

COMMERCIAL LAW AND BANKRUPTCY SECTION

March 22, 2012

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**HOW TO KEEP TESTIMONY AND DOCUMENTS
OUT OF THE RECORD IN FEDERAL AND STATE COURT**

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HOW TO KEEP TESTIMONY AND DOCUMENTS OUT OF THE RECORD IN FEDERAL AND STATE COURT

You have many weapons in your arsenal to object to testimony and documents at trial. You must be poised to object before the witness has answered each question. Object strategically, which means that you will object only when the proffered testimony or document will be detrimental to your case and you have a good faith basis to object, keeping in mind the judge's prior rulings on evidence during the course of the trial. Know the evidentiary basis for each objection so you can articulate it instantaneously. Unless you object *before* the witness responds to a question, you are relegated to making a motion to strike, which is not nearly as effective.

This is a guide to the most common objections to seek to exclude testimony and documents your opponent attempts to put into the record. This list of objections is not intended to be all inclusive. References to the Connecticut Code of Evidence are "CCE" and references to the Federal Rules of Evidence are "FRE."

BEFORE TRIAL

1. During the discovery phase, when defending depositions, object strategically to questions that are objectionable, to preserve your objections for trial and, if the deponent is your client, instruct your client not to answer, when appropriate.
2. During the discovery phase, be vigilant about not disclosing documents within the attorney/client and other privileges and those protected by the work product doctrine. For the scope of the work product privilege, see Fed. R. Civ. P. 26(b)(3) and CCE 13-3. If you make an inadvertent disclosure, be aware of the procedure in FRE 502.
3. Anticipate the testimony of each witness opposing counsel is likely to call at trial and determine what objections you can properly raise. Some pre-trial orders require disclosure of all such witnesses, and procedural rules require disclosure of all testifying expert witnesses [Practice Book Sec. 13-4 and Fed. R. Civ. P. 26(a)(2)].
4. Anticipate all documents opposing counsel will likely seek to put into the record at trial and determine what objections you can properly raise. Some pre-trial orders require disclosure of all documents each side intends to put into the record, giving you advance notice of those documents, except for rebuttal or sur-rebuttal. See the Standing Order Regarding Trial Memoranda in Civil Cases, item 11, in the District of Connecticut, for the mandatory pre-trial disclosure of trial exhibits.



5. File motions *in limine* when appropriate, to alert the judge before trial of key evidentiary issues, provide the judge with authorities on those issues, and seek a ruling on those issues before trial. Be aware that often judges reserve decision on motions *in limine* until trial, when they can consider the motion in context. It is appropriate to file a motion *in limine* when you seek to keep something out of the record, or get something into the record, and the evidentiary issue is sufficiently complex that a pre-trial motion and supporting memo would aid the court. Be mindful that filing a motion *in limine* also gives your opponent advance notice of the evidentiary issue and of the authorities you rely on regarding it. In state court, file your motion *in limine* as soon as you know who your trial judge is. Do not wait until the start of evidence.
6. If opposing counsel intends to put deposition transcripts into evidence in lieu of live testimony (as when an out-of-state witness has been deposed and will not be appearing at trial, a witness who has been deposed cannot attend the trial, or opposing counsel seeks to put in an admission of a party from a deposition transcript), carefully review the transcript to determine what excerpts from that transcript are objectionable, for which you have preserved your right to object [Fed. R. Civ. P. 29, 30(c)(2), and 32]. In addition, get into the record other excerpts that help your case [CCE 1-5 and FRE 106, and Fed. R. Civ. P. 32(a)(6)].

DURING TRIAL – TESTIMONY

Reasons to object

1. Exclude prejudicial evidence that is properly excludable.
2. Make a record for appeal.
3. Prevent unfair treatment of a witness.
4. Break up the testimony of an opposing witness, if you have a proper basis to object.
5. Reinforce your theme when objecting, unless the court does not allow speaking objections.

Common objections as to the *form* of the question

1. leading question during direct examination, unless preliminary question or necessary to develop the witness's testimony [FRE 104(a), 611(c)]
2. compound



3. ambiguous or unintelligible
4. already asked and answered
5. argumentative
6. too general or calls for a narrative answer
7. misquotes the witness or misstates prior evidence
8. assumes facts not in evidence

Common objections to the *substance* of testimony

1. irrelevant [CCE 4-1, 4-2, FRE 401, 402]
2. immaterial
3. hearsay [CCE 8-1, *et seq.* and FRE 801, *et seq.*]
4. lack of personal knowledge [FRE 602]
5. no foundation
6. speculation
7. waste of time or cumulative [CCE 4-3 and FRE 403]
8. prejudice outweighs probative value [CCE 4-3 and FRE 403]
9. confusing or misleading [CCE 4-3 and FRE 403]
10. inadmissible opinion of lay witness [CCE 7-1 and FRE 701]
11. privileged [CCE 5-1 and FRE 501, 502]
12. voir dire question beyond the scope of proper voir dire
13. cross beyond scope of direct [CCE 6-8(a) and FRE 611(b)]
14. redirect beyond the scope of cross CCE 6-8(a) and [FRE 611(b)]
15. improper impeachment [CCE 6-10 and FRE 613]



16. prior consistent statement [CCE 6-11(b) and FRE 801(d)(1)(B)]
17. testimony admissible only for a limited purpose [CCE 1-4 and FRE 105]
18. answer beyond scope of question (motion to strike)

DURING TRIAL – DOCUMENTS

1. irrelevant [CCE 4-1, 4-2 and FRE 401, 402]
2. immaterial
3. waste of time or cumulative [CCE 4-3 and FRE 403]
4. no foundation
5. prejudice outweighs probative value [CCE 4-3 and FRE 403]
6. confusing or misleading [CCE 4-3 and FRE 403]
7. inadmissible opinion of lay witness [CCE 7-1 and FRE 701]
8. privileged
9. not authenticated [CCE 9-1, 9-2 and FRE 901, 902]
10. improper copy [CCE 1-2 and FRE 1003]
11. public record not certified or insufficient supporting testimony [CCE 9-3, 10-4 and FRE 902(1) to (5) and 1005]
12. summary if underlying documents not made available as required [CCE 10-5 and FRE 1006]
13. not disclosed as required by mandatory disclosure [Fed R. Civ. P. 26(a)]
14. not disclosed as required by a document request to which opposing counsel did not object in the discovery phase [Practice Book Sec. 13-10 and Fed. R. Civ. P. 34(b)]
15. not disclosed as required by a pre-trial order
16. document admissible only for a limited purpose [CCE 1-4 and FRE 105]



Object Strategically to Questions on Direct

Listen carefully to each question posed by the plaintiff's counsel. That's one reason not to take copious notes of the witness's answers. As each question is asked, consider: Is the question improperly leading? Does it call for hearsay, irrelevant or immaterial testimony, assume facts not in evidence, or seek an answer for which there is no foundation? Is it otherwise objectionable? Be poised to stand and object before the witness can answer. Be prepared to object on more than one ground if you can. State your strongest objection first.

Make objections timely. Don't interrupt the question posed by the plaintiff's counsel, but don't wait until the answer is in the record before objecting. If you wait until the answer is given, you are relegated to making a motion to strike. As discussed below, the untimeliness of your objection is especially a problem in jury cases.

You have an arsenal of objections to keep out testimony and exhibits. At trial, you could object to each potentially objectionable question, and you may even keep some things out of the record by doing so. It is far more effective, though, to object strategically.

Objecting strategically means asking yourself, before you stand up to object, whether you can accomplish something meaningful by objecting. If a question is readily fixable and you have good reason to believe that opposing counsel will fix it, don't bother to object. For example, if opposing counsel has not established all the elements for the business record exception to the hearsay rule (FRE 803(6)), but can easily do so by asking a follow-up question – and will get the right answer – then what do you accomplish by objecting? On the other hand, if you doubt opposing counsel can satisfy the requirements of FRE 803(6), certainly object.

When you object, you may decide not to telegraph more than necessary, especially when opposing counsel is struggling in attempting to get something into the record. If the judge does not require more from you and knows the rules of evidence, simply say: "Objection." If the judge sustains your objection, without explanation, plaintiff's counsel will have the burden of figuring out what the problem is. Be prepared, though, to state the basis for each objection, including citation to the applicable rule of evidence. And when given the opportunity, weave your counter-theme into your objection, so you can frame the evidentiary issue to your client's benefit.

How do you know when to object? In preparing for trial, ask yourself what testimony and exhibits plaintiff's counsel will want to get into the record and whether you have a proper basis to keep out any of it. Strategically, object to testimony and evidence that both hurts your case and is objectionable. By picking your shots, you will find that the judge is more likely to pay close attention to the objections you *do* raise,



and you will have greater success in limiting plaintiff's evidence. Also consider filing a motion *in limine*. Even if you don't file that motion, be prepared at trial to state the basis for each objection and have appropriate authorities at your fingertips, including the applicable section of the rules of evidence.

Listen carefully to the judge's words when ruling on your objections, and adjust your later objections based on what you learn. For example, if a judge's interpretation of what is a leading question is far more limited than yours (allowing answers to questions you consider leading but the judge does not), you accomplish little, and risk antagonizing the judge, by repeatedly objecting to such questions.

This does not mean that you refrain from protecting the record. On evidentiary issues that truly make a difference in a case, you must object and create a record at trial sufficient for a successful appeal if you get an adverse ruling. Keep in mind, though, that appellate courts give trial courts wide latitude in evidentiary rulings, and very few cases are overturned on appeal as a result of errors in such rulings.

Object to Plaintiff's Exhibits When Appropriate

For each document you expect plaintiff will want to put into the record, determine before trial whether you have a valid basis to object. Here are just some examples: Is it irrelevant (CCE 4-1 and FRE 402), and, even if relevant, is it excludable under CCE 4-3 and FRE 403? Does it include hearsay (CCE 8-1 and FRE 801), not within one of the exceptions in CCE 8-3 and FRE 803? Is it properly authenticated, as required in CCE 9-1 and FRE 901, assuming the self-authenticating provisions of CCE 9-1 (Official Comment (b)), 9-3, and 10-4, and FRE 902 do not apply? If it is a summary, has plaintiff complied with CCE 10-5 and FRE 1006?

If you conducted proper discovery, including comprehensive document requests, well before trial, you will have received and analyzed all the documents plaintiff's counsel may want to put into the record at trial. Pre-trial orders typically require both parties to disclose a list of documents they intend to put into the record. You should have at your fingertips a list of all such documents, and copies of all of them, indexed in a separate three-ring binder, on your computer, or both.

One reason for such comprehensive discovery is avoiding surprises at trial, including that all-time favorite, the smoking gun document. But what do you do if, at trial, plaintiff's counsel seeks to put into evidence a document that you had not received in discovery?

You must determine whether that document is within your pre-trial document requests, whether by request for production of documents pursuant to Practice Book Sec. 13-9 and Fed. R. Civ. P. 34 (note the continuing duty to disclose in Practice Book Sec. 13-15 and Fed. R. Civ. P. 26(e)), or a document to be produced at deposition,



pursuant to Practice Book Sec. 13-27(a) and Fed. R. Civ. P. 30(b)(5). You should object to any unproduced document offered at trial that you asked for in pre-trial discovery. An informal pre-trial document request is likely useless here.

To avoid the risk that the judge will consider plaintiff's failure of production a mere oversight of little consequence, when objecting you should emphasize the significance of the document, how it is clearly within the scope of the documents you sought, and, most importantly, the prejudice your client suffers from the failure of disclosure. Be prepared for the judge to suggest a way to minimize the prejudice by allowing you to take a deposition or conduct other discovery in the middle of the trial. After all, the judge may say, a trial is a search for the truth (see CCE 1-2(a) and FRE 102), so why keep out of the record a key document just because of a technicality, especially where any prejudice can be minimized?

You can respond, if true, that your trial strategy is based on the documents plaintiff's counsel produced; that further discovery in the middle of trial cannot undo that prejudice; that the court should not condone – and certainly not reward – plaintiff's counsel gaming the system; and that a break in the trial would be disruptive. This last argument is even more effective in a jury trial.

When appropriate, you can conduct voir dire of a witness in establishing the basis for your objecting to a document being made an exhibit. Such voir dire can give you the opportunity to reinforce your counter-theme, while interrupting the flow of plaintiff's presentation.

Offers of Proof

If a judge sustains your objection to testimony or to a document being made a full exhibit, opposing counsel has the right to make an offer of proof. FRE 103 provides, in part, that if a judge excludes evidence that affects a substantial right of a party, error is preserved by informing the court of its substance by an offer of proof, unless the substance was apparent from the context. By an offer of proof, an attorney informs the judge what would be put in the record but for the judge's exclusionary ruling. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means, so offers of proof are made outside the presence of the jury.

There is no Connecticut Code of Evidence analog to FRE 103. Even so, the procedure for making an offer of proof in state court is essentially the same as in federal



court. Making an offer of proof is crucial to preserve your right to appeal the trial judge's evidentiary rulings.

If opposing counsel makes an offer of proof, and you have good reason to conclude that the judge has made reversible error by excluding evidence, consider withdrawing your objection as to what the court excluded if it may raise a substantial appellate issue. This strategic decision requires careful thought, because you want to keep out evidence that is properly inadmissible, and you have already won the battle on a particular evidentiary issue. If on a crucial issue, you may want to request a brief recess to give yourself time to think.

Keep Out Expert Testimony in Federal Court

FRE 702 and 703

Rule 702 provides that an expert witness may testify "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" based on the reliability factors summarized below. Rule 703 sets forth the permissible bases of opinion testimony by experts, including hearsay.

Key Cases

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

Court rejects the *Frye* rule, which had required that a scientific theory be generally accepted by the scientific community to be admissible. *Frye v. United States*, 293 F. 1013, 1014 (D. C. Cir. 1923). Trial court judges are gatekeepers to exclude unreliable expert testimony.

Two-step analysis required, if witness qualified as an expert: whether the reasoning or methodology underlying the expert's testimony is valid, and whether that reasoning or methodology properly can be applied to the facts in issue

Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999)

Trial court judges' gatekeeping function applies to *all* expert testimony, such as testimony based on technical or other specialized knowledge, not just to scientific testimony. The *Daubert* factors are not exhaustive or definitive, and do not apply exclusively to all experts or in all cases.

General Electric Co. v. Joiner, 522 U.S. 136 (1997)

"Abuse of discretion" is the proper standard by which to review a district court's decision to admit or exclude scientific evidence. A court of appeals in applying the



“abuse of discretion” standard may not categorically distinguish between rulings allowing expert testimony and rulings disallowing it. Court rejects position that a *particularly stringent* standard of review applies to the trial judge’s *exclusion* of expert testimony.

Burden of Proof

FRE 104(a) provides that it is for the court to determine whether someone is qualified to testify. The proponent of expert testimony has the burden of demonstrating, by a preponderance of the evidence, that the testimony is competent (*i.e.*, qualified), relevant, and reliable.

Relevance Issue

Will the expert’s scientific, technical, or other specialized knowledge assist the trier of fact to understand the evidence or to determine a fact in issue? If so, can the expert’s reasoning or methodology be properly applied to the facts before the court? Is an untrained layperson qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute. Expert testimony is generally admissible so long as it will assist the trier of fact to understand the evidence or to determine any fact in issue.

When Expert Testimony Excluded Even If Relevant

Even if expert testimony is relevant, the trial court should exclude it if it is directed solely to lay matters which a jury is capable of understanding and deciding without the expert’s help, where it is unreliable, or where FRE 403 applies.

FRE 403 provides: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

Reliability Issue

The reliability requirement applies to all aspects of the expert’s testimony: methodology, facts underlying the expert’s opinion, and the link between the facts and the conclusions.

FRE 702 sets forth the requirement of reliability. The testimony of 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 as to relevant matters only if the following three criteria are met:



1. the testimony is based on sufficient facts or data
2. the testimony is the product of reliable principles and methods
3. the expert has reliably applied the principles and methods to the facts of the case.

No single factor is dispositive. The trial court enjoys broad latitude. Factors trial courts can consider include the nature of the issue, the expert's particular expertise, the subject matter of the expert's testimony, Rule 702 factors, and additional factors courts have developed.

The trial court must rigorously examine:

1. the data on which the expert relies – is the testimony grounded on sufficient facts or data?
2. the method by which the expert's opinion is drawn from applicable studies and data – is the testimony the product of reliable principles and methods?
3. the application of the data and methods to the case at hand – has the witness applied the principles and methods reliably to the facts of the case?

Additional reliability factors are as follows:

1. whether a theory or technique has been or can be tested
2. whether the theory or technique has been subjected to peer review and publication
3. the technique's known or potential rate of error and the existence and maintenance of standards controlling the technique's operation
4. the existence and maintenance of standards controlling the technique's operation
5. whether a particular technique or theory has gained general acceptance in the relevant scientific community
6. whether the theory or method has been put to any non-judicial use
7. whether the expert's proposed testimony is about matters growing naturally and directly out of research the expert conducted independent of



the litigation, or whether the expert developed the opinion expressly for the purpose of testifying.

8. whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion
9. whether the expert has adequately accounted for obvious alternative explanations
10. whether the expert is being as careful as he or she would be in the expert's regular professional work outside paid litigation consulting
11. whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give

Expert testimony must be excluded if:

1. there is so great an analytical gap between the data and the opinion proffered that the opinion is connected to the existing data only by the *ipse dixit* of the expert
2. it is speculative or conjectural
3. it is based on assumptions so unrealistic and contradictory as to suggest bad faith or to be in essence an "apples and oranges" comparison
4. its prejudicial effect outweighs its probative value

For an article discussing the *Daubert* factors in cases excluding expert evidence on the issue of lost profits, see "*Daubert* and Lost-Profits Testimony," [Trial Magazine](#) (September, 2005).

Where Expert Testimony Only on General Principle

If an expert is testifying only about a general principle, without applying that general principle to the facts of a case, all that is required:

1. the expert is qualified
2. the testimony addresses a subject matter on which an expert can assist the fact finder



3. the testimony is reliable

Expert's Reliance on Hearsay

Rule 703 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."

Appellate Review

The trial court has wide discretion; a decision to admit or exclude expert testimony may be reversed only on a finding of abuse of discretion, requiring a finding that it is manifestly erroneous. A trial court's determination with respect to admission of expert testimony is not an abuse of discretion unless it is manifestly erroneous.

Keep Out Expert Testimony in State Court

CCE 7-2 provides that a witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue. CCE 1-3 provides that it is for the court to determine the qualification and competence of a person to be a witness.

The Official Commentary to CCE 7-2 is very instructive. It states that this code section imposes two conditions on admissibility of expert testimony: 1) the witness must be qualified as an expert, which is a function of whether, based on the witness's knowledge, skill, experience, and the like, his or her testimony will assist the trier of fact; and 2) the witness's testimony must assist the trier of fact in understanding the evidence or determining a fact in issue. To meet this second criterion, the expert's specialized knowledge upon which his or her testimony is based must go beyond the common knowledge and comprehension of the average juror. The subject matter of such testimony extends to all specialized knowledge, not just scientific or technical fields.

The seminal case in Connecticut on this issue is *State v. Porter*, 241 Conn. 57 (1997), *cert. denied*, 523 U.S. 1058 (1998), in which the Connecticut Supreme Court held that, in admitting scientific evidence, trial judges serve in a gatekeeper function in determining whether such evidence will assist the trier of fact. In *Porter*, the court took an approach similar to that in *Daubert*.



Porter requires that the trial judge first determine whether the proffered scientific evidence is reliable, *i.e.*, if the reasoning or methodology underlying the evidence is scientifically valid. In addition to reliability, the trial judge must determine that the proffered scientific evidence is relevant, *i.e.*, that the reasoning or methodology underlying the scientific theory or technique in question properly can be applied to the facts in issue.

Non-exclusive factors the *Porter* court held that trial judges should consider in deciding the reliability of scientific evidence include the prestige and background of the expert witness; the extent to which the scientific technique in question relies on subjective interpretations and judgments by the expert, rather than objectively verifiable criteria; whether the expert can present and explain the data and methodology underlying his or her scientific testimony in such a manner that the fact finder can reasonably and realistically draw its own conclusions therefrom; and whether the scientific technique underlying the proffered testimony was developed and implemented solely to develop evidence for use in court, or for extrajudicial purposes as well.

The Official Commentary to CCE 7-2 takes no position on whether this analysis applies to testimony based on technical and specialized knowledge other than scientific knowledge. See the discussion of *Kumho Tire*, above, holding that the trial court judges' gatekeeping function applies to *all* expert testimony.

Whether in state or federal court, the procedure to keep out expert testimony is to request and conduct a pretrial evidentiary hearing, known in federal court as a *Daubert* hearing, and in state court as a *Porter* hearing. At that hearing, the court hears testimony and receives evidence on the criteria listed above as to the admissibility of expert opinion testimony.

