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EXPERT TESTIMONY IN BANKRUPTCY – BACK TO THE BASICS

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Introduction

The use of experts in the bankruptcy courts, though common, is a source of much confusion for lawyers and, as an experienced practitioner has observed, inconsistency among the judges.[1] There are several reasons for this. Most bankruptcy lawyers are experts on bankruptcy law but are not necessarily expert trial attorneys; and there is little guidance from the bankruptcy courts regarding the procedures for the use of experts. Though experts are frequently used in formal adversary proceedings, their testimony is also commonly proffered in contested proceedings (matters raised by motion). The Rule 26 requirements of notice and of producing a written report are not applicable for contested matters. (The court can impose such requirements, but, in my experience, this is rarely requested.) As a result, the many issues that can arise in connection with the use of an expert tend to come-up last minute, and the lawyers and the judge have had little if any opportunity to consider the ramifications of the expert's testimony.

In addition, as any bankruptcy practitioner knows, bankruptcy cases can be crisis-driven and move quickly with many hearings on a wide array of issues. It is my view that when expert testimony is needed, the proffering lawyer is uncomfortable with how to put-on an expert, and the objecting lawyer is uncomfortable with the breadth of, and latitude given to, an expert's testimony. This discomfort likely stems from the notion that expert testimony undermines basic evidentiary requirements that testimony be based on personal knowledge and not on hearsay. A clear understanding of the rules of evidence and procedure that address the use of expert testimony and recognizing the somewhat ad hoc manner in which expert testimony is used in the bankruptcy court can help demystify the use of expert testimony in bankruptcy.

I.

The Rules

Federal Rules of Evidence 702, 703, 704, 705, and 104, and Federal Rule 26 and Bankruptcy Rule 9014 govern the use of expert testimony in the bankruptcy court.

Rule 702 addresses the testimony of expert witnesses and sets the standard for the use of expert testimony. The rule provides as follows:

> 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 if:
> (a) 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;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

[1] Mark E. Andrews, *Written Materials for Presentation on Expert Testimony and Evidence in Bankruptcy*, at the 32nd Annual Jay L. Westbrook Bankruptcy Conference (Nov. 21, 2013).

Rule 703 provides that the facts or data on which the expert's opinion is based "need not be admissible for the opinion to be admitted," provided the facts or data are the kinds that experts in the field would reasonably rely on in forming an opinion on the subject.

Rule 704 simply provides that an opinion is not objectionable just because it embraces an ultimate issue.

Rule 705 allows an expert to state his opinion—and the reasons for it—without first testifying to the underlying facts or data. But such facts and data can be elicited on cross-examination.

It is important to recognize that Rule 104(a) of the Federal Rules of Evidence states that the court, in deciding the preliminary question about whether a witness is qualified or evidence is admissible, is not bound by the evidence rules, except those on privilege.

Rule 7026 of the Federal Rules of Bankruptcy Procedure incorporates Federal Rule 26. Rule 26 sets forth certain requirements concerning expert testimony. Rule 26 is part of the bankruptcy adversary rules and thus its following provisions apply in all adversary proceedings:

> **(a)(2) Disclosure of Expert Testimony.**
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> **(A) In General.** In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.
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> **(B) Witnesses Who Must Provide a Written Report.** Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
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> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
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> (ii) the facts or data considered by the witness in forming them;
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> (iii) any exhibits that will be used to summarize or support them;
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> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
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> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
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> (vi) a statement of the compensation to be paid for the study and testimony in the case.
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> **(D) Time to Disclose Expert Testimony.** A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:
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> (i) at least 90 days before the date set for trial or for the case to be ready for trial; or

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