ORIGINAL

23-1174

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

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Peter Kleidman,
Petitioner,

v.

Hilton & Hyland Real Estate, Inc., et al.,
Respondents.

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On Petition for Writ of Certiorari
to the US Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does Federal Rule of Evidence 704(a) ("Rule 704(a)") allow an expert to opine that a person's conduct complied with the person's legal duties?

Does Rule 704(a) allow an expert to opine on the nature and extent of a person's legal duties?

Did the Ninth Circuit err in holding that under Rule 704(a), Respondents' expert witness was allowed to testify that Respondents' conduct complied with their legal duties to Kleidman?

Did the Ninth Circuit err in holding that under Rule 704(a), Respondents' expert witness was allowed to testify on the nature and extent of Respondents' legal duties to Kleidman?

PARTIES TO THE PROCEEDING

Hilton & Hyland Real Estate, Inc., Matthew Altman, Joshua Altman.

STATEMENT OF RELATED PROCEEDINGS

In re Kleidman, No. 1:12-bk-11243-MB (Bankr. C.D.Cal.)

Kleidman v. Hilton & Hyland Real Estate, Inc., No. 1:17-ap-01007-MB, (Bankr. C.D.Cal.)

Kleidman v. Hilton & Hyland Real Estate, Inc., No. 2:21-cv-03287-JFW (C.D.Cal.)

Kleidman v. Hilton & Hyland Real Estate, Inc., No. 22-55381 (9th Cir.)

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JURSIDICTION

Kleidman's petition for rehearing in the Ninth Circuit was denied January 23, 2024. Accordingly, the deadline for this petition is April 22, 2024. This Court has jurisdiction under 28 USC § 1254

STATUTORY PROVISION INVOLVED

Federal Rule of Evidence 704

(a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness 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. Those matters are for the trier of fact alone.

STATEMENT OF THE CASE

In 2013 during Kleidman's Chapter 11 bankruptcy, Kleidman sold a particular item of real property ("Property"). Respondent Hilton & Hyland Real Estate, Inc. ("Hilton & Hyland") acted as a dual broker on the transaction, representing both

Kleidman (seller) and the buyer ("Buyer"). Respondents Joshua Altman and Matthew Altman were real estate agents, licensed under Hilton & Hyland, who worked on the transaction.

Later in 2013, Kleidman obtained plan confirmation and discharge.

In 2017, Kleidman sued Hilton & Hyland and the Altmans in an adversary proceeding in the bankruptcy court, *Kleidman v. Hilton & Hyland Real Estate, Inc., et al.*. Kleidman alleged (inter alia) that the price at which he sold the Property was significantly below the market at the time, and that the cause of the below-market sale was Respondents' breach of fiduciary duties.

One of the issues raised was that Respondents allegedly had a pre-existing business relationship with the Buyer, and Kleidman alleged that the extent of that relationship was tortiously concealed. That is, Kleidman alleged that Respondents breached their fiduciary duty by concealing the extent of the prior relationship with the Buyer.

In their defense, Respondents relied on an expert, Allan Wallace, who testified[1] that there was no such fiduciary duty to disclose the extent of the prior relationship with the Buyer. App.58 (seller's broker/agent "does not owe any duty to disclose to the seller whether it had represented the buyer in prior real estate transactions").

Kleidman objected to this evidence on the grounds that experts are not permitted to testify about the law. App.59. The bankruptcy court overruled Kleidman's objection by invoking Federal Rule of Evidence 704(a) ("Rule 704(a)"). App.59. The court

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[1] Mr. Wallace's testimony was in the form a written declaration. *Crawford v. Washington*, 541 US 36, 51-52 (2004) ("testimony" can include declarations and affidavits).

admitted Wallace's declaration into evidence and thereupon wholly adopted Wallace's legal position. The bankruptcy court asserted, based solely on Wallace's declaration, that Respondents "did not owe a duty to disclose whether [they] had represented [the Buyer][2] or one of his entities in any prior real estate transactions." App.38, ¶46 (footnote added).

In the appellate proceedings, the appellate courts accepted Wallace's testimony. App.2; App.19. The Ninth Circuit ruled thusly:

> The district court did not abuse its discretion in overruling Kleidman's objection to the expert declaration ... *See* Fed. R. Evid. 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue.")....

App.2.

REASONS TO GRANT THIS PETITION

I. This Court has never issued a fully-developed opinion discussing Federal Rule of Evidence 704(a), and almost all of the Courts of Appeals have expressed that this Rule can be difficult to apply

A. Rule 704(a) abrogated the common-law prohibition against testimony expressing opinions on ultimate issues

Federal Rule of Evidence 704(a) ("Rule 704(a)") states:

> "An opinion is not objectionable just because it embraces an ultimate issue."

This Rule was introduced in 1975[3] to abolish a

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[2] The Buyer's name is Makowsky.

[3] The original version, effective January, 1975, was former Rule 704: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Pub. L. 93–

common-law rule which forbade ultimate-issue testimony. According to the Notes of Advisory Committee on Proposed Rules:

> [T]he so-called "ultimate issue" rule is ... abolished by the instant rule. [¶] The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues.... The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information.

Id.. accord *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 239-240 (5th Cir. 1983); *US v. Barile*, 286 F.3d 749, 759 (4th Cir. 2002); *Hygh v. Jacobs*, 961 F.2d 359, 363 (2nd Cir. 1992); *Salas By Salas v. Wang*, 846 F.2d 897, 905, n. 4 (3rd Cir. 1988).

According to the Third Circuit, Rule 704(a) was introduced in accordance with "the letter and the spirit of the federal rules, which encourage the use of expert testimony to render trials more rational and efficient." *Id.*, 905 (3rd Cir.). According to the Second Circuit, Rule 704(a) establishes a "generally liberated approach to expert testimony." *US v. Scop*, 846 F.2d 135, 141-142 (2nd Cir. 1988).

595, §1, Jan. 2, 1975, 88 Stat. 1937. In 1984, Rule 704 was divided into subdivisions (a) and (b), the latter applying only to criminal cases. Former Rule 704 became Rule 704(a), which had the additional language, "Except as provided in subdivision (b)." Pub. L. 98–473, Title II, §406, Oct. 12, 1984, 98 Stat. 2067. The current version became effective December 1, 2011. According to the Advisory Committee Notes to the 2011 Amendment, "These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. [¶] ... No change in current practice is intended."

B. However, Rule 704(a) did not 'open the door' to all opinions and almost all the Circuits have expressed difficulty in applying this Rule

Although Rule 704(a) expanded the domain of admissible evidence by allowing ultimate-issue testimony, it did "not open the door to all opinions." *Owen*, 240 (5th Cir.); *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 100 (1st Cir. 1997) (Rule 704(a) "'is not a carte blanche for experts'"); *Hygh*, 363 (2nd Cir.) (Rule 704(a) "has not 'lower[ed] the bars so as to admit all opinions,'" quoting Adv. Comm. Notes); *Barile*, 759 (4th Cir.); *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985); *US v. Noel*, 581 F.3d 490, 496 (7th Cir. 2009); *Specht v. Jensen*, 853 F. 2d 805, 807-808 (10th Cir. 1988).

So what types of opinions are now allowed under Rule 704(a) that had been barred before Rule 704 was enacted?

Well, the consensus is that opinions on ultimate issues of fact can be admissible, whereas opinions on ultimate issues of law are generally inadmissible. *US v. Perkins*, 470 F.3d 150, 157 (4th Cir. 2006) ("'opinion testimony that embraces an ultimate fact'" is admissible whereas "'opinion 'testimony that states a legal conclusion'" is inadmissible); *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) ("An expert may testify as to his opinion on an ultimate issue of fact. ... Testi[mony] that ... was a legal conclusion ... should not have been admitted"); *US v. Oti*, 872 F.3d 678, 691-692 (5th Cir. 2017) ("expert witness is not permitted to offer conclusions of law;" "'expert may never render conclusions of law'"); *Air Disaster at Lockerbie Scotland on December 21*, 1988, 37 F.3d 804, 827 (2nd Cir. 1994) ("expert testimony expressing a legal conclusion should ordinarily be

excluded; ... testimony ... embodied a legal conclusion that crossed the fine line between a permissible conclusion as to an ultimate issue of fact and an impermissible legal conclusion"); *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (DC Cir. 1997) ("testimony ... consisted of impermissible legal conclusions rather than permissible factual opinions").

However, differentiating between admissible testimony on ultimate factual issues and inadmissible testimony on ultimate legal issues is a source of particular consternation among the Circuit courts. While the prior common-law rule (prohibiting ultimate-issue opinions) was purportedly "difficult of application" (Adv. Comm. Notes; *supra*, p. 4), it turns out that Rule 704(a) (allowing ultimate-issue opinions) *is also difficult of application.* Remarkably, almost all the Circuit Courts of Appeals have in some fashion articulated that Rule 704(a) is difficult to apply. *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99-100 (1st Cir. 1997) (although an opinion on "purely legal issues is rarely admissible" and an opinion on a "factual conclusion" is admissible, nevertheless "it is often difficult to draw the line between what are questions of law, what are questions of fact, and what are mixed questions"); *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 218 (3rd Cir. 2006) ("the line between admissible and inadmissible expert testimony as to the customs and practices of a particular industry often becomes blurred when the testimony concerns a party's compliance with customs and practices that implicate legal duties"); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 366 (4th Cir. 1986) ("expert opinion in many cases raises problems difficult of resolution ..., where the line must be drawn between

proper expert evidence as to facts, the inferences ... from those facts, and the opinions of the expert, on the one hand, and testimony as to the meaning and applicability of the appropriate law, on the other hand. While sometimes difficult to discern that line, ... it ... must be drawn"); *US v. McIver*, 470 F.3d 550, 561-562 (4th Cir. 2006) ("line between a permissible opinion on an ultimate issue and an impermissible legal conclusion is not always easy to discern") accord *US v. Richter*, 796 F.3d 1173, 1195 (10th Cir. 2015); *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983) ("The task of separating impermissible questions which call for overbroad or legal responses from permissible questions is not a facile one"), accord *Torres*, 150-151 (6th Cir.); *Woods v. Lecureux*, 110 F.3d 1215 (6th Cir. 1997) (referencing "the difficulty district courts face when determining whether to admit testimony that arguably amounts to a legal conclusion"); *US v. Vallone*, 698 F.3d 416, 453, n. 3 (7th Cir. 2012) (discussing intra- and inter-circuit splits); *US v. Sinclair*, 74 F.3d 753, 758, n. 1 (7th Cir. 1996) ("[W]hen can expert witnesses offer legal opinions? ... [C]ourts have not provided uniform answers. ... Not every court has followed [our] approach, and some of their opinions do not clearly determine when experts may ... testify about legal issues"); *Wade v. Haynes*, 663 F.2d 778, 784 (8th Cir. 1981) *aff'd on other grounds sub nom. Smith v. Wade*, 461 US 30 (1983) (commenting, "the issue is a close one," when reviewing the trial court's decision to allow the testimony); *Kostelecky v. NL Acme Tool/NL Industries, Inc.*, 837 F.2d 828, 830 (8th Cir. 1988) ("it is not easy to distinguish permissible questions from those that are not permissible"); *US v. Simpson*, 7 F.3d 186, 188, 189 (10th Cir. 1993) ("Whether ... proffered testimony amounts to a legal

conclusion ... is a close question"); *Parker v. Williams*, 855 F.2d. 763, 777-778 (11th Cir. 1988) (commenting, "This is a close question," when reviewing the trial court's decision to allow the testimony); *Haney v. Mizell Memorial Hosp.*, 744 F.2d 1467, 1473 (11th Cir. 1984) ("courts ... often struggle in attempting to characterize challenged testimony as either admissible factual opinions or inadmissible legal conclusions.. The distinction ... is not always easy to perceive"); *Hanson v. Waller*, 888 F.2d 806, 811-812 (11th Cir. 1989) ("'the law in this circuit pertaining to the admissibility of an expert's opinion couched in legal terms is not crystal clear'"); *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1212 (DC Cir. 1997) ("line between an inadmissible legal conclusion and admissible assistance to the trier of fact ... is not always bright"); *US v. Boney*, 977 F.2d 624, 630 (DC Cir. 1992) (finding that "no coherent line can be drawn" between the domains of admissible and inadmissible testimony, "and that the effort to find such a boundary has caused the tension we perceive in the Second Circuit's opinions"); see also 6 Handbook of Fed. Evid., Art. VII, § 704:1 (9th ed., Nov. 2023 update) ("Determining whether an opinion on the ultimate issue ... is ... inadmissible or conversely is [admissible] ... is sometimes extremely difficult"); 1 McCormick on Evid., Title 2, Ch. 3, § 16, n. 43 (8th ed., July 2022 update) (same).

Based on the foregoing, while Rule 704(a) may have expanded the realm of admissible evidence by 'abolishing' a 'difficult-to-apply' boundary, it created yet another 'difficult-to-apply' boundary.

C. This Court has not issued a fully-developed opinion on Rule 704(a)

This Court has not yet issued a fully-developed opinion on Rule 704(a). *Clark v. Arizona*, 548 US 735 (2006) mentioned Rule 704(b) (not 704(a)) in a footnote. *Id.*, 758-759, n. 30. *US v. Scheffer*, 523 US 303 (1998) (plurality) discussed Rule 704(a) in a concurring opinion. *Id.*, 319 (Kennedy, J, joined by O'Connor, Ginsburg, Breyer, JJ, concurring). *Colorado v. New Mexico*, 467 US 310 (1984) mentioned Rule 704(a) in a footnote, but without extensive discussion. *Id.*, 336, n. 5. *Barefoot v. Estelle*, 463 US 880 (1983) discussed Rule 704(a). *Id.*, 904-905 & n. 9. However, this case involved Texas rules of evidence in a habeas corpus proceeding, so any discussion of Rule 704(a) was dictum. *Ibid.* (finding no "constitutional infirmity in the application of the Texas Rules of Evidence").

Given the difficulty that the Circuits encounter in attempting to apply Rule 704(a), it may be appropriate for this Court to grant certiorari so that it can issue its first, fully-developed opinion concerning this Rule.

II. There is Circuit split on whether an expert can testify that a person's conduct complies with (or violates) his/her legal duties

Here, the Ninth Circuit permitted expert testimony on the scope of Respondents' duties and which asserted that Respondents' omission of certain information was not a violation of their fiduciary duties of disclosure in a real estate transaction. The Ninth Circuit relied on Rule 704(a). App.2. The Ninth Circuit had made a similar ruling in *US v. Burreson*, 643 F.2d 1344 (9th Cir. 1981), finding no abuse of discretion in the admission of expert testimony about "the nature and extent of the

fiduciary duty of an investment management company to a fund and its investors." *Id.*, 1349.

The Ninth Circuit's position – that an expert can legitimately testify as to whether a person complied with his/her legal duties and obligations – contravenes the decisions in other Circuits. *Boudreau v. Shaw's Supermarkets, Inc.*, 955 F.3d 225, 237 (1st Cir. 2020) ("presence of duty is a legal question" which cannot be resolved by expert testimony); *Gomez v. Rodriguez*, 344 F.3d 103, 115 (1st Cir. 2003) ("testimony was not admissible for the purpose of proving what obligations the law imposed upon the Mayor"); *Andrews v. Metro-North Commuter R. Co.*, 882 F.2d 705, 709-710 (2nd Cir. 1989) (holding, "The existence and nature of the duty is a question of law," and then finding that the admission of expert testimony on this issue was reversible error); *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 508 (2nd Cir. 1977) ("District Court erred in permitting ... expert witness ... to give his opinion as to the legal obligations of the parties under the contract"); *US v. Bronston*, 658 F.2d 920, 930 (2nd Cir. 1981) ("expert testimony ... regarding the ultimate question of whether Bronston's conduct amounted to a breach of fiduciary was clearly inadmissible"); *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195, 218 (3rd Cir. 2006) (expert "cannot testify as to whether Berckeley complied with legal duties that arose under the federal securities laws"); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359 (4th Cir. 1986) (discussed below, *infra*, pp. 11-12); *Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997) (testimony was inadmissible because it pertained to "[w]hether ... officers and directors fulfilled their fiduciary duties," and, "[i]f not, how and to what extent did [they] breach their

fiduciary duties"); *US v. Messner*, 107 F.3d 1448, 1454 (10th Cir. 1997) (district court abused its discretion in allowing expert legal testimony "regarding a debtor's post-confirmation duty of disclosure"); *Montgomery*, 1541 & n. 8 (11th Cir.) (opinion testimony that "Aetna had a duty to hire tax counsel ... was a legal conclusion, and therefore should not have been admitted ... [The testimony also was improper because it was relevant only to the issue of the scope of Aetna's duty under the policy").

This case is postured similarly to *Adalman* (4th Cir.), which reached a result opposite to that reached by the Ninth Circuit in the instant action. In *Adalman*, the plaintiffs alleged that certain material information was not disclosed in the private offering of limited partnership interests, in violation of the Securities Act of 1933. *Id.*, 361-362. The defendants "tendered" expert Casgar "as an expert witness to testify as to his conclusion that the applicable law did not require the disclosure of the omitted information." *Id.*, 365. The district court refused to allow expert Casgar to testify on the disclosure requirements. *Id.*, 368. *Adalman* affirmed the exclusion of Casgar's proffered testimony on the disclosure requirements under the Securities Act. However, *Adalman* did not merely defer to the discretion of the district court, but rather ruled that Casgar's proffered testimony was inadmissible as a *matter of law*. *Id.*, 366-368. *Adalman* states at p. 366, "The analysis here begins," and then states at p. 368, "We conclude that such evidence as that proposed to be adduced from Casgar as an expert is not admissible." Nowhere in between does *Adalman* reference the trial court's discretion. Rather, *Adalman* held that as a matter of law, the expert's proposed testimony – that the omission of certain

information in a private offering did not violate securities laws – was inadmissible as a matter of law.

Adalman is on all fours with this case. Kleidman (just like *Adalman*'s plaintiffs) alleged that certain information was unlawfully concealed, and expert Wallace (just like expert Casgar in *Adalman*) put forth testimony that the defendants were not legally required to disclose the omitted information. *Adalman* and the Ninth Circuit reached opposite results. *Adalman* held that, despite Rule 704(a), the expert testimony was inadmissible as a matter of law, whereas here the Ninth Circuit held that the trial court did not abuse its discretion in allowing the testimony under Rule 704(a). *Adalman*, 366-368; App.2.

Based on the foregoing, there is an apparent split between the Ninth Circuit (on the one hand), and the First, Second, Third, Fourth, Fifth, Tenth and Eleventh Circuits (on the other hand).

But the story does not end here. The Seventh Circuit may be in the Ninth Circuit's camp. *Carmel v. Clapp & Eisenberg, PC*, 960 F.2d 698 (7th Cir. 1992) held:

> Mr. ... Brennan ... testified that C & E and Litwin ... compl[ied] with the securities law. Mr. Brennan also opined that Litwin did an outstanding job of disclosing to the investors what they were getting. Certainly, this evidence was ... admissible under Rule 704.

Id., 702. *Carmel* (7th Cir.) conflicts starkly with *Berckeley*, 218 (3rd Cir.) (expert "cannot testify as to whether Berckeley complied with ... securities laws") and *Adalman*, 366-368 (4th Cir.) (expert Casgar prohibited from opining on whether defendant

complied with disclosure requirements under securities laws). Thus there is a split between the Seventh and Ninth Circuits (on the one hand) and the First, Second, Third, Fourth, Fifth, Tenth and Eleventh Circuits (on the other hand).

There may even be more inconsistencies among the Circuits. For instance, the Eighth Circuit allowed expert testimony that the defendant (a prison correctional officer) "egregious[ly] fail[ed]" to protect the plaintiff (an inmate), so that the defendant violated its obligations to the plaintiff under the Eighth Amendment. *Wade*, 782-784 (8th Cir.), *aff'd on other grounds sub nom. Smith v. Wade*, 461 US 30 (1983). The Federal Circuit allowed expert testimony on whether a defendant unlawfully infringed on a patent. *Symbol Technologies, Inc. v. Opticon, Inc.*, 935 F.2d 1569, 1575 (Fed. Cir. 1991) ("'expert testimony is admissible ... to give an opinion on the ultimate question of infringement'"). One has a legal duty not to inflict cruel or unusual punishment (Eighth Amendment), and a legal duty not to infringe on a patent, and so, arguably, the Eighth and Federal Circuits align with the Seventh and Ninth Circuits in that they all permit testimony on the ultimate issue of whether a person complied with (or violated) their legal duties and obligations. Thus there are inconsistent holdings in the First, Second, Third, Fourth, Fifth, Tenth and Eleventh Circuits (on the one hand) and the Seventh, Eighth, Ninth and Federal Circuits (on the other hand).

Finally, *Milwaukee & St. Paul R. Co. v. Kellogg*, 94 US 469 (1877) held:

> "Witnesses are not receivable to state their views on matters of legal ... obligation.'"

Id., 473. Arguably, this holding would tip the scales in favor of the First, Second, Third, Fourth, Fifth,

Tenth and Eleventh Circuits, and against the Seventh, Eighth, Ninth and Federal Circuits. However, *Milwaukee* appeared well before Rule 704(a) was enacted, and so the question remains whether Rule 704(a) somehow limits the force of *Milwaukee*'s holding, or even abrogates it.

CONCLUSION

Since the Circuits do not see to eye-to-eye on the application of Rule 704(a), and have expressed difficulty in its application, it is requested that this Court grant this petition for certiorari to the Ninth Circuit Court of Appeals

Dated: April 22, 2024

Respectfully,

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