

**UNITED STATES TAX COURT**  
**WASHINGTON, DC 20217**

LEON MAX,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 20237-16.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	

**ORDER**

This case is scheduled for trial at a special session of the Court on September 16, 2019, in Los Angeles, California. Three motions in limine are pending before us: one by the Commissioner and two by Mr. Max, all filed on August 26, 2019. The parties filed responses on September 3, 2019. We deny all three of the motions.

The Commissioner’s motion asks us to exclude the report by Mr. Max’s expert Sean Cormier. The Commissioner asserts that the report is “neither helpful nor relevant”. His motion also questions Mr. Cormier’s credentials. He argues that the report will not help the Court in understanding any issues in the case and therefore does not meet the standards of Federal Rule of Evidence 702. In response, Mr. Max defends Mr. Cormier’s experience and knowledge and explains why the report is relevant to the questions at issue in the case.

Mr. Max’s first motion asks us to “exclude or limit the expert reports and testimony of Mary Batcher, PH.D.” Mr. Max argues that Dr. Batcher’s report and rebuttal report “solely and improperly provide legal opinions and conclusions.” He also asserts that Dr. Batcher’s report goes beyond opinions on statistics, her area of expertise. The Commissioner responds that Dr. Batcher’s opinions, while relevant to legal conclusions, are proper opinions for admission, and that her report discusses matters within her area of qualification.

Mr. Max’s second motion asks us to exclude evidence on two topics: (1) the discovery rule, a test that was previously set forth in the regulations under section

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41 but has since been removed; and (2) discussions between counsel about sampling procedures. First, Mr. Max expresses concern that the Commissioner may try to introduce evidence on a rule that is no longer good law. He argues that any reference to the discovery rule could “confuse the witnesses” and “create confusion as to the legal standards at issue”. He again cites “confusion to witnesses as to the proper legal standard before the Court” as a reason we should exclude evidence of counsel’s discussions about sampling. In response, the Commissioner somewhat agrees with Mr. Max and states that he does not intend to “invoke the ‘discovery rule,’” or “introduce specific discussions between counsel about sampling”. However, he asks that the motion be denied, fearing that granting the motion would result in objections to similar evidence that might be relevant.

Generally, relevant evidence is admissible, and irrelevant evidence is not admissible.<sup>1</sup> Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.”<sup>2</sup>

An expert witness may testify if “the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue”.<sup>3</sup> The Tax Court has “broad discretion to evaluate the cogency of an expert’s analysis.”<sup>4</sup> We may “accept or reject expert testimony when in our best judgment, on the basis of the record, it is appropriate to do so.”<sup>5</sup> We may accept an expert’s testimony or report in whole, in part, or not at all depending on his or her credibility and whether the expert’s testimony is supported by the record.<sup>6</sup>

We will deny the Commissioner’s motion as to the expert report of Mr. Cormier. His report is helpful to the Court in that it discusses industry practices and provides useful background information.

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<sup>1</sup>Fed. R. Evid. 402. We conduct trials in accordance with the Federal Rules of Evidence. Sec. 7453; Tax Court Rule 143(a).

<sup>2</sup>Fed. R. Evid. 401.

<sup>3</sup>Fed. R. Evid. 702(a).

<sup>4</sup>Neonatology Assocs., P.A. v. Commissioner, 115 T.C. 43, 85 (2000).

<sup>5</sup>Mileham v. Commissioner, T.C. Memo. 2017-168, at \*40 (citing Fed. R. Evid. 702; Parker v. Commissioner, 86 T.C. 547, 561 (1986)).

<sup>6</sup>See Neonatology Assocs., P.A. v. Commissioner, 115 T.C. 43, 85 (2000).

We will also deny Mr. Max's motion as to Dr. Batcher's expert report. We do not agree that her report offers mere legal conclusions. And we do not agree that her report goes beyond her areas of her expertise.

We will deny Mr. Max's second motion as well. Although we fully expect that Mr. Max may make any objections at trial he feels necessary, including relevance objections, we do not share his concerns about confusion of the witnesses or the Court. Witnesses testify to relevant facts, not legal standards. If questions relate to topics that are not relevant, the Court will address objections made at that time. We are not concerned that the Court will become confused as to the correct legal standard.

ORDERED that the Commissioner's Motion in Limine filed August 26, 2019, is denied. It is further;

ORDERED that Mr. Max's Motions in Limine filed August 26, 2019, are denied.

**(Signed) Ronald L. Buch**  
**Judge**



Dated: Washington, D.C.  
September 6, 2019