Business Session

How to Prepare Your Expert Witness for Deposition and Trial

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EXPERT WITNESS TESTIMONY

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EXPERT WITNESS TESTIMONY

Retention, Preparation, Reports, Communications, and Testimony at Depositions and Trial

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Federal Rule of Evidence 702

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.

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Federal Rule of Civil Procedure 26(a)(2)(B)

(2) Disclosure of Expert Testimony

. . .

(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:

(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;

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Federal Rule of Civil Procedure 26(a)(2)(B), cont'd.

(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.

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Federal Rule of Civil Procedure 26(a)(2)(C)

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

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Federal Rule of Civil Procedure 26(b)(4)(B)

(4) Trial Preparation: Experts.

. . .

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

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Federal Rule of Civil Procedure 26(b)(4)(C)

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* **Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:**

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

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EXPERT WITNESS TESTIMONY

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RETENTION AND PREPARATION OF THE EXPERT WITNESS

Retention and preparation of the right expert is often critical to the success of an engagement, whether that success depends on prevailing on a claim in a lawsuit or proving the confirmability of a reorganization plan. The purpose of this article is to discuss the appropriate steps to retain and prepare an expert witness, to ensure that the expert's testimony will provide the critical boost that will facilitate your client winning its case.

THE FIRST STEP

When a new engagement is at its inception, it is important to preliminarily determine whether an issue in question is both essential to the case and will require expert testimony so that the judge[2] may fully understand the issue. Generally, under Federal Rule of Evidence 702, an expert is appropriate if the expert's testimony will facilitate the court better understanding a technical or scientific subject that is at issue in the case. Federal Rule of Evidence 702 provides:

> 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.

What types of issues in bankruptcy cases are generally those that require expert testimony? Clearly, factual issues relating to valuation, appropriate interest rate, ordinary course

[2] This article assumes that the trier of fact will be a bankruptcy judge, in light of the minimal number of disputes in bankruptcy court in which a jury trial is appropriate. "[J]ury trials are exceedingly rare in this district and elsewhere." *In re British American Ins. Co. Ltd.*, 2013 WL 211336 at * 3 fn. 4 (Bankr. S.D. Fla. 2013). Indeed, the option of a jury trial is available only "in rare and unusual circumstances." *In re Fed. Press. Co.*, 116 B.R. 650, 653 fn. 3 (Bankr. N.D. Ind. 1989) (citing *Bittner v. Borne Chem. Co., Inc.*, 691 F.2d 134, 135 (3d Cir. 1982) (citing 3 Collier on Bankruptcy ¶ 502.03 (15th ed. 1981).

of business transfers and new value transfers are the types of issues that are frequently the subject of expert testimony in many chapter 11 bankruptcy cases.

In addition, when an issue of foreign law presents itself in a case, bankruptcy courts have entertained expert testimony on what the law of a foreign jurisdiction provides in a particular area. See, e.g., *In re Gosman*, Adv. Pro. No. 02-3155-BKC-PGH-A (C.P. No. 355) (finding that a divorce in the Dominican Republic was not appropriately recognized in Florida, subsequent to the permitted testimony of a marital attorney admitted to practice in the Dominican Republic who had expertise with respect to that country's divorce law).[3]

However, it is widely accepted that is inappropriate for expert testimony to be provided to a trier of fact on any area of U.S. law or state law, notwithstanding how arcane or complicated the area of law might be. *See, e.g.*, *U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.*, 582 F.3d 1131, 1151 (10th Cir. 2009) (holding that when experts opine on domestic law, it "would 'invade the province of the court to determine the applicable law and to instruct the jury as to that law.'"); *see also Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 366 (4th Cir.1986); *Owen v. Kerr–McGee Corp.*, 698 F.2d 236, 240 (5th Cir.1983). "Each courtroom comes equipped with a 'legal expert,' called a judge." *Burkart v. Wash. Metropolitan Area Transit Authority*, 112 F.3d 1207, 1213 (D.C. Cir. 1997).

WHEN SHOULD THE EXPERT WITNESS BE RETAINED?

Once a lawyer has been engaged and has developed a solid grounding in the facts underlying the engagement and dispute(s) at issue, the lawyer should prepare a litigation or case plan (the "Case Plan"). This Case Plan identifies what discovery needs to be obtained, what

[3] *See also* Federal Rule of Civil Procedure 44.1, which states, in part, "The court, in determining foreign law, may consider any relevant material or source, ***including testimony***, whether or not submitted by a party or admissible under the Federal Rules of Evidence." (emphasis added).

motions are expected to be filed, what issues must be addressed, and whether any expert testimony will need to be presented to the court. Retention of an expert shortly after the Case Plan is prepared will likely facilitate many other aspects of the lawyer's responsibilities.

For example, an expert retained early in the process may assist the lawyer in developing effective written discovery to the opposition. The expert can help craft interrogatories and document production requests that pinpoint essential fact evidence necessary for the client to prevail.

An expert can assist the lawyer with reviewing production from the opposition, as well as the client's documentation, in order to help the lawyer locate and analyze relevant data.

Early retention of an expert will generally facilitate the scheduling of examinations of witnesses, particularly if it is important for the expert witness to attend the depositions of any of the opposition's witnesses, and the expert can also assist the lawyer in preparing appropriate areas of inquiry for the opposition's lay witnesses and expert witnesses, and avoiding the lawyer missing relevant areas about which these witnesses should be questioned before trial.

Experts also benefit directly from early retention as it enables the expert to prepare a cogent and relevant expert report, and will avoid the expert having to compromise his/her preparation because of inadequate time to fully absorb the factual data upon which the expert's assumptions and opinion will be based.

Further, when an expert is retained at an early stage of a chapter 11 bankruptcy case, the expert can often be invaluable in helping the client and the lawyer develop a confirmable plan of reorganization. A valuation expert can determine the true value of the debtor's assets, both as a going concern and in liquidation, and can evaluate what impact a restructuring process will likely

have on the debtor's assets. Prior to the commencement of settlement discussions, the expert can assist the lawyer in advising the client on what the client's potential downside exposure is if the client does not prevail in the case, as well as what alternative strategies might be pursued in order to maximize value, such as an out of court workout, an assignment for the benefit of creditors proceeding, a sale of the client's assets in chapter 11, chapter 7 liquidation, or a pre-packaged bankruptcy plan. Finally, an appropriate expert might also assist with the marketing and sale of assets.

In connection with adversary proceedings, the retention of an expert early on in the case will assist the litigator in evaluating the overall business and technical issues in the case, and whether they should be raised. Moreover, to the extent the litigator does not have a background in a technical area at issue, the expert can help educate the lawyer about the specialized area. In the event the dispute is one in which a settlement rather than litigation will yield the best result for the client, the expert can often assist the litigator in developing effective negotiation strategies. The scope of damages may be at issue in a particular dispute, and the expert can be essential to pinpoint the exact extent of damages incurred by the client. The expert can help the lawyer identify critical research which should be pursued, as well as develop key legal arguments to make based upon the expert's technical knowledge. Finally, the expert can help develop the proof or fallacy of critical points at issue in the case, and can assist the litigator in identifying weaknesses in the opposition's case.

For all these reasons, retention of an expert at the earliest appropriate point in the engagement is recommended to ensure the client's best chance at prevailing.

HOW TO PICK THE RIGHT EXPERT?

Picking the right expert is critical to the success of any case. The obvious question is, how do you know who the right expert is for a particular case?

Preparing the Case Plan will highlight for the lawyer the issues or issues for which one or more experts may be needed in the case. Once the lawyer has performed an initial evaluation of what type of expert is needed, then the lawyer must take the next steps to ensure that the right expert is retained for the case.

The lawyer should consult with fellow practitioners who have handled similar types of cases with similar issues. Chances are, someone in the lawyer's professional circle has had to address a similar issue and can recommend an expert who has the knowledge, credentials and experience to serve as an expert in the lawyer's case.

Perform a Google search. The advent of extensive and sophisticated search methodology makes finding an expert a less formidable task. Often, potential experts have published thought leadership pieces in order to market their talents. Reviewing published articles by potential experts will facilitate the lawyer locating an expert who can prepare a convincing expert report and competently render an expert opinion on point.

Review the court docket on any recent cases that are similar to your case in order to determine which expert(s) were retained, and which expert's testimony was found to be more compelling by the court.

Determine which experts previously appeared the judge to whom the case is assigned, and identify which experts the judge previously determined were credible and whose opinions the judge adopted.

For specific types of disputes, the lawyer may need to retain an industry specific expert. For example, in connection with valuation of a hotel, an appraiser who specializes in residential developments would not be appropriate. Instead, an expert who appreciates the different aspects of valuation that need to be taken into account when valuing a hotel should be retained.

The number of times that a potential expert has actually testified at trial is not necessarily the right test to determine if the expert should be retained, given the limited number of disputes that actually proceed to trial. Instead, consider how frequently the expert has testified at deposition, and whether the expert's testimony resulted in a favorable outcome for the retaining lawyer's client.

Ask the prospective expert for his/her prior opinions rendered in similar fact situations and on similar issues. This will enable the lawyer to determine whether the expert is using an accepted methodology. The lawyer should also inquire of the prospective expert whether the expert has previously appeared before the judge presiding over the case or adversary proceeding, and what the outcome was of that appearance.

Finally, it is critical for the expert to be retained for a flat fee, rather than a contingent fee or incentive-based compensation. This will avoid the expert's testimony being discounted on the basis of bias or self-interest.[4]

THE IMPORTANCE OF ONGOING COMMUNICATION

The client's mantra is often to keep the costs of litigation as low as possible, and that may tempt the lawyer to limit communication with an expert. This is a serious mistake. All relevant,

[4] *See In re Tousa Inc.*, 422 B.R. 783, 839-40 (Bankr. S.D. Fla. 2009), rev'd on other grounds, 444 B.R. 613 (S.D. Fl;a. 2011), aff'd, 680 F.3d 1298 (11th Cir. 2012).

discoverable information obtained by counsel should be freely shared with the expert so that the expert can provide the most convincing report possible, based upon all known and relevant facts.

However, remember that everything that the expert reviews can and likely will be examined by the opposition. That means that the expert should not be provided with any materials that the lawyer does not produce to the opposition, either because such materials are privileged or because the opposition did not seek these materials in discovery and they are detrimental to the client's case.

TESTING THE EXPERT'S OPINION

The expert will ultimately have to explain his/her opinion to the judge, so it is critical that the expert has the ability to clearly and concisely explain the facts and assumptions upon which the expert relied, the methodology utilized by the expert, and what opinion the expert is rendering. Prior to providing any testimony at deposition or at trial, the lawyer should have the expert explain in detail what steps were undertaken in order to render his/her opinion, to ensure that all of the facts the expert relied upon are true and correct, and to verify that the expert has not overlooked any relevant facts. Particularly in a document-intensive engagement, an expert may not have focused on documents that might significantly alter the expert's opinion.

The expert should be able to explain his/her opinion in layman's terms, without resort to technical jargon to the extent possible, in order to ensure that the opinion can be clearly understood by the judge. Finally, the lawyer should not be afraid to challenge the expert's opinion, or to suggest variables that might alter the expert's opinion, in an effort to ensure that the expert can stand up to thorough cross-examination by opposing counsel.

SUMMARY OF CRITICAL RECOMMENDATIONS WHEN RELYING ON EXPERT TESTIMONY

1. Identify the specific issue on which expert testimony is needed and make sure the expert has a discrete expertise in that issue. For example, if the issue relates to the appropriate interest rate to be employed by the debtor under a plan of reorganization in connection with post-confirmation payments to a secured creditor, the testimony of a financial advisor who is not familiar with current trends in commercial lending in the jurisdiction in which the debtor is located may not be relevant to the court, particularly if the opposition retains an experienced commercial lender as its expert to opine about interest rates currently offered to borrowers with the debtor's risk profile.

2. Spell out the critical facts that will inform the expert's opinion.

3. Make sure the expert's qualifications, including his/her experience, education and prior testimonial engagements, are relevant to the issues extant in the case and the opinion that must be rendered. Make sure that no prior testimonial engagements by the expert would undermine the needed testimony in the current case.

4. Evaluate whether more than one expert is required to render all of the necessary opinions in the case.

5. Make sure you hire an expert who can not only prepare a persuasive report, but who can also testify persuasively and stand up to thorough cross-examination.

6. Don't assume that a broad-based expert is the right expert for a discrete issue – in other words, not every financial expert can testify on all financial issues.

7. Ask the expert what information he/she needs to provide the opinion sought to support your client's position. Make sure the information needed by the expert is provided to him/her, and provided in a timely manner, not just in the week prior to the due date of the expert's report or deposition.

8. Be sure the expert himself/herself performs the work needed to render the opinion. If the expert has staff members assist in gathering data or performing analyses, be sure that the expert has verified all data and analyses.

9. Don't try to influence your expert's opinion. An expert who doesn't believe in his/her opinion will not be persuasive, and the expert will likely crumble under careful cross-examination.

10. The expert's report must describe all facts and assumptions critical to reaching the opinion rendered by the expert.

11. Make sure the expert can fully explain his/her credentials, methods and applications. A practice cross-examination is appropriate, particularly with an expert you have not utilized previously.

12. Instruct the expert to carefully, directly and politely answer any questions posed by the court, and to avoid telling the court that the question will be addressed at a later point in the expert's testimony.

13. Have the expert be prepared to explain why one methodology was chosen over another, especially in connection with valuation opinions, based upon the particular facts of the given case.

14. If the expert has adopted a different methodology than a traditional one, the expert must be prepared to fully explain why a variance from the norm was selected. To the extent possible, the expert should rely on professional literature to justify the use of a divergent methodology.

15. The expert should be prepared to justify the use of the expert's judgment, based upon professional literature or personal direct experiences.

IMPACT OF 2010 AMENDMENTS TO RULE 26 ON EXPERT WITNESSES

AMENDMENTS TO RULE 26 - GENERALLY

On December 1, 2010, Rule 26 of the Federal Rules of Civil Procedure was amended in four significant ways regarding expert witnesses and discovery involving expert witnesses. First, Rule 26(a)(2)(B)(ii) was amended to require that the expert report contain the "*facts or data considered*" by the witness in forming his/her expert opinions as opposed to the previous version of the Rule which required that the expert report contain "*data or other information considered*" by the expert. As discussed below, this change was principally designed to foster attorney – expert communications and prevent the disclosure of the mental impressions or theories of the attorney, which were previously encompassed by the Rule's prior use of the term "*other information considered*."

Second, a new Subsection (C) was added to Rule 26(a)(2) to require the disclosure of anticipated expert testimony of witnesses who are not required to prepare a report under Rule 26(a)(2)(B). As discussed below, this new Subsection (C) was designed to encompass witnesses who were not specifically hired to provide, or compensated for, expert testimony, and who may also provide fact testimony.

Third, a new Subsection (B) was added to Rule 26(b)(4) to provide work product protection to all drafts of expert reports or disclosures from discovery regardless of the form in which the draft is recorded.

Fourth, a new Subsection (C) was added to Rule 26(b)(4) to protect communications between the attorney and the expert from discovery regardless of the form of the communication.

As discussed below, the protection for such attorney-expert communications applies only to those experts who are required to deliver a report under Rule 26(a)((2)(B).

Finally, in the context of bankruptcy proceedings, it is important to note that Bankruptcy Rule 7026 only makes Rule 26 applicable in adversary proceedings. A contested matter is not an adversary proceeding, and is instead governed by Rule 9014. As a result, under Bankruptcy Rule 9014(c), Rule 26(a)(2) is not applicable in contested matters unless the court orders otherwise. Therefore, in contested matters, there are no mandatory expert witness reports to be filed with the court.

RULE 26(A)(2)(B)(II) – AMENDMENT LIMITING DISCLOSURE TO "*FACTS OR DATA CONSIDERED*."

According to the Committee Notes in regards to the 2010 amendment to Rule 26(a)(2)(B)(ii), the focus has changed concerning disclosures required by experts away from attorney-expert communications (which now enjoy the work product protection pursuant to amended Rule 26(b)(4)) to "material of a factual nature by excluding theories or mental impressions of counsel." However, the Committee Notes also make clear that the term "facts or data" must be interpreted broadly so that all material considered by the expert, from any source, must be disclosed if it contains facts. Moreover, in addition to the requirement to disclose "facts or data" relied upon in forming the expert's opinions, the expert must also disclose facts "considered" informing the expert's opinion.

The amendment to Rule 26(a)(2)(B)(ii) has been interpreted by courts as limiting the disclosure required of an expert.[5] However, the Committee Notes clearly indicate that the term

[5] *See Allstate Ins. Co. v. Electrolux Home Prods., Inc*., 840 F. Supp. 2d 1072, 1077-78 (N.D. Ill. 2012 (the amendment to Rule 26(a)((2)(B)(ii) was intended to provide that counsel's mental impressions and theories was not

"facts or data" must be interpreted broadly, and must include all facts considered by the expert and not just relied upon, regardless of the source of the facts. In *Fialkowski v. Perry*, the plaintiff was assisting her attorney in preparing an analysis of various documents in the case and provided that analysis to the expert. Since the analysis was considered by the expert, it fell within the category of "facts or data considered" and therefore had to be produced. The court noted that the plaintiff, as opposed to her attorney, had prepared the analysis and therefore it was not protected by the work product doctrine. However and importantly, the court added that even if the analysis involved communications between the expert and the attorney, the analysis fell within the umbrella of "facts or data considered" by the expert and so those communications would not be privileged under Rule 26(b)(4)(C).[6]

RULE 26(A)(2)(C) – DISCLOSURE REGARDING WITNESSES NOT REQUIRED TO PREPARE A REPORT.

Under Rule 26(a)(2)(A), a party must disclose the identity of any witness who will provide expert testimony at trial. The addition of Subsection (C) to Rule 26(a)(2) was intended to encompass those witnesses who may provide expert testimony at trial, but who were not hired to, or compensated for, the provision of expert testimony. In many cases, such witnesses provide both fact and expect testimony. One example of such a witness in the bankruptcy context could be a chief restructuring officer. As a result, in a situation where a witness will be called to provide expert testimony and that witness is not required to prepare an expert report, Subsection (C) requires disclosure of the subject matter of the expert testimony and a summary disclosure of the facts and opinions on which the witness is expected to testify. Even though the disclosures

subject to disclosure); *Fialkowski v. Perry*, 2012 BL 248993 at *3 (E.D. Pa. June 29, 2012)(the disclosure of "facts or data" under the 2010 amendments is narrower than the previous version of the Rule.)

[6] Rule 26(b)(4)(C) provides that communications between an attorney and an expert hired to prepare a report are protected as work product except to the extent, among other things, that the communications "identify facts or data that the party's attorney provided and the expert considered in forming opinions to be expressed…."

required of these non-retained experts is more limited than in the case of an expert specifically retained to provide expert testimony, the non-retained expert is still require to sit for deposition. In fact, a deposition of such a witness is even more critical given the limited disclosures required by the amendments to Rule 26(a)(2).[7]

RULE 26(B)(4)(B) – PROTECTION AFFORDED TO DRAFT EXPERT REPORTS.

Under new Rule 26(b)(4)(B), work product protection afforded under Rule 26(b)(3)(A and (B) is extended to cover drafts of any expert report or disclosure under Rule 26(a)(2) regardless of the form in which the draft is recorded. According to the Committee Notes, this "protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C)." It also "applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise." Lastly, it "also applies to drafts of any supplementation under Rule 26(e)."[8]

Even though drafts of expert reports are now protected under the work product doctrine, the Committee Notes make it clear that such protections "do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions." Moreover, the Committee Notes also make it clear that "the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule." Similarly, "inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on

[7] *See Allstate Ins. Co., v. Nassiri*, 2011 WL 2975461 at *10 (D. Nev. July 21, 2011).
[8] *See* Rule 26(a)(2)(E).

which they are testifying, whether or not the expert considered them in forming the opinions expressed." Lastly, the new protections under Rule 26(b)(4) "do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), and related cases."

Notwithstanding the above protection for draft reports, courts have narrowly interpreted what constitutes a draft report. For example, in *In re Application of the Republic of Ecuador*,[9] the court did not extend work product protection to include notes, outlines and similar items prepared by an expert and his staff under the rubric of a "draft" report. Essentially, the court found that such items were outside the draft report and therefore did not fall within the work product protection afforded under Rule 26(b)(4)(B). As a result, it is important that an expert follow the formalities of preparing his/her analysis and work product in the context of a "draft" report so as to avoid any argument that notes, outlines and similar items are not excluded from the protections afforded to "draft" reports.

RULE 26(B)(4)(C) – PROTECTION AFFORDED TO COMMUNICATIONS BETWEEN AN ATTORNEY AND AN EXPERT.

Under new Rule 26(b)(4)(C), work product protection afforded under Rule 26(b)(3)(A and (B) is extended to cover communications between an attorney and an expert, regardless of the form of the communication with certain exceptions provided for in the Rule and discussed below.

The protections afforded to attorney-expert communications are limited to those experts who are required to provide a written report under Rule 26(a)(2)(B). As a result, if an attorney is seeking to protect communications with a witness who is providing expert testimony but is not

[9] 280 F.R.D. 506, 513 (N.D. Cal. 2012)

required to produce a report, then the attorney needs to rely on another basis for that protection, whether it be the attorney client privilege or the general work product doctrine.[10]

Moreover, the protection under Rule 26(b)(4)(C) applies only to communications between a party's attorney and the expert. It does not apply to communications with the party or a non-attorney.[11] However, the Committee Notes provide some clarification with regard to communications between an attorney and an expert as follows:

> "[t]he protection for communications between the retained expert and 'the party's attorney' should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party's behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the 'party's attorney' concept."

While the protection for communications between an attorney and the expert is very helpful to counsel in the preparation for trial, it is not without its exceptions. Specifically, Rule 26(b)(4)(C) excludes from protection communications that: (i) relate to compensation for the expert's study or testimony,[12] (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed, or (iii) identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

[10] *See Graco, Inc. v. PMC Global, Inc.,* 2011 WL 666056 at *14 (D.N.J. Feb. 14, 2011)
[11] *See Fialkowski* (Court found that a party's communication with an expert was not protected by the changes to Rule 26(b)).
[12] *See In re TOUSA, Inc.*, 422 B.R. 783, 839 (Bankr. S.D. Fla. 2009.

The Committee Notes provide some additional perspective on the above exceptions. Specifically, as it relates to the first exception dealing with the compensation of an expert, the Committee Notes provide, in part, as follows:

> "It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias."

As they relate to the second exception concerning facts or data provided by the attorney and relied upon by the expert, the Committee Notes explain that the "exception applies only to communications 'identifying' the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected."

Lastly, as they relate to the third exception concerning assumptions provided by the attorney and relied upon by the expert, the Committee Notes explain that this "exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception."

USING AN EXPERT TO PREPARE FOR THE DEPOSITION OF THE OPPOSING PARTY'S EXPERT.

In most instances, it is imperative that counsel use the full resources of his/her consulting or testifying expert to assist in the preparation for the deposition of the opposing side's expert, or cross examination at trial. Among other things, your expert can and should guide you through the expert report of the other side and identify weaknesses or areas where you need to explore in more detail. Your expert can also provide the bases for a *Daubert* challenge in respect of the other side's expert. Of course, you can decide whether and how many of those weaknesses you want to alert the opposing expert to during deposition, as opposed to waiting for trial and cross examination. In many instances, identifying areas of weakness in an expert report will lead to educating the other side's expert, as well as create the risk that the other expert will supplement or amend his/her expert report to correct the issues that were raised in deposition. One trial strategy is to wait for the expert to take the stand at trial and then bring out the weaknesses.

Turning to the 2010 amendments to Rule 26, at least one court has concluded that notes provided by an expert to an attorney to be used in preparation for deposition of the other side's expert were not subject to disclosure under Rule 26(b)(4)(C). In *Int'l Aloe Science Council, Inc. v. Fruit of the Earth, Inc.*,[13] the Court concluded that notes provided by a party's expert to the party's attorney for use in the preparing for the deposition of the other side's expert – which notes identified weaknesses and issues with the other side's expert – were not subject to disclosure because the notes were not being used by the expert in the context of the opinion the expert was providing to the court. Rather, they were being used to prepare the attorney for

[13] 2012 WL 1900536 at *2 (D. Md. May 23, 2012)

deposition and therefore were included under the work product protection for attorney-expert communications provided for in Rule 26(b)(4)(C).

EXPERT TESTIMONY AND *DAUBERT*

Daubert requires that trial courts act as "gatekeepers" to ensure that speculative and unreliable expert testimony does not determine the outcome of a case.[14] The trial court must "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[15] With the trial court's duty comes the great deference afforded to evidentiary rulings as a trial court's decision to exclude an expert's testimony pursuant to *Daubert* is reviewed under an abuse of discretion standard.[16] This standard of review requires that the appellate court affirm the trial court unless it is "manifestly erroneous."[17] The deferential standard of review is not relaxed even though the admissibility of expert evidence may be outcome determinative.[18] Because the burden of laying the proper foundation for the admission of expert testimony is on the offering party, it behooves the offering party to understand early in the case whether an expert witness can offer reasoning or methodology that is scientifically valid to the facts in issue.[19]

Federal Rules of Evidence 702 governs the admissibility of expert testimony in federal court:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable

[14] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
[15] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).
[16] *General Elec. Co. v. Joiner*, 522 U.S. 136, 140, 118 S. Ct. 512, 139 L. Ed. 2d. 508 (1997).
[17] *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291 (11th Cir. 2005).
[18] *Joiner*, 522 U.S. at 142-43, 118 S. Ct. 512.
[19] *Daubert*, 509 U.S. at 593-94, 113 S. Ct. 2786.

> principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[20]

In conjunction with Rule 702, the expert testimony may be admitted if three requirements are met: (1) the expert must be qualified to testify competently regarding the matter he or she intends to address; (2) the methodology used must be reliable; and (3) the testimony must assist the trier of fact through the application of expertise to understand the evidence or determine a fact in issue in the case.[21]

While the requirements of Rule 702 of the Federal Rules of Evidence apply equally to all types of expert testimony—valuation, accounting, medical, scientific or statistical—the application of the rule differs slightly depending on the nature of the proposed expert testimony.[22] Where the testimony hinges on reliable methodology and scientific technique, the Supreme Court has set forth a non-exhaustive list of relevant factors to be considered: (1) whether the expert's theory has been or can be tested; (2) whether the theory is subject to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community.[23] However, the proposed expert's knowledge need not be scientific or technical; it can be other specialized knowledge including that obtained through appropriate experience.[24] The text of the rule acknowledges that a witness' formal training or education may qualify that witness as an expert.[25] The key inquiry in that regard is whether the proffered opinion will help the trier of fact understand the evidence or determine a fact in issue based on the application of sufficient

[20] It has been noted that the first requirement is the most important. *In re J.C. Householder Land Trust #1*, 501 B.R. 441, 454 (Bankr. M.D. Fla. 2013).
[21] *Tuscaloosa v. Harcros Chemicals, Inc.*, 157 F.3d 548, 562 (11th Cir. 1998); *Householder*, 501 B.R. at 454.
[22] *Bakst v. U.S. (In re Kane & Kane)*, 479 B.R. 617, 624-25 (Bankr. S.D. Fla. 2012).
[23] *Daubert*, 509 U.S. at 593-94, 113 S. Ct. 2786.
[24] *In re Kane & Kane*, 479 B.R. at 625.
[25] *Id.*

information and reliable principles to the facts of the case.[26] Any assumptions made by the expert, if any, should be laid out clearly so that they may be tested by the trier of fact.[27]

It is the second type of expert testimony, based on experience or specialized knowledge that is not merely scientific or technical, which fairly draws more scrutiny as the "court must still determine the reliability of the opinion, not merely the qualifications of the expert who offers it."[28] The simple *ipse dixit* of the expert is not enough; there has to be specific facts and data to support this conclusion.[29] While courts agree that an examining medical doctor is an expert qualified by *Daubert*, the line between what a party in interest believes is an expert opinion and the court's duty to function as a gatekeeper may be less obvious in the bankruptcy context.[30] While in bankruptcy court most expert testimony is typically related to valuations (appraisers), or plan interest rates and feasibility (economists, mortgage bankers, venture capitalists), expert testimony can also sometimes relate to somewhat more uncommon issues, such as solvency, or far more atypical topics such as, for example, whether legal services performed by a law firm constituted reasonably equivalent value for fraudulent transfer purposes (in that instance, an executive compensation consultant).[31] Nonetheless, the more common expert witness/Daubert issue in bankruptcy court is with regard to confirmation feasibility and interest rates.

To confirm a Chapter 11 plan, the debtor has the burden of establishing the requirements enumerated in 11 U.S.C. § 1129(a)(1)-(16). If the debtor is unable to satisfy § 1129(a)(8) – requiring that each impaired class accept the plan – the debtor must look to § 1129(b) to confirm

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[26] *Id.* (recognizing that "[o]utside of a narrow range of fields, statistical reliability of the data is difficult or impossible to ascertain" and therefore it "need not be perfect data unassailable for all purposes, as its shortcomings may be taken into account by the trier of fact in weighing the evidence.")
[27] *Id.*
[28] *See Kumho Tire*, 526 U.S. at 149, 119 S. Ct. 1167.
[29] *In re J.C. Householder Land Trust #1*, 501 B.R. at 454.
[30] *See, e.g., In re J.C. Householder Land Trust #1*, 501 B.R. at 454-55; *In re Kane & Kane*, 479 B.R. at 627 ("An expert opinion based on a standard so completely at odds with the standard delineated by the Eleventh Circuit is not a matter going to the weight of the evidence"). See note 371, *infra*.
[31] In Re *Kane & Kane*, 479 B.R. at 623-27.

the plan.[32] Under § 1129(b), the bankruptcy court can confirm a plan over the objection of the impaired creditor rejecting the plan if it is "fair and equitable"[33]—"cramdown" involves the court's imposition of plan treatment on the impaired creditors rejecting the plan.[34] A debtor may satisfy the "fair and equitable" requirement by providing a creditor with deferred payments of a value at least equivalent to the allowed secured claim as of the effective date of the plan.[35] The interest rate therefore becomes the crucial issue in the cramdown analysis for a secured creditor, which brings us to the Supreme Court's decision in *Till*.[36]

In *Till*, a secured creditor objected to the debtor's cramdown interest rate proposed in a Chapter 13 plan.[37] Much like Chapter 11, Chapter 13 allows a debtor to cramdown a secured creditor as long as the bankruptcy plan has a total value as of the effective date of the plan is at least equal to the objecting creditor's allowed secured claim.[38] In addressing the key issue of the appropriate interest rate for the Chapter 13 cramdown, the Supreme Court in *Till* agreed upon a formula approach whereby the bankruptcy courts start with the national prime rate and add supplemental risk adjustments.[39] In deciding upon the formulaic approach, the Supreme Court recognized the lack of an efficient market for Chapter 13 cramdown lending.[40] However, the Court noted that an efficient market did, in theory, exist for Chapter 11 exit financing due to numerous lenders advertising financing for Chapter 11 debtors.[41] *Till* did not answer what

[32] *In re J.C. Householder Land Trust #1*, 501 B.R. at 452.
[33] *Id.* (assuming all of the other required elements of confirmation under § 1129(a) are met).
[34] *Id.*
[35] *Id.*; *citing* 11 U.S.C. § 1129(b)(1)(A)(i)(II).
[36] *Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004).
[37] *Id.*
[38] *Compare* 11 U.S.C. § 1129 *and* 11 U.S.C. § 1325.
[39] *Till*, 541 U.S. at 478-79, 124 S. Ct. 1951 (risk adjustments include, but are not limited to, circumstances of the bankruptcy estate, the nature of the creditor's collateral and the duration and feasibility of the plan).
[40] *Id.* at 477 n. 14, 124 S. Ct. 1951.
[41] *Id.* ("Because every cramdown loan is imposed by a court over the objection of the secured creditor, there is no free market of willing cramdown lenders. Interestingly, the same is *not* true in the Chapter 11 context, as numerous lenders advertise financing for Chapter 11 debtors in possession… Thus, when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce.")

method should be used to determine the interest rate in Chapter 11 cramdown, but bankruptcy courts have used the opinion as backdrop against which to determine the proper interest rate.[42]

From *Till*, bankruptcy courts have determined that the threshold issue for determining the appropriate cramdown interest rate is whether an efficient market for Chapter 11 debtor, exit financing exists.[43] Expert witness testimony on that issue is almost universally offered and allowed, assuming a dispute exists as to the existence (or not) of an efficient market. Nonetheless, and while the existence or nonexistence of an efficient market seems like an area ripe for expert testimony, the latent complexity of the issue has led to opinions limiting the weight of proposed expert testimony or even, on occasion, completely disregarding it.[44] To offer expert testimony that an efficient market exists for a debtor in a Chapter 11 cramdown situation under *Daubert*, the expert must present facts or data of actual loans being made to bankruptcy debtors akin to the debtor at issue in the same way an appraiser presents comparables as the basis for his valuation opinion.[45] As the court noted in *J.C. Householder*, "[w]hat the Court is looking for is a list of lenders actually providing chapter 11 exit financing for debtors similar to the one in this case."[46] The same type of testimony was lacking in *Cypress Creek* wherein the proposed expert witness did not pass the *Daubert* test due to a failure to identify particular examples of cramdown loans.[47] In the absence of specific cramdown loans to debtors

[42] *SPCP Group, LLC v. Cypress Creek Assisted Living Residence, Inc.*, 434 B.R. 650, 654 (M.D. Fla. 2010).
[43] *In re J.C. Householder Land Trust #1*, 501 B.R. at 454.
[44] *See SPCP Group, LLC*, 434 B.R. at 654 (affirming bankruptcy court's decision crediting testimony by the debtor's expert over testimony by the creditor's expert on lack of existence of an efficient market); *In re J.C. Householder Land Trust #1*, 501 B.R. at 455 (finding that creditor's expert testifying to the existence of an efficient market did not meet the *Daubert* and Rule 702 standard).
[45] *In re J.C. Householder Land Trust #1*, 501 B.R. at 455 ("Without the comparables, the [hypothetical appraiser's] valuation opinion is worthless.")
[46] *Id.* (holding that proposed expert that made phone calls to lenders asking whether the lenders would make a loan to a debtor emerging from a bankruptcy case in order to determine that an efficient market existed did not meet the *Daubert* and Rule 702 standard).
[47] *SPCP Group, LLC*, 434 B.R. at 654-55.

– or in other words, the comparables – the proposed expert testimony does not meet the *Daubert* and Rule 702 standard as it lacks the sufficient facts or data necessary to support the opinion.[48]

In the event that no efficient market exists, the *Till* formula dictates that the Court start with the prime rate and add an appropriate supplemental risk adjustment.[49] While this may again seems like an innocuous task, presenting a witness with methodology outside of the confines of *Till* may lead to the rejection of the proposed expert testimony's under *Daubert,*[50] as, for example, if the witness's testimony relates to a "tiered" or "blended" interest rate, and/or does not adequately focus upon and address the risk factors in the proposed cramdown loan. In *In re West Airport Palms Bus. Park, LLC*, the parties agreed upon the absence of an efficient market, but the creditor objected to the debtor's proposed cramdown interest rate and offered an expert opinion that the rate should be fourteen percent.[51] The creditor's expert witness relied upon a methodology which started his interest rate analysis with a baseline rate acquired from data on investments and others loans outside of bankruptcy.[52] While the court stated it did not necessarily agree that the expert's data was unreliable, the court refused to accept the lender's expert witness' contention that *Till* requires the court "look to some industry data on actual loans that were made under other circumstances and start from" those market interest rates to reach a cramdown rate for the debtor.[53] The court ultimately recited the risk elements that it found to be

[48] *See SPCP Group, LLC*, 434 B.R. at 654; *In re J.C. Householder Land Trust #1*, 501 B.R. at 455. It is not lost on the author that certain cramdown loans, such as 100% loan-to-value, may not exist today or have existed at the time of the Supreme Court's decision in *Till*. As a result, the potential for abuse may arise in situations where an otherwise performing debtor with funds available to pay down the loan to 80% to refinance in the open market instead selects the bankruptcy court for refinancing in an effort to obtain an artificially lower interest rate through cramdown under application of *Till*.
[49] *In re J.C. Householder Land Trust #1*, 501 B.R. at 456.
[50] *In re West Airport Palms Business Park, LLC*, United States Bankruptcy Court, S.D. Fla. Case No. 13-25728-BKC-RAM (Doc. No. 237) (rejecting proposed expert's methodology that reviewed actual data from investments or loans made under circumstances outside of bankruptcy instead of the prime rate as a starting point for cramdown loan under *Till*).
[51] *Id.*
[52] *Id.*
[53] *Id.*

concerning, aided somewhat by accepted expert testimony for the creditor and debtor identifying the potential loan risks, and found an 8.25 interest rate to be appropriate by adding the risk to the prime rate under *Till*.[54]—a rate well outside the usually stated "prime rate plus 1-3 percent." While it has been suggested that the *West Airport* decision found that expert testimony is not necessary with respect to at least the second half of the *Till* analysis assuming no efficient market exists that may be too broad of a reading. It does seem, however, that expert testimony regarding the proper cramdown interest rate in the absence of an efficient market should identify and assess specific potential risks (and perhaps assign specific risk points for each), based upon the expert's knowledge and experience and apply the risks, in light of facts and data presented by the expert, to the formula of prime rate plus risk assessments.

[54] *Id.*