DEVELOPMENTS IN FIFTH CIRCUIT EVIDENCE LAW: 2013–2014

William J. Stowe[*] *and Michael J. Woodson*[**]

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* Associate, Litigation, Jackson Walker L.L.P., Houston, Texas; J.D., University of Virginia School of Law, 2010.

** Associate, Litigation, Jackson Walker L.L.P., Houston, Texas; J.D., South Texas College of Law, 2012.

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I. INTRODUCTION

Several important developments in federal evidence law occurred during the period of this survey, July 2013 through June 2014. First, an important amendment to Federal Rule of Evidence 803(10), governing the hearsay exception for the absence of public records, became effective on December 1, 2013.[1] The amendment was designed to alleviate constitutional concerns in the wake of a Supreme Court opinion addressing whether certifications are "testimonial" for purposes of the Confrontation Clause.[2]

Second, the Fifth Circuit issued opinions on a variety of evidence-related topics, including the standards for admissibility of expert testimony, authentication of business records, application of various hearsay exceptions, and the admissibility of testimony concerning the meaning of words.

II. AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

The Supreme Court adopted—effective December 1, 2013—an amendment to the hearsay exception for the absence of public records in Federal Rule of Evidence 803(10) following the recommendation of the Judicial Conference Committee on Rules of Practice and Procedure (Committee).[3] The amendment was adopted in response to the Supreme Court's holding in *Melendez-Diaz v. Massachusetts*, where the Court held that certificates of analysis from a state laboratory were "testimonial" for purposes of the Confrontation Clause.[4] Prior to the amendment, Rule 803(10) allowed the Government, in a criminal case, to use a certificate to prove that a public record did not exist.[5] The Committee recognized, however, that under *Melendez-Diaz* "the certificate would often be 'testimonial' within the

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1. *See infra* Part II.

2. *See infra* Part II.

3. *See* Summary of the Report of the Judicial Conference, Committee on Rules of Practice and Procedure, at 33–35 (Sept. 2012), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2012.pdf [hereinafter Committee Report]; CHIEF JUSTICE JOHN G. ROBERTS, JR., AMENDMENT TO THE FEDERAL RULES OF EVIDENCE, H.R. DOC. NO. 113-26, at 1–2 (2013), http://www.gpo.gov/fdsys/pkg/CDOC-113hdoc26/pdf/CDOC-113hdoc26.pdf (letter from Chief Justice Roberts to Speaker Boehner); *see also* FED. R. EVID. 803 advisory committee's note (amended 2013).

4. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009); *see also* Peter Nicolas, *But What if the Court Reporter Is Lying? The Right to Confront Hidden Declarants Found in Transcripts of Former Testimony*, 2010 BYU L. REV. 1149, 1175 (2010) (addressing the impact of *Melendez-Diaz* on the use of certificates of non-existence of records under Rule 803(10)); Committee Report, *supra* note 3, at 34 (noting that the amendment to Rule 803(10) was intended "to avoid a constitutional infirmity in the current rule in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*").

5. Committee Report, *supra* note 3, at 34.

meaning of the Confrontation Clause."[6] Thus, the Committee concluded that under *Melendez-Diaz* "the admission of certificates (in lieu of testimony) violates the accused's right of confrontation."[7]

The new version of Rule 803(10) attempts to solve this problem through a "notice-and-demand" procedure that, with minor variations, was approved by the *Melendez-Diaz* Court.[8] Specifically, amended Rule 803(10) provides that a certification of the non-existence of a public record is only permitted if the "prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice."[9] Amended Rule 803(10) also allows the court to set a different time for the notice or the objection.[10]

III. SIGNIFICANT FIFTH CIRCUIT OPINIONS ON EVIDENCE

A. The Importance of Ensuring that an Expert's Analysis Is Linked with the Facts of a Case and Founded upon a Scientifically Reliable Methodology: Diggs v. Citigroup, Inc.

In *Diggs v. Citigroup, Inc.*, the Fifth Circuit addressed the importance of linking an expert's opinion to the facts of the case and buttressing the expert's opinion with a scientifically reliable methodology.[11] The plaintiff filed a wrongful-termination suit against her former employer "alleging sex discrimination in violation of Title VII and the Family and Medical Leave Act."[12] The employer moved to dismiss and compel arbitration based on an arbitration agreement that the plaintiff signed upon employment.[13]

In seeking to avoid enforcement of the arbitration agreement, the plaintiff argued that "(1) the arbitration agreement was unenforceable because of fraud, mistake, or prior breach; (2) [the] arbitration policy was unconscionable; and (3) mandatory employment arbitration before the [American Arbitration Association] violates public policy."[14] Importantly, the plaintiff relied on a study conducted by a university professor, which contended "that arbitration awards in employment disputes dispropor-

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6. *Id.*; *see Melendez-Diaz*, 557 U.S. at 323; Crawford v. Washington, 541 U.S. 36, 51–52 (2004).

7. Committee Report, *supra* note 3, at 34.

8. FED. R. EVID. 803(10) advisory committee's note; *see Melendez-Diaz*, 557 U.S. at 326–27 (discussing notice-and-demand statutes).

9. FED. R. EVID. 803(10)(B).

10. *Id.*

11. Diggs v. Citigroup, Inc., 551 F. App'x 762, 765 (5th Cir. Jan. 2014) (per curiam). Although *Diggs* is unpublished and, therefore, not controlling precedent, it may be persuasive authority and can be cited. *See* FED. R. APP. P. 32.1(a); 5TH CIR. R. 47.5.4; Ballard v. Burton, 444 F.3d 391, 401 n.7 (5th Cir. 2006).

12. *Diggs*, 551 F. App'x at 763.

13. *See id.*

14. *Id.* at 763–64.

tionately favor employers over employees."[15] The plaintiff also relied on an affidavit from the professor summarizing his findings.[16] After referral of the employer's motion to a magistrate judge, the district court adopted the magistrate judge's recommendation that the employer's motion to compel arbitration be granted.[17] The district court disregarded the study because it did not satisfy the standards set forth in Rule 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and *Kumho Tire Co. v. Carmichael*.[18]

The Fifth Circuit affirmed the district court's decision to disregard the expert's study and affidavit.[19] The Fifth Circuit noted that *Daubert* and *Kumho* call not only for "evidentiary reliability," but also "a valid . . . connection to the pertinent inquiry as a precondition to admissibility."[20] The Fifth Circuit noted that the study provided "no case-specific analysis to aid the trier of fact in determining whether the arbitration agreement between [the plaintiff] and [the defendant was] enforceable."[21] Further, the expert did not prepare an affidavit explaining the implications of his study on the facts of the case.[22] Indeed, the expert's affidavit was prepared three years before the lawsuit was filed in connection with another case involving different parties who were engaged in post-arbitration litigation.[23]

The Fifth Circuit also held that the expert's analysis failed to meet the reliability threshold for admission of expert testimony.[24] Specifically, the expert's study compared "arbitration statistics from the years 2003–2007 to litigation statistics from 1996 (state court) and 1999/2000 (federal court)."[25] The Fifth Circuit noted that "[c]omparing statistics from variant time periods in this fashion could result in misleading conclusions."[26] Additionally, because the study's data was compiled at least five years before the lawsuit was filed, the Fifth Circuit noted that "[s]ignificant changes in litigation and arbitration outcomes may have occurred during that span of time."[27] Thus,

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15. *Id.* at 764.

16. *Id.*

17. *See id.*

18. *See id. See generally* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (extending *Daubert* to apply to all expert testimony); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (stating that admitted scientific testimony must be relevant and reliable).

19. *See Diggs*, 551 F. App'x at 765.

20. *Id.* (alteration in original) (quoting *Kumho Tire Co.*, 526 U.S. at 149); *see also* Knight v. Kirby Inland Marine Inc., 482 F.3d 347, 355 (5th Cir. 2007) (holding an expert's testimony inadmissible when that expert "failed to provide a 'relevant' link with the facts at issue").

21. *Diggs*, 551 F. App'x at 765.

22. *Id.*

23. *See id.* In similar contexts, courts have held that an expert's testimony prepared for another case is inadmissible hearsay. *See, e.g.*, Kirk v. Raymark Indus., Inc., 61 F.3d 147, 165 (3d Cir. 1995) (holding that the testimony of an expert in a prior, unrelated action was hearsay and thus inadmissible under the former-testimony exception).

24. *See Diggs*, 551 F. App'x at 765.

25. *Id.*

26. *Id.*

27. *Id.*

the Fifth Circuit upheld the district court's decision to disregard the expert's study and affidavit.[28]

B. The Co-Conspirator Hearsay Exclusion Under Rule 801(d)(2)(E), Waiver of the Exclusionary Provisions of Rule 410, and the Attorney–Client Privilege Under Federal Common Law: United States v. Nelson

The Fifth Circuit addressed three notable evidence-related topics in *United States v. Nelson*: the hearsay exclusion for statements of a co-conspirator, admissibility of a plea agreement that is later withdrawn, and the application of the attorney–client privilege under federal common law.[29] In *Nelson*, the defendant, a former mayor, was convicted of corruption-related offenses after he allegedly took bribes in exchange for supporting the efforts of a company, Cifer, to obtain government contracts for cleaning waste containers.[30] The defendant initially agreed to plead guilty by signing a plea agreement.[31] The plea agreement contained a waiver clause providing that if the defendant failed to plead guilty, the Government could use any information provided by the defendant, including a factual stipulation contained in the plea agreement, against the defendant.[32] After signing the plea agreement, however, the defendant retained an alternate attorney and decided to plead not guilty.[33]

At trial, the district court admitted testimony from the defendant's attorney during the plea-bargaining stage "about the circumstances surrounding [the defendant's] signing of the stipulated factual basis."[34] The district court also admitted video excerpts of a recorded conversation between a paid cooperating witness and another Louisiana mayor, who—along with the defendant—were part of a close-knit group of several mayors.[35] The defendant argued that the district court erred because it admitted the video excerpts, the factual statement contained in the plea agreement, and the testimony of the defendant's prior attorney.[36]

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28. *Id.*

29. *See* United States v. Nelson, 732 F.3d 504, 515–20 (5th Cir. Oct. 2013), *cert. denied*, 134 S. Ct. 2682 (2014).

30. *See id.* at 509–13.

31. *Id.* at 512.

32. *Id.* at 513.

33. *See id.*; *see also* United States v. Barrow, 400 F.3d 109, 116 (2d Cir. 2005) (citing FED. R. EVID. 410 advisory committee's note) ("The underlying purpose of Rule 410 is to promote plea negotiations by permitting defendants to talk to prosecutors without sacrificing their ability to defend themselves if no disposition agreement is reached."); 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 410.02 (2d ed. 2015) (providing a general discussion on the admissibility of withdrawn guilty pleas).

34. *Nelson*, 732 F.3d at 513

35. *See id.* at 509–10, 513.

36. *Id.* at 513.

1. Rule 801(d)(2)(E)

The Fifth Circuit held that the district court did not abuse its discretion in admitting the video excerpts under the co-conspirator hearsay exclusion in Rule 801(d)(2)(E).[37] The Fifth Circuit noted that to admit evidence under this rule, the party seeking to introduce the evidence must show "(1) the existence of a conspiracy, (2) [that] the statement was made by a co-conspirator of a party, (3) the statement was made during the course of the conspiracy, and (4) the statement was made in furtherance of the conspiracy."[38] The Fifth Circuit observed that the conspiracy, for the purpose of the hearsay exclusion, need not be unlawful.[39] There was evidence that the defendant and the mayor who had been recorded "were, at the least, engaged in a common scheme to recruit Cifer's business" to their respective towns.[40] The Fifth Circuit noted that the defendant and the other mayor had met previously with the paid cooperating witness to discuss the benefits of the company for the mayors' communities.[41] The finding of a common scheme was also supported by the statements of the defendant, who "told FBI agents that he understood [the other mayor] was . . . putting the whole Cifer deal together."[42] Because the requirements of Rule 801(d)(2)(E) were satisfied, the Fifth Circuit affirmed the admission of the video excerpts.[43]

2. Rule 410

The Fifth Circuit also held that the admission of the factual statement in the plea agreement was not barred by Rule 410, which prohibits the use of "a guilty plea that was later withdrawn" or "a statement made during a proceeding on [that plea] under Federal Rule of Criminal Procedure 11."[44] The Fifth Circuit observed that "absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable."[45] The Fifth Circuit rejected the defendant's implicit argument that the Government must have detrimentally relied on the plea agreement to

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37. *Id.* at 516.

38. *Id.* (alteration in original) (quoting United States v. Robinson, 367 F.3d 278, 291 (5th Cir. 2004)) (internal quotation marks omitted); *see also* United States v. El-Mezain, 664 F.3d 467, 502 (5th Cir. 2011) (setting forth the elements).

39. *Nelson*, 732 F.3d at 516.

40. *Id.*

41. *Id.*

42. *Id.* (internal quotation marks omitted).

43. *See id.*

44. *Id.* at 517; FED. R. EVID. 410(a).

45. *Nelson*, 732 F.3d at 517 (quoting United States v. Mezzanatto, 513 U.S. 196, 210 (1995)).

introduce it after it has been withdrawn.[46] The Fifth Circuit also noted that counsel was involved in the waiver of Rule 410.[47]

3. Attorney–Client Privilege

The Fifth Circuit's ruling on the attorney–client privilege in this case is also noteworthy. The Fifth Circuit held that the attorney–client privilege applied, and hence the district court erred in admitting the testimony.[48] Because this was a federal criminal case in which state law did not supply the rule of decision, federal common law governed the claim of privilege.[49]

The Fifth Circuit began by noting that "[t]he mere appearance of an attorney testifying against a former client[ ] . . . is distasteful and should only be used in rare instances."[50] The Fifth Circuit recognized that it may be permissible to admit an attorney's evaluation of his client's mental competency during plea bargaining under the theory that it is not a private, confidential communication: the attorney is as "qualified as a layman to express a view as to his client's mental competency."[51] The Fifth Circuit held, however, that the former attorney's testimony in this case was not limited to observations about the defendant's "demeanor that could have easily been made by a layperson; nor was it offered outside the presence of a trial jury on a narrow issue like competency or voluntariness."[52] Instead, the former attorney testified that the defendant had read the plea agreement with her, that he understood and agreed with it, and that he signed it only after a lengthy discussion with his experienced attorney.[53] The Fifth Circuit held that such information "reveal[ed] more than the plain fact of the voluntariness" of the defendant's signature on a guilty plea attestation.[54] Although it was an error to admit the testimony, the Fifth Circuit held that the error was harmless since the testimony was largely cumulative of other evidence and the district court had limited the former attorney's testimony.[55]

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46. *Id.*

47. *Id.*

48. *See id.* at 519–20.

49. *See* FED. R. EVID. 501; *see also Nelson*, 732 F.3d at 519 (relying on FED. R. EVID. 501).

50. *Nelson*, 732 F.3d at 519 (alteration in original) (quoting United States v. Cochran, 546 F.2d 27, 29 n.5 (5th Cir. 1977)).

51. *Id.* (quoting Clanton v. United States, 488 F.2d 1069, 1071 (5th Cir. 1974)).

52. *Id.* (footnote omitted).

53. *Id.*

54. *Id.*; *see also* United States v. Robinson, 121 F.3d 971, 974 (5th Cir. 1997). "The assertor of the lawyer-client privilege must prove: (1) that he made a confidential communication; (2) to a lawyer or his subordinate; (3) for the primary purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding." *Robinson*, 121 F.3d at 974 (emphasis omitted) (citation omitted).

55. *See Nelson*, 732 F.3d at 519–20.

C. "Pattern or Practice" Evidence in Discrimination Cases and the Challenge of Striking the Appropriate Balance Under Rule 403: Lawson v. Graphic Packaging International Inc.

In *Lawson v. Graphic Packaging International Inc.*, the Fifth Circuit addressed the admissibility of "pattern or practice" evidence in discrimination cases and the impact of Rule 403 on the analysis thereof.[56] Here, the plaintiff sued his former employer, alleging that the former employer terminated him because of his age in violation of the Age Discrimination in Employment Act (ADEA).[57] On appeal, the plaintiff argued that the district court erred in excluding the plaintiff's testimony recounting detailed examples of his former boss's prior discriminatory conduct toward other employees.[58] The district court sustained the employer's objection under Rule 403 to "detailed testimony" concerning an alleged prior instance of discrimination, but it permitted the plaintiff to testify repeatedly "in a more limited fashion" as to his former boss's alleged discriminatory conduct toward several other employees.[59]

The Fifth Circuit upheld the district court's decision under Rule 403 to allow only limited testimony concerning alleged prior instances of discrimination.[60] The Fifth Circuit recognized that testimony concerning "similarly situated employees and the reasons for their discharge [is] relevant in proving a pattern and practice of age discrimination."[61] A plaintiff, however, "may not effectively force the employer to defend 'mini-trials' on other employees' claims of discrimination that are 'not probative on the issue of whether [the plaintiff] faced discrimination.'"[62]

The Fifth Circuit held that "the district court struck a considered balance between permitting the jury to consider 'pattern and practice' evidence and avoiding introduction of cumulative evidence."[63] Specifically, the district court allowed limited testimony from the plaintiff regarding alleged instances of discrimination directed toward other employees, but disallowed the detailed testimony that plaintiff sought to introduce.[64] Additionally, the Fifth Circuit pointed out that the district court had allowed the plaintiff's attorney

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56. Lawson v. Graphic Packaging Int'l Inc., 549 F. App'x 253, 256 (5th Cir. Dec. 2013) (per curiam).

57. *Id.* at 255.

58. *Id.*

59. *Id.* at 256. Courts routinely apply Rule 403 in determining whether to admit pattern or practice evidence. *See, e.g.*, Haskell v. Kaman Corp., 743 F.2d 113, 121–22 (2d Cir. 1984) (holding that the court erred in allowing six former company officers to testify concerning the circumstances of their own terminations as pattern or practice evidence after applying Rule 403).

60. *See Lawson*, 549 F. App'x at 256.

61. *Id.* (alteration in original) (quoting Harpring v. Cont'l Oil Co., 628 F.2d 406, 409 (5th Cir. 1980)).

62. *Id.* (alteration in original) (quoting Wyvill v. United Cos. Life Ins. Co., 212 F.3d 296, 303 (5th Cir. 2000)).

63. *Id.*

64. *Id.*

to cross-examine the former boss concerning his age-related comments to other employees.[65] Thus, the Fifth Circuit approved of the district court's decision under Rule 403 to allow the pattern or practice testimony, but only in limited form.[66]

D. Admissibility of Habit Evidence Under Rule 406: United States v. Anderson

The Fifth Circuit addressed the use of "habit evidence" under Rule 406 in *United States v. Anderson*.[67] The jury convicted the defendant of aiding and abetting a bank robbery after he picked up another individual, Jeremy Butler, who had just robbed a bank.[68] The defendant argued that the district court erred in excluding evidence that Butler had robbed a bank alone two weeks prior to the incident in question.[69] According to the defendant, such evidence qualified as habit evidence under Rule 406 and was crucial to his defense because it made it more probable that Butler acted alone during the incident.[70]

The Fifth Circuit rejected the defendant's argument that the evidence was admissible as habit evidence under Rule 406.[71] The Fifth Circuit noted that "[t]o offer evidence of a habit, a party must at least demonstrate a regular practice of meeting a particular kind of situation with a specific type of conduct."[72] The Fifth Circuit held that evidence "that Butler committed *one* prior bank robbery alone [did] not demonstrate that . . . he acted in conformity with a habit of committing bank robberies alone" on the date in question.[73] There simply "was no evidence that robbing banks alone was Butler's regular practice."[74] Thus, the Fifth Circuit held that the district court did not abuse its discretion in excluding the evidence.[75]

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65. *Id.*

66. *See id.*

67. United States v. Anderson, 755 F.3d 782, 794 (5th Cir. June 2014); *see* WEINSTEIN & BERGER, *supra* note 33, § 406 (providing a general discussion of Rule 406 and cases applying Rule 406).

68. *Anderson*, 755 F.3d at 789.

69. *Id.* at 793.

70. *Id.* at 793–94.

71. *See id.* at 794.

72. *Id.* (quoting United States v. Heard, 709 F.3d 413, 434 (5th Cir. 2013)).

73. *Id.*; *see also* U.S. Football League v. NFL, 842 F.2d 1335, 1373 (2d Cir. 1988) (excluding testimony about the NFL's alleged "'habitual disregard' of antitrust advice" under Rule 406 because "three or four episodes over a 20–year period" was insufficient to establish a pattern of behavior).

74. *Anderson*, 755 F.3d at 794 (internal quotation marks omitted).

75. *Id.*

E. Reasonable Notice of Intent to Offer Business Records for Purposes of Authentication Under Rule 902(11): United States v. Daniels

In *United States v. Daniels*, the Fifth Circuit addressed what constitutes reasonable notice for purposes of authenticating business records under Rule 902(11)—a procedural tool frequently used by both civil and criminal attorneys.[76] In *Daniels*, the defendants were convicted of "conspiracy to distribute and to possess with intent to distribute five kilograms or more of cocaine."[77] On the second day of trial, the Government sought to authenticate certain business records using attestations provided by custodians of record pursuant to Rule 902(11).[78] But because the Government had not given written notice to the defendants of its intent to do so, the defendants argued that the attestations were untimely under Rule 902(11).[79]

At the time of the trial, the version of Rule 902(11) in effect provided that:

> [A] party intending to offer a record into evidence . . . "must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them."[80]

The Fifth Circuit recognized that the language of Rule 902(11) had been amended in 2011, but "the changes to Rule 902(11) were stylistic only."[81] Thus, the question under either version was whether the attestations were provided to opposing counsel "a reasonable time before trial."[82]

At trial, the district court offered two solutions to the lack of timely written notice: the district court could (1) "grant *instanter* subpoenas to have the record custodians come and testify and could attach an order to the subpoenas if necessary"; or (2) "grant a full day's continuance to allow defense counsel to evaluate the attestations and obtain witnesses."[83] After further discussion, the Government then proposed that it would "restructure

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76. *See* United States v. Daniels, 723 F.3d 562, 579–81 (5th Cir. July), *modified*, 729 F.3d 496 (5th Cir. Sept. 2013), *cert. denied*, 134 S. Ct. 973, *and* 134 S. Ct. 974, *and* 134 S. Ct. 975, *and* 134 S. Ct. 977 (2014).

77. *Id.* at 564.

78. *Id.* at 579.

79. *Id.* at 580.

80. *Id.* at 579 (quoting FED. R. EVID. 902(11)); *see also* United States v. Jordan, 544 F.3d 656, 669–70 (6th Cir. 2008) (addressing delay in serving notice under Rule 902(11)).

81. *Daniels*, 723 F.3d at 579 (internal quotation marks omitted) (citing FED. R. EVID. 902 advisory committee's note). In *Daniels*, the Fifth Circuit recognized that Rule 902(11) "now provides that the party seeking to introduce the record into evidence provide 'reasonable written notice' '[b]efore the trial or hearing.'" *Id.* (alteration in original) (quoting FED. R. EVID. 902(11)).

82. *Id.*

83. *Id.* at 580.

its case so as not to use the attestations until three days after the defense raised its objection," arguing that three days' notice was sufficient.[84] The defendants did not select either of the district court's remedies and—after three days—the Government introduced the records and attestations.[85]

The Fifth Circuit held that the three-day period between the time that the Government first gave notice of its intent to introduce the business records by way of custodial attestation and the introduction of the records was sufficient for purposes of Rule 902(11).[86] Significantly, the Fifth Circuit relied on *United States v. Olguin*, in which the Fifth Circuit held that notice was sufficient for purposes of Rule 902(11) when it was given five days before trial.[87] Although the Fifth Circuit conceded that *Olguin* was distinguishable since the notice in that case was given before trial—not in the midst of trial—the Fifth Circuit nevertheless concluded that three days' notice was not "materially unlike" the five days' notice in *Olguin*.[88] Further, the Fifth Circuit noted that the defendants had not availed themselves of the remedies offered by the district court.[89] The Fifth Circuit concluded that "[w]hile it might not be the best practice to admit records upon three days' review in the midst of trial, [it could not] say that it constitute[d] an abuse of discretion."[90]

F. Authenticating Business Records that Have Passed Through Multiple Businesses: United States v. Isgar

In *United States v. Isgar*, the Fifth Circuit addressed a common scenario facing litigators: laying the foundation for the business records hearsay exception when the business's files have been passed through several other businesses and there are no employees available with direct knowledge of the original business's record-keeping practices.[91]

The defendants were convicted of various charges relating to a scheme in which false loan applications were submitted to purchase homes with inflated prices.[92] Two of the defendants operated a title company, First Southwestern Title Company (FSW), which handled the closings.[93] When FSW ceased to exist, its files were acquired by another company, Commonwealth Land Title Insurance (Commonwealth).[94] Thereafter, Commonwealth was acquired by a third company, Fidelity National Title

84. *Id.*
85. *Id.*
86. *Id.* at 580–81.
87. *See id.* (citing United States v. Olguin, 643 F.3d 384, 390 (5th Cir. 2011)).
88. *See id.* at 581.
89. *Id.*
90. *Id.*
91. United States v. Isgar, 739 F.3d 829, 839 (5th Cir. Jan.), *cert. denied*, 135 S. Ct. 123 (2014).
92. *Id.* at 833.
93. *Id.*
94. *Id.* at 839.

Group (Fidelity).[95] At trial, the State introduced the records of FSW through a witness employed by Fidelity, who testified based on an affidavit from a Commonwealth employee.[96] On appeal, the defendants argued that the trial court erred in admitting the documents under the business records exception because the witness offering the records "had never been employed at FSW and could not testify as to its business practices."[97]

The Fifth Circuit held that the witness's testimony was sufficient to lay the foundation for the admission of the business records, even though the witness had never been employed by the business and had relied on an affidavit of another individual who had also never been employed by the business.[98] The Fifth Circuit noted that "a court does not abuse its discretion by admitting documents from a custodian that never worked for the employer that created the documents if that custodian explains 'how she came to possess them and how they were maintained.'"[99] The Fifth Circuit reasoned that the business records exception "hinges on the trustworthiness of the records."[100] In reaching its holding, the Fifth Circuit observed that the witness's testimony (based on the affidavit) established that the intermediary company, Commonwealth, maintained FSW's files and had not removed any documents.[101] The Fifth Circuit also noted that the Commonwealth employee's affidavit stated that FSW's files "appeared to contain the type of records usually found in guaranty files that a title company maintains in the ordinary course of business."[102] Finally, the Fifth Circuit noted that when Fidelity acquired Commonwealth, it "immediately placed FSW's files in storage."[103] The Fifth Circuit concluded that the district court had sufficient evidence of trustworthiness to admit FSW's documents under the business records exception to hearsay.[104]

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95. *Id. Compare id.* (noting that there was insufficient evidence of trustworthiness to admit FSW's files after Fidelity acquired Commonwealth, and even if not, the error was harmless "in light of the other evidence in the record"), *with* United States v. Jakobetz, 955 F.2d 786, 801 (2d Cir. 1992) (rejecting the argument that toll receipts could not be authenticated by a witness from an entity into whose business records toll receipts generated by another were incorporated, noting that "[e]ven if the document is originally created by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity" (citation omitted)).

96. *Isgar*, 739 F.3d at 839.

97. *Id.*

98. *Id.*

99. *Id.* (quoting United States v. Morrow, 177 F.3d 272, 295 (5th Cir. 1999) (per curiam)).

100. *Id.* (quoting *Morrow*, 177 F.3d at 295) (internal quotation marks omitted); *see also* FED. R. EVID. 803(6)(E) (providing that the business records exception will apply only if "neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness").

101. *See Isgar*, 739 F.3d at 839.

102. *Id.*

103. *Id.*

104. *Id.*

G. When Expert Testimony Is Unnecessary to Establish the Standard of Care in Professional Negligence Cases: In re Schooler

In *In re Schooler*, the Fifth Circuit examined whether expert testimony was necessary under Rule 702 to determine if a bankruptcy trustee's conduct deviated from the standard of care.[105] Lamesa National Bank (Lamesa), an unsecured creditor of the bankruptcy debtors, sued Liberty Mutual Insurance Company (Liberty), claiming it was liable as a surety for the bankruptcy trustee.[106]

Robert and Tina Schooler filed for bankruptcy.[107] After the Schoolers filed for bankruptcy, Mrs. Schooler's father died; she was named executrix of his estate and was left a one-half interest in his estate.[108] Upon learning of Mrs. Schooler's interest in the estate, Lamesa repeatedly urged the trustee to take control of the probate estate.[109] Despite the repeated demands by Lamesa, the trustee made no formal demands for the Schoolers to turn over assets from Mrs. Schooler's father's estate.[110] When the trustee finally demanded the Schoolers turn over the assets from Mrs. Schooler's estate, it was too late and all the assets had been dissipated.[111]

Lamesa sued Liberty, arguing it was liable under a surety bond for the trustee's gross negligence.[112] The bankruptcy court held "that the [t]rustee's gross negligence caused damages to the bankruptcy estate in the amount of $112,247.66."[113] On appeal, Liberty claimed that the court erred in finding the trustee grossly negligent without the aid of expert testimony.[114]

The Fifth Circuit noted that the Federal Rules of Evidence do not provide an explicit standard for when expert testimony is needed to determine if a trustee's actions deviated from the professional standard of care.[115] Under Rule 702, "expert testimony may be introduced only when it 'will help the trier of fact to understand the evidence or to determine a fact in issue.'"[116] The Fifth Circuit noted that "although expert testimony may be 'necessary in a professional negligence case to establish the standard of care for the industry,' an exception applies in 'instances of negligence that are a matter of common knowledge comprehensible to laymen.'"[117] The Fifth Circuit

105. Liberty Mut. Ins. Co. v. Lamesa Nat'l Bank *ex rel.* United States (*In re* Schooler), 725 F.3d 498, 514 (5th Cir. Aug. 2013).
106. *Id.* at 499–500.
107. *Id.* at 500.
108. *Id.*
109. *Id.* at 500–01.
110. *Id.* at 502.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 502–03.
115. *Id.* at 514.
116. *Id.* (quoting FED. R. EVID. 702(a)).
117. *Id.* (quoting Rupp v. Ayres (*In re* Fabbro), 411 B.R. 407, 425 n.54 (Bankr. D. Utah 2009)).

held that no special knowledge was required to recognize that the trustee should have taken some action.[118] Although a layperson would not understand what type of action a trustee should take, the layperson could understand that some action was needed.[119] Accordingly, the Fifth Circuit concluded that expert testimony under Rule 702 was unnecessary to establish that the trustee failed to meet the standard of care.[120]

H. Summary Evidence Under Rule 1006 and Testimony Regarding Summary Evidence: United States v. Echols

In *United States v. Echols*, the Fifth Circuit addressed the use of summary evidence under Rule 1006 and testimony accompanying summary evidence.[121] The defendant, a medical director of two home health care agencies, was convicted of conspiracy to commit health care fraud and "making false statements in connection with the delivery of or payments for health care benefits."[122] At trial, the Government's final witness "authenticated and was the admitting witness for numerous summaries of voluminous writings."[123] On appeal, the defendant argued that the witness impermissibly repeated the Government's case-in-chief rather than merely offering charts or summaries of voluminous records.[124]

The Fifth Circuit held that the district court did not err in admitting the witness's testimony.[125] The Fifth Circuit noted that summary evidence is appropriate in three instances.[126] "First, Rule 1006 explicitly allows introduction of a 'summary, chart or calculation' when the 'content of voluminous writings . . . cannot be conveniently examined in court.'"[127] Second, the court noted that experts may "offer opinion testimony that rests on facts or data that reasonably were relied on to form the expert opinion and hence may constitute summary opinion of a specialized character."[128] Third, the court recognized that "summary evidence, usually in the form of demonstrative aids but also . . . in complex cases, through witness testimony accompanying Rule 1006 evidence, may be admissible."[129]

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118. *Id.* at 515.
119. *Id.*
120. *See id.*
121. United States v. Echols, 574 F. App'x 350, 354–56 (5th Cir. June) (per curiam), *cert. denied*, 135 S. Ct. 463 (2014).
122. *Id.* at 351.
123. *Id.* at 355.
124. *Id.* at 354.
125. *See id.* at 356.
126. *Id.*
127. *Id.* (alteration in original) (quoting FED. R. EVID. 1006).
128. *Id.* (citing FED. R. EVID. 702, 703; United States v. Moore, 997 F.2d 55, 57–59 (5th Cir. 1993)).
129. *Id.* (citing United States v. Armstrong, 619 F.3d 380, 383–85 (5th Cir. 2010); United States v. Taylor, 210 F.3d 311, 315 (5th Cir. 2000); United States v. Winn, 948 F.2d 145, 157–59 (5th Cir. 1991)).

As to the third category, the Fifth Circuit observed that "summary testimony referencing prior testimony is appropriate so long as the testimony has an 'adequate foundation in evidence that is already admitted,' is unquestionably accurate, and is 'accompanied by a cautionary jury instruction.'"[130] The Fifth Circuit also noted that the evidence being summarized must be sufficiently complex to be helpful under Rule 611(a) and not excludable as cumulative under Rule 403.[131]

Applying these standards, the Fifth Circuit held that the admission of the witness's testimony was not error because these conditions were met.[132] Specifically, the witness had "summarized documentary evidence admitted at trial or allowable under Rule 1006," the witness's testimony was not inaccurate, "the district court provided a cautionary Rule 1006 jury instruction,"[133] and the case was sufficiently complex because it involved multiple billings for numerous patients over a period of years.[134] Accordingly, the Fifth Circuit held that the district court did not err in admitting the witness's testimony.[135]

I. The Boundaries of Rule 704(b) as Applied to Testimony Regarding a Drug Courier Profile—Do Not Connect the Dots for the Jury: United States v. Medeles-Cab

In *United States v. Medeles-Cab*, the Fifth Circuit examined the standards for admitting testimony regarding characteristics of drug trafficking without violating Rule 704(b).[136] Here, border patrol agents arrested the defendant at a border checkpoint near Laredo, Texas, after an inspection of her car revealed ten kilograms of cocaine hidden in a secret compartment.[137] The State charged the defendant with possession with intent to distribute and conspiracy.[138] At trial, Agent Joseph Osborne of the Drug Enforcement Agency (DEA) testified regarding the business of drug trafficking from Mexico to the United States.[139] Specifically, Agent Osborn stated:

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130. *Id.* (quoting *Armstrong*, 619 F.3d at 385; United States v. Fullwood, 342 F.3d 409, 414 (5th Cir. 2003)).

131. *Id.* (citing *Armstrong*, 619 F.3d at 385; *Fullwood*, 342 F.3d at 414).

132. *Id.*

133. *Id.* The district court's jury instruction provided: "Certain charts and summaries have been received into evidence. Charts and summaries are valid only to the extent that they accurately reflect the underlying supporting evidence. You should give them only such weight as you think they deserve." *Id.* at 356 n.6.

134. *Id.* at 356.

135. *Id.* at 357.

136. United States v. Medeles-Cab, 754 F.3d 316, 320–21 (5th Cir. June), *cert. denied*, 135 S. Ct. 314 (2014).

137. *Id.* at 318–19.

138. *Id.* at 319.

139. *Id.*

> Well, as . . . the cocaine moves north from Mexico it actually increases from going—crossing the river there's an increase in price and then again crossing the checkpoint there's an increase in price. *There's money paid to the driver* . . . . The farther it goes typically the more expensive it is. There's more risk involved taking it further into the country and *they have to pay somebody to take it so the price continues to go up*.[140]

The jury convicted the defendant on the possession charge but acquitted on the conspiracy charge.[141] On appeal, the defendant argued that the agent's testimony amounted to an improper "drug courier profile," which suggested to the jury that the defendant was knowingly transporting drugs.[142]

The Fifth Circuit held that the district court did not err in admitting the testimony.[143] The Fifth Circuit examined the agent's testimony under Rule 704(b), which provides that an expert in a criminal case "must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense."[144] Under Rule 704(b), "[t]hose matters are for the trier of fact alone."[145] The Fifth Circuit noted that a drug profile is "a compilation of characteristics that aid law enforcement officials in identifying persons who might be trafficking in illegal narcotics."[146] In a drug courier profile case, agents attempt to testify that "because a defendant's conduct matches the profile of a drug courier, the defendant must have known about the drugs he was transporting."[147] The fact that a defendant matches a profile, however, may not be used to establish guilt.[148] On the other hand, the Fifth Circuit noted that an agent may testify to "certain characteristics of drug trafficking, without drawing the connection."[149] The Fifth Circuit held that Osborne's testimony commented on the drug trafficking business and not the defendant's knowledge of drugs.[150] The agent's testimony did not draw the connection that if the defendant was driving the car, and if she had been paid to drive, she must have had knowledge of the drugs.[151] Thus, the district court did not err in admitting the testimony.[152]

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140. *Id.* (first alteration in original).
141. *Id.* at 320.
142. *Id.* at 320–21.
143. *Id.* at 324.
144. FED. R. EVID. 704(b).
145. *Medeles-Cab*, 754 F.3d at 320 (quoting FED. R. EVID. 704(b)).
146. *Id.* at 321 (quoting United States v. Sanchez-Hernandez, 507 F.3d 826, 831 (5th Cir. 2007)).
147. *Id.* (quoting United States v. Gonzalez-Rodriguez, 621 F.3d 354, 363 (5th Cir. 2010)).
148. *Id.*
149. *Id.*
150. *Id.* at 323.
151. *Id.*
152. *Id.* at 324.

J. Admissibility of Lay and Expert Testimony Regarding the Meaning of Drug Code Words: United States v. Akins

In *United States v. Akins*, seven defendants were convicted of conspiracy to possess with intent to distribute various drugs.[153] At trial, the Government introduced recorded telephone calls that were gathered during the investigation.[154] The recordings contained various code words used by the defendants.[155] The Government called Agent Darrell Lyons, one of the investigators, as a lay witness to testify about the meaning of the code words.[156] Mark Styron, a DEA Group Supervisor, also testified as an expert witness for the Government regarding the code words.[157]

On appeal, the defendants challenged Lyons's testimony under Rule 701 regarding the meaning of code words, arguing that Lyons had essentially attempted to testify as an expert without qualifying as such.[158] The Fifth Circuit noted that code language by drug traffickers is an ideal subject for expert testimony, but stated that the subject is not limited to expert testimony.[159] The Fifth Circuit observed that a witness can provide lay testimony under Rule 701 regarding drug jargon when the witness has "extensive involvement in the underlying investigation."[160] An agent's extensive involvement in the investigation allows him to provide testimony about what the drug jargon means to him.[161] The Fifth Circuit held that Lyons's testimony was based largely on his own perception and involvement in this specific investigation, even if he drew in part from his law enforcement experience.[162] Additionally, the Fifth Circuit held that to the extent any of Lyons's testimony "crossed the line into drawing exclusively on his expertise, it was cumulative of other testimony and therefore harmless."[163]

The defendants also objected to Styron's testimony.[164] The defendants claimed, among other things, that Styron's testimony violated the Confrontation Clause.[165] The defendants' objection was based on two arguments. First, they argued that Styron's testimony was outside his

153. United States v. Akins, 746 F.3d 590, 595 (5th Cir. Mar.), *cert. denied*, 135 S. Ct. 189, *and* 135 S. Ct. 467, *and* 135 S. Ct. 707 (2014).

154. *Id.*

155. *Id.* at 596.

156. *Id.* at 597.

157. *Id.*

158. *Id.* at 598.

159. *See id.* at 599; *see also* United States v. Griffith, 118 F.3d 318, 321 (5th Cir. 1997) (holding that a DEA agent was qualified to testify about the meaning of jargon used in the defendant's wiretapped conversation).

160. *Akins*, 746 F.3d at 599.

161. *Id.*

162. *Id.* at 599–600.

163. *Id.* at 600.

164. *See id.* at 601–02.

165. *Id.* at 602.

expertise, which amounted to him testifying as both a fact witness (on drug slang) and an expert (on guns).[166] The defendants argued that this limited "defense counsel's ability to cross-examine Styron because a failed attempt to impeach Styron as an expert could backfire to enhance his credibility as a fact witness."[167] The Fifth Circuit swiftly rejected this argument, holding that Styron's testimony was within his expert designation and did not include both fact and expert testimony.[168]

Second, the defendants claimed that Styron's testimony violated the Confrontation Clause because he testified that his expertise was based on what he heard from other conspirators that he had investigated throughout his career.[169] According to the defendants, Styron simply "relayed impermissible hearsay to the jury in violation of the Confrontation Clause."[170]

The defendants urged the Fifth Circuit to adopt the Second Circuit's reasoning in *United States v. Mejia*.[171] In *Mejia*, the Second Circuit held that expert testimony violated the Confrontation Clause because the expert simply transmitted testimonial hearsay—interrogations of other gang members—without applying his experience to the inadmissible materials.[172] The Fifth Circuit found *Mejia* inapplicable.[173] The Fifth Circuit noted that Stryon's testimony was not based on a specific conversation but on information he gathered over the course of his career.[174] Further, Styron did not convey any third-party testimonial statements, and Rule 703 allows an expert to base his opinion on inadmissible evidence "[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject."[175] The Fifth Circuit concluded that Stryon's testimony suggested that it was only based on the type of information typically relied on by agents with extensive experience investigating drug conspiracies.[176] Thus, the Fifth Circuit held that there was no violation of the Confrontation Clause.[177]

166. *Id.*
167. *Id.*
168. *Id.* at 603.
169. *Id.*
170. *Id.*
171. *Id.* (citing United States v. Mejia, 545 F.3d 179, 183 (2d Cir. 2008)).
172. *Mejia*, 545 F.3d at 197.
173. *Akins*, 746 F.3d at 603.
174. *Id.*
175. *Id.* (quoting FED. R. EVID. 703).
176. *Id.*
177. *Id.*