

Preparing Expert Valuation Reports

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1. Overview

- a. Valuation is a critical, and often hotly disputed, issue in many bankruptcy cases. Enterprise valuations drive creditor recoveries and solvency valuations are often outcome determinative for the success (or failure) of fraudulent transfer and other bankruptcy-related litigation. As a result, valuation disputes often become a mini-battle of the experts, the reasonableness of their assumptions, and their relative credibility.
- b. Valuations are done for different purposes in the context of a single bankruptcy case. For example, a valuation may be necessary to determine whether: (i) a plan can be confirmed over the opposition of creditors, (ii) a priming post-petition loan can be approved, or (iii) a debtor was insolvent in connection with a fraudulent transfer action.

2. Selecting the Testifying Expert

- a. Lay witnesses to be competent must provide testimony based on perceived senses or experiential knowledge. Fed.R. Evid. 601. In more recent time, the prohibition on lay witness opinion testimony has been loosened and lay witnesses may provide some opinion testimony. Fed.R. Evid. 701.
- b. Selecting the right expert is critical to the success of the case. Rule 702 of the Federal Rules of Evidence requires an expert to have appropriate "knowledge, skill, experience, training, or education" to "testify in the form of an opinion or otherwise" on the subject matter at issue. Finding a qualified expert (in terms of knowledge, skill, and experience) is an important part of the selection process, but other factors are equally critical.
- c. Items to consider during the interview process include:
 - i. Conflicts?
 - ii. Credentials to provide a basis for qualification as an expert without being challenged?
 - iii. Industry experience?
 - iv. Bankruptcy experience v. other valuation experience?
 - v. Client base: Creditors? Debtors? A mix?
 - vi. Availability?
 - vii. Referrals?
 - viii. Prior qualification, challenges, or disqualifications?
 - ix. Prior deposition experience?
 - x. Prior testifying experience?
 - xi. Track record? Has a court rejected your opinions?
 - xii. Any published decisions involving expert?

- xiii. Any aspect of opinion challenged/questioned by a court?
- xiv. Experience before judge? Experience in the particular court?
- xv. Previous work for or against other side (and their counsel)?
- xvi. Previous work with opposition expert?
- xvii. Previous work for or against client?
- xviii. Relevant publications?
- xix. Thoughts on how you would approach this assignment?
- xx. Fee structure?
- xxi. Can the expert testify persuasively and stand up to a rigorous cross-examination?

d. Attorneys should consider whether the expert witness selection process is in reality selection bias – whether you are seeking to retain a qualified expert or seeking an expert who will testify favorable to the position you advocate.

3. **Disclosure**

- a. Parties must disclose the identity of expert witnesses. *See* Rule 26(a)(2)(A) of the Federal Rules of Civil Procedure ("Fed.R.Civ.Proc.").
- b. Parties must exchange expert reports signed by the experts. *See* Fed.R.Civ.Proc. 26(a)(2)(B).
- c. The disclosure and expert report requirement applies in adversary proceedings, but not in contested matters unless the court orders otherwise. *See* Fed. R. Bankr. P. 9014(c).

4. **Expert Report**

- a. Fed.R.Civ.Proc. 26(a)(2)(B) provides that an expert report must contain:
 - i. a complete statement of all opinions the witness will express and the basis and reasons for them;
 - ii. the facts or data considered by the witness in forming them;
 - iii. any exhibits that will be used to summarize or support them;
 - iv. the witness's qualifications, including a list of all publications authored in the previous 10 years;
 - 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
 - vi. a statement of the compensation to be paid for the study and testimony in the case.

5. **Rebuttal Reports**

- a. Fed.R.Civ.Proc. 26(a)(2)(D)(ii) provides that, absent a court order or stipulation between the parties, experts may file rebuttal reports.

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