Written Materials for Presentation on Expert Testimony and Evidence in Bankruptcy

Author Contact Information:[1]

Mark E. Andrews
1201 Elm Street, Suite 3300
Dallas, Texas 75270
mandrews@coxsmith.com
(214) 698-7819

[1] The author thanks Meghan Bishop and Aaron Kaufman for their assistance in preparing these materials. For an excellent source of bankruptcy case annotations applying to the Federal Rules of Evidence, the author also refers readers to review the Bankruptcy Evidence Manual, as prepared by the Honorable Barry Russell, U.S. Bankruptcy Judge, Central District of California, available on Westlaw.

Bankruptcy lawyers frequently employ experts in order to assist the Court on issues of value. Bankruptcy courts routinely take evidence from accountants, appraisers and financial advisors. Less frequently, the Court will hear from investment bankers, forensic accountants and, occasionally, from all manner of experts on matters associated with a debtor's business.[2]

Notwithstanding the common use of experts, in this practitioner's opinion, there is considerable misunderstanding among members of the Bar, and some inconsistency among the judiciary, on the role of experts.

THE BASICS

The use of experts and admissibility of their testimony is controlled by the Federal Rules of Evidence, the Federal Rules of Civil Procedure, certain local rules and a sizeable body of case law. The Rules of Evidence begin with the premise that "all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress or by these Rules or other rules prescribed by the Supreme Court *(FRE 402).* Witnesses generally are permitted to testify regarding matters within their personal knowledge. As a general rule, witnesses are precluded from offering opinions, except for two general circumstances: (i) where a lay witness is testifying in compliance with FRE 701; and (ii) where an expert is testifying in compliance with FRE 702. Testimony from a witness who is not testifying as an expert falls under FRE 701 and must be in the form of an opinion that is limited to one that is (a) rationally based on the witness's perception; (b) helpful to clearly understand the witness's testimony or to determine a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The three limitations under FRE 701 have generated some interpretive case law. First, in preparing a lay witness to give an opinion, it is critical to lay a foundation. See *FRE 602.*

[2] The author's favorite expert was a gentleman who edited *Splash Magazine,* an industry publication for water park operators.

> Rule 602. Need for Personal Knowledge
>
> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

In *Butler v. Polk,* 592 F2d 1293, 1297 (5th Cir. 1979), the Court described the requirement that the witness's testimony be rationally based as essentially a fact and circumstance test. Finally, the Rule is express that the opinion of the witness cannot be based on scientific, technical or specialized knowledge. That type of testimony falls under Rule 702 for experts.

HOW DOES RULE 701 COME UP IN BANKRUPTCY?

Very often in consumer and small business cases, the only witness available on the question of value is the debtor/owner of the property. Owners are certainly competent to give testimony regarding the value of property. *See South Central Livestock v. Security State Bank of Hedley,* 614 F2d 1056, 1061 (5th Cir. 1980). However, there are some traps. Suppose your witness testifies as to his property and then in rebuttal wants to testify about the other side's comparables – the testimony may not be admitted. The reason is that the testimony as to the value of his or her own property is deemed within his or her knowledge, while the testimony regarding value of the property of another becomes a matter of expert opinion requiring qualification as an expert. *FRE 702.* (This presumes that the owner witness is not otherwise an expert). The contours of FRE 701 and the equivalent Texas Rule of Evidence have narrowed. In 2012, the Texas Supreme Court held that the landowner's testimony must refer to "market, rather than intrinsic or some other value." In essence, the Court requires a predicate showing some familiarity with market value. *See Natural Gas Pipeline v. Justiss,* 397 S.W.3d 150; 2012 Tex. LEXIS 1054; 56 Tex. Sup. J. 151.