Case o' the Week

A little memo on a big case.

From: Steven Kalar, Federal Public Defender ND Cal Date: Monday, Jan. 19, 2016
Re: *United States v. Spangler*, 2016 WL 191997 (9th Cir. Jan.15, 2016): **Experts**: Disappointing decision upholds "relevance" exclusion of defense forensic accountant

Players: Decision by Sr. DJ Lefkow, joined by Judges McKeown and Tallman.

Facts: Spangler was an investment advisor who created two "normal" investment funds. *Id.* at *1. Investors were told that these funds would hold stock from publically-traded companies, and investment decisions would be made by an outside investment manager. *Id.* Spangler also created a high-risk investment fund dedicated to start-up companies. *Id.* Spangler himself diverted money from the "normal" investment funds to support the (unsuccessful) high-risk fund, without clearly explaining to the "normal fund" investors what was happening. *Id.* at *2. The scheme fell apart, and Spangler was charged with wire fraud, money laundering, and investor fraud. *Id.* at *1. *Id.* Before trial, Spangler noticed expert witness John Keller, a forensic accountant and former IRS criminal investigator. *Id.* at *3. The court excluded this expert as not relevant. Spangler was convicted. *Id.*

Issue(s): "Spangler . . . argues that the district court erred in precluding his expert witness, John Keller, from testifying." *Id.* at *3. "Spangler argues that Keller's testimony would have been relevant to his intent to defraud his clients." *Id.* at *4.

Held: "Spangler's ability to challenge the ruling excluding expert testimony is governed by Federal Rule of Evidence 702." *Id.* at *3. "Given the government's theory, any testimony that the client's financial statement accurately reflected the amount of money invested in each . . . fund would have been irrelevant. Rather, the government's point was that, while the financial statements were technically accurate, they failed to disclose the reality behind Spangler's investment decisions. . . . Nor was Keller's proposed testimony about the prudence of Spangler's investment decisions relevant to fraudulent intent . . . That in hindsight Spangler's investments in startup companies were arguably prudent does not negate his fraudulent intent." *Id.* at *4.

Of Note: *Spangler* is a case to distinguish. One important fact is that Spangler had three *other* experts that the district court deemed admissible – yet the defense didn't call them at trial. In both the harmless error analysis, *id.* at *4, and the Sixth Amendment analysis, *id.* at *5, the Ninth emphasized that Spangler did not call these (permitted) experts to testify. An unusual fact to seize upon when fighting a harmless error analysis. (And note a small bright spot – the Ninth rejects the government's argument that the entire expert-appeal was precluded because Spangler presented *no* defense at trial. *See id.* at *3 (distinguishing *Luce,* , 469 U.S. 38 (1984)).

How to Use: You've dissected the indictment and have found a flaw. Eureka! Now, do you move to dismiss pretrial (allowing the AUSA to trot back to the grand jury to get a superseding), or do you wait and bring the motion after the petit jury is sworn in? *Spangler* discusses this conundrum. (Spangler brought a challenge to the indictment ten days into trial). "Although the failure of an indictment to state an offense cannot be waived, a tardy challenge – that is, one made during trial or after the verdict – suggests a purely tactical motivation and is needlessly wasteful because pleading defense can usually be readily cured through a superseding indictment before trial." *Id.* at *7. The defense family wrestled with this timing question during the early *Apprendi* era – *Spangler's* discussion is a depressing refresher on how a "tardy challenge" is likely to be viewed on appeal.

For Further Reading: FRE 702 needs a re-write. So argues *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 Wm. & Mary L. Rev. 1 (2015), available here: http://wmlawreview.org/defending-daubert-its-time-amend-federal-rule-evidence-702 Here's a teaser: "Many commentators have bemoaned the "lackadaisical" approach that some courts have taken in screening out unreliable forensic evidence in criminal prosecutions. Public defenders offices have argued that more vigilant 'gatekeeping' is especially important in criminal cases, where innocent defendants can lose their liberty based on faulty forensic evidence, and adversarial testing is less likely to curb the impact of 'bad science.'"