2006) (finding that bankruptcy court’s decision to admit into evidence, without authenticating witness, a duplicate of certified transcript of an evidentiary hearing conducted before another judge was not abuse of discretion, where no genuine question was raised as to transcript’s authenticity and no showing of unfairness was made).
 - c. United States v. Carroll, 860 F.2d 500 (1st Cir. 1988) (finding that a microfilm copy of a check is a “duplicate” for purposes of Rules 1001(4) and 1003).
 3. Summaries. Rule 1006 provides, in part: “The contents of voluminous writings, records, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation.”
 - a. Rule 1006 provides that the originals or duplicates underlying summaries are to be made available to other parties for examination and/or copying.
 - b. Air Safety, Inc. v. Roman Catholic Archbishop of Boston, 94 F.3d 1, 7 (1st Cir. 1996) (stating that evidence underlying Rule 1006 summaries need not be admitted into evidence unless so ordered by the court).
 - c. Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505 (9th Cir. 1985) (“Rule 1006 does not contemplate that summaries must be prepared by someone independent of the party offering the summary.”).
 - d. In re Snider Farms, Inc., 83 B.R. 977 (Bankr. N.D. Ind. 1988) (stating that, to be admissible: (1) a summary must be of the contents of the documents and not the testimony; and (2) “while projections of future lost profits are not legitimately admissible as summaries under [Rule 1006] since they are interpretations of past data and projections of future events, not simply a compilation of voluminous records they nevertheless may be admissible as opinion evidence under [Rules 701 and 702].”).
4. Demonstrative Evidence (i.e., tables, charts).
 - a. “Demonstrative evidence, including such items as a model, map, chart, photograph, or demonstration is distinguished from real evidence in that it has no probative value itself, but serves merely as a visual aid in comprehending the oral testimony of a witness or other evidence; demonstrative evidence illustrates and clarifies.” Barry Russell, Bankruptcy Evidence Manual § 401.2 (2000).

- b. “Use by a witness of visual illustrations to explain testimony is a common occurrence in bankruptcy proceedings.” *Id.* at § 401.5.

IV. ADMISSION OF BUSINESS AND FINANCIAL RECORDS.

A. Hearsay.

1. Definition of Hearsay. Rule 801(c) provides:

“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.

2. Rule 802 provides that hearsay is generally inadmissible:

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.

B. Hearsay Exceptions.

1. **Business and Computer Records.** Certain business and financial records are excepted from the general rule that hearsay is inadmissible. Rule 803(6) provides:

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

...

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, 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.

- a. Haag v. United States, 485 F.3d 1, 3 (1st Cir. 2007) (IRS computerized records containing notification letters sent to taxpayers following the filing of a tax lien were admissible as business records under Rule 803(6)).

- b. United States v. Kayne, 90 F.3d 7, 12 (1st Cir. 1996) (“The foundation for admission of a business record under Fed. R. Evid. 803(6) requires both the testimony of a qualified custodial witness and a showing that the declarant was a person with knowledge acting in the course of regularly conducted business activity.”).
- c. United States v. Lizotte, 856 F.2d 341, 344 (1st Cir. 1988) (a drug dealer’s recording of weekly drug sales on calendar is a business record admissible under Rule 803(6)).
- d. United States v. Grossman, 614 F.2d 295, 297 (1st Cir. 1980) (holding that the trial judge properly admitted a catalog of cigarette lighters since it qualified as a business record pursuant to Rule 803(6)).
- e. Remington Investment, Inc. v. Quintero & Martinez Co., Inc., 961 F. Supp. 344 (D.P.R. 1997) (indicating that the bank records used by the FDIC in preparing its report were kept by the bank in the regular course of its business operations and as such are admissible under Rule 803(6) as an exception to the hearsay rule).

2. **Absence of Entry in Records.** Rule 803(7) provides:

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

...

Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

- a. United States v. Munoz-Franco, 487 F.3d 25, 39-40 (1st Cir. 2007) (finding that use of bank board’s minutes in bank fraud prosecution to demonstrate that board did not receive information about loan transactions were admissible under Rule 803(7) given the minutes’ thorough description of information discussed at meetings and missing information related to the loan transactions at issue).
- b. Resolution Trust Corp. v. Gladstone, 895 F. Supp. 356, 373 (D. Mass. 1995) (finding that the absence of documents in the loan

files created a material issue of fact sufficient to defeat a motion for summary judgment).

- c. Humboldt Express, Inc. v. The Wise Co., Inc. (In re Apex Express Corp.), 190 F.3d 624, 635 (4th Cir. 1999) (“The absence of business records can be used as evidence to prove the non-existence of such a record.”)
- d. Armstead v. United States, 815 F.2d 278, 282 n.3 (3d Cir. 1987) (“The dissent notes that under Fed. R. Evid. 803(7), absence of an entry in relevant business records may be used to prove the non-existence or non-occurrence of a matter. The Rule allows such evidence as an exception to the hearsay rule. The admission of such evidence, however, depends upon presentation of a proper foundation, and exclusion may result where circumstances ‘indicate lack of trustworthiness.’”).
- e. United States v. Lee, 589 F.2d 980, 987 (9th Cir. 1979) (“The exceptions to the hearsay rule which provide for the admissibility of negative records in the Federal Rules (Fed. R. Evid. 803(7) and 803(1)) were designed to resolve any doubts about such evidence in favor of admissibility.”) (quoted in Resolution Trust Corp. v. Gladstone, 895 F. Supp. 356, 373 (D. Mass. 1995)).

3. **Market Reports.** Rule 803(17) provides:

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

...

Market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by person in particular occupations.

- a. United States v. Cassiere, 4 F.3d 1006, 1019 (1st Cir. 1993) (upholding the lower court’s admission of County Comps reports because they were published compilations of property sales data which were generally used and relied upon by appraisers).
- b. United States v. Mount, 896 F.2d 612, 625 (1st Cir. 1990) (holding books admissible under Rule 803(17) where witness testified that manuscript dealers rely on the books to locate original documents).
- c. United States v. Grossman, 614 F.2d 295, 297 (1st Cir. 1980) (holding that the trial judge properly admitted a catalog of cigarette lighters since it qualified as a commercial publication pursuant to Rule 803(17)).

- d. United States v. Meo, 15 F.3d 1093, 1994 WL 12340, at *6-7 (9th Cir. 1994) (unpublished opinion) (upholding lower court's admission of Kelley Blue Book valuations under Rule 803(17) as witnesses testified that the Blue Book is a standard reference within the used car industry).
- e. In re Young, 390 B.R. 480, 492-93 (Bankr. D. Me. 2008) (finding that values in Kelley Blue Book may be accepted as reliable market reports or compilations under Rule 803(17)).
- f. In re McCutchen, 224 B.R. 373, 375 n.1 (Bankr. E.D. Mich. 1998) (noting in footnote that N.A.D.A. guides and similar publications are admissible as evidence pursuant to Rule 803(17)).
- g. In re Roberts, 210 B.R. 325, 330 (Bankr. N.D. Iowa 1997) (explaining that while N.A.D.A. values constitute admissible evidence for purposes of valuation, these values are not necessarily conclusive).
- h. In re Huffman, 204 B.R. 562 (Bankr. W.D. Mo. 1997) (taking judicial notice of the United State Government's Directory of Zip Codes and a United States Atlas pursuant to Rules 201 and 803(17)).
- i. In re Byington, 197 B.R. 130 (Bankr. D. Kan. 1996) (noting that market guides, such as the N.A.D.A., are admissible under Rule 803(17) but they should not be exclusively relied upon by the court as it contradicts the court's duty to determine value under 11 U.S.C. § 506(a)).

C. Authentication of Business Records Without a Foundation Witness.

- 1. Under Rule 803(6) records kept in the regular course of a regularly conducted business activity may be admitted by a certification complying with Rule 902(11), 902(12) or a statute permitting certification.
- 2. Under Rules 902(11) and 902(12), the certificate must state that the business 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 regularly conducted activity; and
 - c. was made by the regularly conducted activity as a regular practice.

3. A party intending to offer a record into evidence under Rule 902(11) or 902(12) must provide written notice to all adverse parties, and must make the record and the declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.
4. The certification should also provide a foundation for the personal knowledge of the person making the certification.

V. LAY WITNESS OPINION TESTIMONY. RULE 701.

A. 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's 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.

- B. The primary distinction between an expert witness and a lay witness is that the expert witness may offer an opinion based upon information and data from a number of sources, while a lay witness is confined to testifying from personal knowledge. United States v. Williams, 81 F.3d 1434, 1442 (7th Cir. 1996).
1. Unlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based upon firsthand knowledge or observation. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 592, 113 S.Ct. 2786, 2796, 125 L.Ed.2d 469 (1993).
 2. A real estate finance expert would be able to testify as to the projected rentals for a particular property. However, a lay witness is limited to testimony based upon personal knowledge, such as the owner of a house who testifies regarding value based upon the purchase price. Malloy v. Monahan, 73 F.3d 1012, 1016 (10th Cir. 1996).
- C. Rule 701(c) prohibits lay witnesses from offering opinion testimony based on scientific, technical or other specialized knowledge within the scope of Rule 702. This provision was added to the Rule on December 1, 2000 to eliminate the risk that the reliability requirements of Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Rule 701(c) does not distinguish between expert and lay witnesses, but rather between expert and lay testimony.
- D. The trial court has broad discretion in ruling on the admissibility of lay opinion evidence and such rulings are reviewed only for "manifest abuse of discretion."

Alexis v. McDonald’s Restaurants of Massachusetts, Inc., 67 F.3d 341, 347 (1st Cir. 1995).

E. Owner’s Testimony as to Value of Property.

1. Generally, an owner of property is competent to give an opinion of value based upon substantial familiarity with the property. Shane v. Shane, 891 F.2d 976, 982 (1st Cir. 1989) “In testifying as to the value of his property, an owner is entitled to the privileges of an expert.” Id.
2. However, the cases prior to 2000 should be reviewed carefully.
 - a. On December 1, 2000, Rule 701 was amended by adding subsection (c) which excludes opinion testimony by lay witnesses which is “based on scientific, technical, or other specialized knowledge within the scope of Rule 702.”
 - b. According to the advisory committee notes “Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.”
 - c. Notwithstanding the advisory committee’s note on the addition of subsection (c) to Rule 701, the advisory committee’s notes to Rule 702 regarding testimony by expert witnesses under Rule 702 states:

“Thus within the scope of [Rule 702] are not only 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.” [emphasis added]
3. The 2000 amendment to Rule 701 clearly intended to limit opinion testimony from persons not qualified as experts under Rule 702. Therefore, in spite of the advisory committee notes to Rule 702, it appears that Rule 701 may now restrict valuation opinion testimony by lay witness property owners.
 - a. Rule 701(c), by its terms, restricts an owner of property from giving an opinion of value based on more than personal knowledge.
 - b. In addition, if an owner of property is expected to give an opinion of value under Rule 702 that may rely on hearsay (i.e., market data, compilations, registry reports), then the property owner

would presumptively need to qualify as an expert under Rule 702 and be subject to pretrial disclosures under Federal Rule of Civil Procedure 26(a)(2)(B) with respect to an expert report, list of qualifications, etc., as well as discovery depositions by an opposing party.

F. Lay Witness Opinion Testimony Admissible.

1. Based upon foundation evidence establishing that a DEA agent was regularly exposed to marijuana as part of his job, the First Circuit affirmed the admission of lay witness testimony by the DEA agent that he smelled marijuana during a search of the defendant's home because the testimony was based upon his perception and he was not required to qualify as an expert under Rule 702. Unites States v. Santana, 342 F.3d 60, 69 (1st Cir. 2003).
2. A witness in a commodity business who occupied a desk near one of his partners, a cattle buyer, was not involved in cattle buying, had not traveled to the feedlots with his partner on buying trips and did not know specific details of the cattle buying business was permitted to testify. At trial, the agency status of his partner with the defendant was at issue. The trial court allowed him to testify that on the basis of frequent daily telephone conversations with his partner and an employee of the defendant, he "understood" that his partner was buying cattle for the defendant. On appeal, the Fifth Circuit found that the witness's inference, although "tenuous," was predicated upon conduct he personally observed, was an inference that a normal person might draw from those observations, and is an inference that the trial court could, in its discretion, consider helpful in the determination of a disputed fact. Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250, 263-64 (5th Cir. 1980).
3. A self-employed real estate appraiser with four years of experience performing appraisals for lending institutions and over one thousand tax appeals at the local and state level was proffered as an expert for the debtor in a § 505 adversary proceeding against the state Department of Revenue over the real estate tax assessment of the debtor's motel. The trial court found that the witness's educational background consisted of a graduate degree in theology, no scholarly training in the fields of taxes, statistics or real estate and that the majority of his appraisal work had been in the area of residential property. The court held he did not qualify as an expert under Rule 702. However, the court allowed him to testify as a lay witness under Rule 701 based upon his investigation of assessments made by the DOR upon the debtor's property as well as eighteen parcels of commercial real estate sold in the debtor's county during the relevant time frame. Lipetzky v. Dept. of Revenue of the State of Montana (In re Lipetzky), 66 B.R. 648, 650-51 (Bankr. D. Mont. 1986).

4. In a dispute over the validity of a deed, the trial court allowed the son of the decedent to give lay opinion testimony that the signature on the deed did not appear to be that of his father and that he doubted that his father was able to see well enough at the time of the execution of the purported deed to place his name on the signature line. Although the testimony was admitted, the fact that the witness was an interested party with no special expertise in the area of handwriting analysis went to the weight to which the testimony was entitled. Pogge v. Neiderer (In re Neiderer), 196 B.R. 417, 419 (Bankr. C.D. Ill. 1996).

G. Lay Witness Opinion Testimony Excluded.

1. A debtor was competent to testify as to her opinion of value on her interest in certain items of personal property, but was unable to provide any detailed explanation of how she arrived at lump sum value for all items of property and had not prepared any valuation for individual items of property. Therefore the testimony had no credibility and was insufficient to establish a value for the property. In re Brown, 244 B.R. 603, 611-12 (Bankr. W.D. Va. 2000).
2. The former president of the debtor and an employee of the defendant submitted an affidavit in support of the Chapter 7 trustee's defense of a motion for summary judgment by the defendant in an action against a former sole supplier of computer motherboards alleging grossly inflated pricing, preference, fraudulent transfer and seeking equitable subordination. The affidavit attested to former president's various positions with the debtor and the defendant in upper-level management, including finance and that he had "personal knowledge of the facts contained herein." The affidavit recited that the defendant had grossly overcharged the debtor for computer motherboards. The court found that the affidavit did not establish that the former president was ever involved in procurement or inventory maintenance while employed by either company, or that he ever supervised those operations in a way to gain either knowledge or expertise in them. The affidavit was devoid of any evidence to establish the former president as an expert under Rule 702. The portion of the affidavit on inflated pricing was excluded since the affidavit did not establish a foundation for personal knowledge and, therefore, there was no foundation for a lay opinion under Rule 701. Leonard v. Mylex Corp. (In re Northgate Computer Systems, Inc.), 240 B.R. 328, 342-43 (Bankr. D. Minn. 1999).
3. A witness who did not qualify as an expert on real estate investment or real estate management could not testify as to the rent forecast, monthly budget and projected income that he prepared regarding the debtor's property. The witness's testimony was not admissible under Rule 701 because it was not based upon personal knowledge, but upon information

from a variety of sources and his own opinions. In re Syed, 238 B.R. 133, 144 (Bankr. N.D. Ill. 1999).

VI. EXPERT WITNESS TESTIMONY. RULE 702.

A. Gatekeeper role of court.

1. “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.” Rule 702.
2. The trial judge must determine that the expert scientific testimony is both reliable and relevant. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 589, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993).
 - a. The reliability of scientific testimony is determined by many factors including, but not limited to, the so-called Daubert factors: (a) can the theory or technique be (and has it been) tested, (b) has the theory or technique been subject to peer review and publication, (c) does the technique have a known or potential error rate and do standards exist for its use, and (d) is the theory or technique generally accepted by the relevant scientific community. Id. at 592-94.
 - b. In order to meet the requirement under Rule 702 that expert testimony “assist the trier of fact to understand the evidence or to determine a fact in issue,” the testimony must be relevant. Relevant testimony must be tied to the facts of the case and must have a credible link to assisting the trier of fact to resolve a factual dispute in issue. Id. at 590.
3. The general holding in Daubert applies not only to testimony based upon “scientific” knowledge, but also to testimony based on “technical” and “other specialized” knowledge. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141, 119 S.Ct. 1167, 1170, 143 L.Ed.2d 238 (1999).
 - a. The test of reliability is “flexible,” and Daubert’s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Id. at 141.
 - b. Rule 702 and the principles in Daubert establish a standard of evidentiary reliability by requiring a “a valid connection to the pertinent inquiry as a precondition to admissibility.” Daubert, 509 U.S. at 592.

- c. The burden of demonstrating that expert testimony is competent, relevant and reliable rests with the proponent of the testimony. Kumho, 526 U.S. at 147-52.
 - d. A trial court has wide discretion in determining the admissibility of expert testimony. In reviewing a trial court's decision about how to determine reliability and admissibility of expert testimony, a court of appeals is to apply an abuse of discretion standard. Kumho, 526 U.S. at 152; Palmacci v. Umpierrez, 121 F.3d 781, 792 (1st Cir. 1997); Bogosian v. Mercedes-Benz of North America, Inc., 104 F.3d 472, 476 (1st Cir. 1997).
 - e. "Rule 702 has been interpreted liberally in favor of the admission of expert testimony." Levin v. Dalva Brothers, Inc., 459 F.3d 68, 78 (1st Cir. 2006) (citing Daubert). "Rule 702 is not so wooden as to demand an intimate level of familiarity with every component of transaction or device as a prerequisite to offering expert testimony." Microfinancial, Inc. v. Premier Holidays Int'l, Inc., 385 F.3d 72, 80 (1st Cir. 2004).
 - f. Expert witnesses need not have overly specialized knowledge to offer opinions. Levin, 459 F.3d at 78 (citing Gaydar v. Sociedad Instituto Gineco-Quirurgico y Planificacionm, 345 F.3d 15, 24-25 (1st Cir. 2003)). But district courts act properly by excluding opinions beyond the witness's expertise. Levin, 459 F.3d at 78.
4. In response to Daubert and Kumho, Rule 702 was amended on December 1, 2000 by adding the following language at the end of the rule:

“, 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.”

This amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case.

C. **Expert Testimony Admissible.**

- 1. The First Circuit upheld the district court's decision to qualify an expert in an employer's suit seeking a declaratory judgment that a former employee's stock options had expired prior to his request to exercise options pursuant to an employee stock option plan. Even though the employer's expert witness was not a certified financial planner with a

focus towards individual investment decisions, the expert had nearly two decades of consulting experience in economics, finance, and strategy, worked on 401(k) committee at his consulting firm, and provided investment advice to employees and accredited investors. Thus, the expert was qualified to testify about how individuals chose investments and arranged portfolios. First Marblehead Corp. v. House, 541 F.3d 36, 40-43 (1st Cir. 2008).

2. The First Circuit affirmed the district court's decision to allow an expert's opinions in an action by buyers of an antique clock against antiques dealer for fraud, negligent misrepresentation, breach of express warranties, unjust enrichment, and a violation of the Massachusetts consumer protection statute. The expert, who possessed advanced degrees in art history, wrote a dissertation on a Regence-era painter, had experience as an appraiser, and had published works on appraisal methodology for art and antiques, was qualified to offer expert opinions that antique clock was unusual, because of its painted panels, and that substantial renovations to the clock would not alter its period of origin, which he assumed was authentic. Levin v. Dalva Brothers, Inc., 459 F.3d 68, 78-79 (1st Cir. 2006).
3. The First Circuit affirmed the district court's decision to allow expert to testify in action by lender against a borrower under a revolving line of credit and a guarantor for fraud, breach of contract, and breach of the covenant of good faith and fair dealing. The expert had served as an IRS agent for 33 years specializing in financial fraud investigations and was qualified to testify as expert with respect to lock-box accounts, although he had no previous experience with such accounts. The expert's testimony did not deal with the esoterica of lock-box accounts, but, rather, with the tracking of funds into and out of the lock-box accounts which the parties had created to guide consumer note payments into the lender's hands, and thus fell within the core of his expertise. Microfinancial, Inc. v. Premier Holidays Int'l, Inc., 385 F.3d 72, 79-81 (1st Cir. 2004).
4. The First Circuit reversed the trial court's exclusion of certain pharmacological and toxicology evidence and ordered a new trial. The evidence was relevant, but was excluded as unreliable. The appellate court found that the expert's methodology was supported in standard medical textbooks and a prestigious peer-reviewed medical journal, as well as several secondary sources, although some disagreement existed within the medical community on the meaning of the results of the methodology. The First Circuit held that Daubert neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance. It demands only that the expert's conclusion has been arrived at in a scientifically sound and

methodologically reliable fashion. Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co., 161 F.3d 77 (1st Cir. 1998).

5. Where Chapter 13 debtor's counsel failed to raise the Kumho issues by questioning the expertise of the City's witnesses on rehabilitation costs for the debtor's property at trial, the qualifications issue was waived. Kumho does not require a court to hold a full Daubert hearing each time a party offers expert witness testimony. The testimony of the debtor's expert, an experienced contractor, who was not a licensed plumber or electrician, and did not consult with a structural engineer, was found to have little credibility. Bankruptcy court denied reconsideration of stay relief order. In re Syed, 238 B.R. 133 (Bankr. N.D. Ill. 1999).
6. Creditors committee objected to the appropriateness of solvency opinions as a field of inquiry. The expert testified that he had obtained undergraduate and graduate degrees from prestigious universities, had subsequently been employed with various financial firms, at the time of trial was a partner and national director of a valuation services group with a leading financial firm, and at a previous firm had developed solvency opinions as a financial product. The bankruptcy court overruled the committee's objection and found that the opinion would assist the court in determining the facts at issue in the proceeding. The Sixth Circuit BAP upheld the bankruptcy court's determination based upon the witness's experience in determining solvency of companies in complex financial circumstances and the nature of the issues in the proceeding. In re Valley-Vulcan Mold. Co., 237 B.R. 322, 335-36 (B.A.P. 6th Cir. 1999).
7. An investment banker's prior representation of a shareholder and creditor of the debtor and his entitlement to a "success fee" on account of prior services to the debtor, if the transactions contemplated by the plan of reorganization were approved, did not taint or disqualify the firm from testifying as an expert witness at the confirmation hearing. A committee's objection to the qualifications of the same expert were overruled where the expert used the same methodologies and sources of data as the committee's expert. In re Zenith Elec. Corp., 241 B.R. 92, 102-03 (Bankr. D. Del 1999).
8. Bankruptcy court found admissible under Daubert an expert's testimony on lost profits based upon the expert's use of generally accepted statistical methods, even though the court rejected some of the expert's conclusions based upon his selection of data. Elder-Beerman Stores Corp. v. Thomasville Furniture Indus. Inc. (In re Elder-Beerman Stores Corp.), 206 B.R. 142, 151-52 (Bankr. S.D. Ohio 1997).
9. At a hearing on confirmation of a Chapter 11 plan of reorganization, a statistician and expert on estimating damages in mass tort cases testified that he had studied every breast implant verdict in the past 3 ½ years and

found that no punitive damages had been awarded to plaintiffs. Based upon that foundation, the expert's opinion on the adequacy of a fund created under a plan of reorganization to pay future claims was admissible. The bankruptcy court made a factual finding that punitive damages would not be paid by a trustee in a Chapter 7 case and that a plan that did not provide for payment of punitive damages did not violate the rights of individual tort claimants rejecting the plan and satisfied § 1129(a)(7) of the Bankruptcy Code. (See section X.C.4 below excluding other expert testimony.) In re Dow Corning Corp., 244 B.R. 721, 728-29 (Bankr. E.D. Mich 1999).

10. In a criminal proceeding for bank fraud, the government proffered the testimony of a special agent of the FBI to testify as an expert on the meaning and definition of check kiting and the common characteristics of check kiting. The district court found the testimony to be reliable and an aid to the trier of fact and allowed the testimony. The Eighth Circuit held that the trial judge did not abuse his discretion in allowing the expert testimony. United States v. Whitehead, 176 F.3d 1030, 1035 (8th Cir. 1999).
11. The issue of insolvency was a factual issue and the methodologies employed by the experts for each party, although not identical, both utilized valuation theories which were consistent with the flexible range of theories that experts use to analyze solvency. The court concluded that each side's objections to the other's expert went to the weight of the testimony, not its admissibility. Union Bank of Switzerland v. Deutsche Financial Services Corp., 2000 WL 178278, *8 (S.D.N.Y. 2000).

D. Expert Testimony Excluded.

1. The First Circuit upheld the trial court's exclusion of the testimony of an expert CPA under Rule 702 because his opinion on the value of collateral was based upon insufficient data and internally inconsistent and unreliable methods. Ed Peters Jewelry Co., Inc. v. C&J Jewelry Co., Inc., 124 F.3d 252, 260-61 (1st Cir. 1997).
2. Plaintiff appealed the trial court's exclusion of expert testimony in a products case. The trial court ruled the testimony of the proffered expert inadmissible because his testimony was not within his area of expertise (qualified master mechanic, not an automotive design engineer), his methodology was unreliable (no evidence that expert's test method was generally accepted) and the factual foundation was inadequate (no evidence that transmission was in substantially the same condition as it was at the time of the accident). The First Circuit upheld the trial court's exclusion of the expert testimony. Bogosian v. Mercedes-Benz of North America, Inc., 104 F.3d 472, 476-80 (1st Cir. 1997).

3. At trial the district court allowed expert testimony by an accountant on lost profits based upon representations from the plaintiff's management on the mix of sales. On appeal, the First Circuit found that other evidence in the record contradicted the expert's assumption and that the expert's testimony was dependent upon a product mix which the record as a whole did not support and which he had not independently verified. Admission of the expert's testimony was an abuse of discretion. The judgment was vacated and a new trial ordered. Irvine v. Murad Skin Research Labs., Inc., 194 F.3d 313 (1st Cir. 1999).
4. A bankruptcy judge did not abuse his discretion in excluding the testimony of the chief title attorney for a national title insurance company and an Indiana title attorney on the effect of a recorded document in the chain of title on the state of the title. The bankruptcy judge excluded the testimony because the ultimate question before the court was a legal conclusion and, in the court's view, the expert testimony would not assist the court in understanding the evidence. Sagamore Park Centre Assocs. Ltd. Partnership v. Sagamore Park Properties, 200 B.R. 332, 341 (N.D. Ind. 1996).
5. Creditors objecting to confirmation of a Chapter 11 plan of reorganization offered expert testimony by a qualified CPA regarding the sufficiency of a fund to be established under the plan to satisfy anticipated tort claims against it. The bankruptcy judge found that the creditors failed to establish that the proposed expert's opinions were based upon reliable data and methodology (i.e., reliance on limited anecdotal data) and excluded the evidence. The bankruptcy judge did allow testimony of the plan proponent's expert on the same issue because he had collected data from what he thought was a comparable mass tort settlement rather than relied on anecdotal information. (See section X.B.6 above admitting other expert testimony.) In re Dow Corning Corp., 237 B.R. 364, 374 (Bankr. E.D. Mich 1999).
6. Bankruptcy court refused to admit any expert testimony on the reasonableness of a trustee's fees in a Chapter 7 proceeding where the trustee had disbursed \$101,492,332 and was seeking the maximum fee allowed under § 326 of the Bankruptcy Code. The trustee offered the testimony of three panel trustees from the jurisdiction and a nationally known panel trustee from another jurisdiction. A secured creditor offered the testimony of a respected local attorney who had never served as a trustee or represented a trustee. The bankruptcy court excluded all expert testimony and held that evidence of the type proffered by the parties lacked the sort of reliability predicated on a reliable foundation in a relevant discipline. The court stated that the proffered evidence was more in the nature of anecdotal hearsay evidence or pure legal conclusions that

could just as well be, and were, presented by counsel in their arguments. In re Miniscribe Corp., 241 B.R. 729, 744-43 (Bankr. D. Colo. 1999).

7. In a trademark infringement case, the plaintiff sought to introduce evidence of lost profits due to the defendant's infringing activity. It proffered as an expert an individual with 15 years experience in the industry but no formal training in accounting. The expert also did not conduct an independent examination of the defendant's sales figures, but instead relied upon figures provided by the plaintiff's lawyers. On appeal, the Fifth Circuit held that the trial judge's exclusion of the evidence based upon the witness's lack of training and failure to conduct an independent analysis of the defendant's sales figures was not an abuse of discretion. Seatrax, Inc. v. Sonbeck Int'l, Inc., 200 F.3d 358, 371-72 (5th Cir. 2000).
8. An adversary proceeding commenced by a debtor was withdrawn to federal district court when the defendant requested a jury trial. The debtor proffered the testimony of a management consultant who had prepared a report on the disputed contract, its terms and an analysis of lost profits as an expert witness. The trial judge excluded expert testimony which would purport to interpret the parties' intentions, contract language, and whether there was a breach of contract because the testimony would do nothing more than "mirror" testimony offered by fact witnesses or argument offered by counsel and pertained to matters which a jury was capable of understanding and deciding without an expert's help. The court did permit expert testimony on damages. Tasch, Inc. v. Sabine Offshore Serv., Inc. (In re Tasch, Inc.), 1999 WL 596261 (E.D. La. 1999).