AMERICAN BANKRUPTCY INSTITUTE

2017 Northeast Bankruptcy Conference

Litigation: Expert Cross-Examination Stratego!

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CONCURRENT SESSION

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CROSS EXAMINATION OF EXPERT WITNESSES

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1. RULE 26(A)(2) REQUIREMENTS

I. Disclosure of Expert

A. Each party must disclose the identity of each testifying expert. Fed. R. Civ. P. 26 (a)(2)(A).
B. The disclosure must be made at least 90 days prior to the trial or hearing, unless a different schedule is ordered by the Court. Fed. R. Civ. P. 26 (a)(2)(D).
C. The disclosure must be accompanied by a written Expert's Report. Fed. R. Civ. P. 26 (a)(2)(B).

II. Requirements of the Report.

A. A complete statement of the opinions to be expressed by the expert and the basis for them. Fed. R. Civ. P. 26 (a)(2)(B)(i).

1. Failure to include the data and the reasoning connecting the data to the opinion to be expressed is grounds for excluding the report and the expert's testimony. RC Olmstead, Inc. v. CU Interface, LLC, 606 F. 3d 262, 271 (6th Cir. 2010); Fed. R. Civ. P. 37 (a) (1).
2. The expert report must be so complete that deposition of the opposing expert is not necessarily needed. Salgado v. General Motors Corp., 150 F.3d 735, 742 n.6 (7th Cir. 1988).

B. The facts or data considered by the witness. Fed. R. Civ. P. 26 (a)(2)(B)(ii)

1. Mere conclusions without connection with the data are insufficient and the data must be described in full.
2. The assumptions provided by counsel must be disclosed.
3. Any factual assumptions based upon testimony or interviews must be disclosed.

C. Any exhibits the expert is to use to summarize or support his opinion. Fed. R. Civ. P. 26 (a)(2)(B)(iii)

D. The witness' qualifications. Fed. R. Civ. 26 (a)(2)(B)(iv).

1. All publications for the last 10 years

E. A list of all cases in the last 4 years in which the witness testified as an expert, whether at trial or deposition
F. A statement of the compensation paid to the expert in the case

III. Failure to Comply

A. Preclusion of expert. Fed. R. Civ. P. 37(c)(1)
B. All of these rules are applicable pursuant to Fed. R. Bankr. P. 7026 and 7037, but not in contested matters pursuant to Fed. R. Bankr. P. 9014(c), unless the court so orders. This is key for plan confirmation and other important contested matters.

IV. Drafting the Report

A. Much easier now as the rules now protect drafts and communications from disclosure. Fed. R. Civ. P. 26 (b)(4), but facts, data and assumptions provided by the attorney are still not protected, so be careful
B. Try to keep jargon out of the report, even though there is no jury. While most bankruptcy judges are conversant with expert reports, particularly appraisals and other valuation reports, it still helps to write in plain English.
C. Make sure that all of the math has been checked carefully. There is nothing more embarrassing for the expert that mathematical errors.
D. Where the expert is relying on the work of subordinates, make sure that their work has been checked carefully.

V. Analyzing the Opposing Report

A. First, have your expert check it
B. Make sure that it complies with the standards of all groups of which the expert is a member
C. Make sure to make note of all assumptions, estimates, predictions, etc. that can be attacked
D. Review the source data carefully, particularly where related parties may be involved.

2. TO DEPOSE OR NOT TO DEPOSE

I. General rule – ALWAYS depose opposing experts

A. Probe Daubert factors
B. Test expertise
C. Pin down testimony so that there is no ability to deviate at trial/hearing
D. Using expert deposition to position case for settlement

1. Limited to cases where destroying opposing expert at deposition threatens to derail entire case (e.g., debtor cannot confirm plan without expert's testimony) and might provide settlement opportunity on favorable terms
2. If you decide to "destroy" rather than merely nonconfrontationally probe and explore, be cognizant about the time between the deposition and the trial/hearing – it gives the opposing expert and counsel the opportunity to chart out a course for rehabilitation and correcting errors

E. Malpractice issues

II. Potential exceptions to the general rule

A. Cost and client's ability to pay
B. Strategic forbearance – saving especially damaging cross-examination for trial/hearing

1. Real question is "to destroy or not to destroy" the opposing expert at the deposition, rather than "to depose or not to depose"
2. Safer alternative is to plan nonconfrontational deposition and not to tip your hand on core weaknesses of expert report

3. EXPERT PREPARATION

I. Testimony preparation begins within the first few weeks of the engagement. Begin to answer:

A. What is the scope of analysis?
B. What professional expertise does the expert bring to this scope?
C. What was the source and basis for the factual information relied upon?
D. What information did the expert not have access to?

II. Testimony as a fact-based narrative

A. Identify 3 – 5 key analytical (not legal) themes
B. The themes are not the results of the analysis. Rather, the themes demonstrate why the results are correct and why the scope of analysis is appropriate (e.g., company was in transition, industry is cyclical, competition was increasing due to foreign imports, etc.)
C. Reinforce these themes with specific examples throughout testimony
D. Simplify. Simplify. Simplify. Consider use of analogies and trial exhibits. Rephrase compounded and/or complex questions before answering. Try to avoid excessive use of jargon. Define jargon where use is beneficial. Effectively use pauses while speaking (especially at trial).
E. Prevent an alternative narrative by answering "the wrong" question. (Listen to the question)

III. Strategy for deposition and trial testimony may differ. Coordinate with counsel:

A. Offense versus defense
B. "Yes/No" versus more expansive responses
C. When to use rebuttal arguments
D. Impact of order of depositions/trial testimony
E. Know the judge: Style? Financial background?

IV. Complexities of bankruptcy

A. Credit/solvency analysis requires highly integrated financial and legal analysis. Expert must clearly delineate scope of expertise and appropriately rely on legal interpretations of lending agreements and other financial and/or transactional contracts. Requires a high degree of coordination between expert and counsel, early in the case
B. Bankruptcy disputes in district court (i.e., Stern v Marshall) may be a less specialized venue and may involve jury trials

V. Remembering the details. Various strategies (one or more)

A. Mock question/answer session with counsel
B. Trial binder
C. Testimony outline
D. Footnotes and detailed appendices in expert reports, which can be directly referenced during testimony. (Testimony is not a memory test)

VI. A mistake – Oh No!

A. Describe the mistake upfront and be prepared to discuss correction and impact on analysis
B. Avoid both defensiveness and seeming indifference

4. MOTIONS IN LIMINE

I. What is a motion in limine?

A. Latin for "at the threshold" or "at the beginning"
B. Usually brought before trial, but can be filed at any time
C. Generally relate to evidentiary issues and are particularly well-suited for expert evidentiary issues
D. There is no statute or rule dictating form or substance of such motions
E. "Motions in limine . . . permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They minimize side-bar conferences and disruptions during trial, allowing for an uninterrupted flow of evidence. Finally, by resolving potentially critical issues at the outset, they enhance the efficiency of trials and promote settlements." Brian D. Chase, Expert Witnesses and Motions in Limine, Consumer Attorneys of California Forum, 2002.

II. "Definitive ruling" standard for preserving issues for appeal

A. Fed. R. Evid. 103(b): "Once the court rules definitively on the record – either before or after trial – a party need not renew an objection or offer of proof to preserve a claim of error for appeal."
B. However, if the court merely defers ruling or fails to rule definitively on the merits, the issue may not be preserved. *See* Clausen v. Sea-3, Inc., 21 F.3d 1181, 1190 (1st Cir. 1994)
C. Motions are purely discretionary and a court is not required to rule on them. *See* Jones v. Stotts, 59 F.3d 143, 146 (10th Cir. 1995)
D. For this reason, rulings on motions in limine are in substance advisory opinions that are subject to change at trial. *See* U.S. v. Yannott, 42 F.3d 999, 1007 (6th Cir. 1994) ("A ruling on a motion in limine is no more than a preliminary, or advisory, opinion that falls entirely within the discretion of the . . . court [which] may change its ruling at trial for whatever reason it deems appropriate."

III. Grounds for motions in limine

A. Motions in limine generally seek to exclude evidence, but may be used to admit evidence, as well. *See* Byrd v. Guess, 137 F.3d 1126, 1134 (9th Cir. 1998)
B. Motions often seek to challenge various aspects of the standard set forth in Fed. R. Evid. 702
C. Witness's "knowledge, skill, experience, training, or education"
D. Daubert and Kuhmo Tire standar: opinion must be "based on sufficient facts or data," be the "product of reliable principles and methods" and the "witness [must have] applied the principles and methods reliably to the facts of the case"
E. "Expert testimony that consists of legal conclusions cannot properly *assist the trier of fact*[.]" *See* Nieves-Villanueva v. Soto-Rivera, 133 F.3d 92, 100 (1st Cir. 1997) (emphasis added)
F. Procedural grounds - improper designation, untimely expert report, testimony beyond scope of designation
G. Bias

IV. Supporting motions in limine

A. Deposition transcripts
B. Affidavits
C. Expert designation and report
D. Discovery materials – interrogatories, request for admission, request for production
E. Treatises
F. Live witnesses
G. Court orders accepting/rejecting similar testimony from same expert

V. Practical considerations

A. Bench trial vs. jury trial – the potential for prejudice/confusion
B. Tendency for deferral until trial
C. Cost/benefit

5. DAUBERT GENERALLY

I. Daubert holding

A. In Daubert v. Merrill Dow Pharms., Inc., 509 U.S. 579 (1993), the United States Supreme Court held that for scientific expert testimony to be admissible, it must be:

1. Scientific Knowledge
2. Which would assist the trier of fact.

B. Scientific Knowledge

1. It must have been tested.
2. Peer reviewed (not mandatory, but very helpful towards admissibility)
3. Court must consider rates of error
4. Court must consider whether methodology is generally accepted.

II. Kumho Tire

A. In Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), the US Supreme Court held that Daubert applies even in matters in which the testimony is not scientific.
B. Court serves as gatekeeper, determining whether expert is reliable and helpful.
C. Flexible Standard relying upon Fed. R. Evid. 702
D. Application in Bankruptcy Context

1. In Re: Nellson Nutraceutical, Inc., 2006 Bankr. LEXIS 3186 (Bankr. D. Del. 2006) (Excluded expert using novel valuation method)

III. Likely Issues

A. Lack of current data (no home sales or other asset sales)
B. Lack of current leasing data
C. Lack of a publicly traded similar company
D. Absorption rate assumptions
E. Discount rates for cash flow purposes
F. Leasing assumptions
G. Interest Rate and Till issues
H. Ordinary course on an industry basis
I. Professional standards of care
J. Effects on market. Failed airline examples.
K. No real scientific type tests in bankruptcy
L. Exclusion, per Daubert in bench trials is very unlikely, but a Daubert challenge gives the expert's opponent an extra shot at the expert.

6. CROSS EXAMINATION

I. Cross-Examination Generally

A. Purposes of cross-examination

1. Eliciting favorable testimony:
   - Get the witness to admit facts that support your case and are consistent with your theory of the case
   - Use cross to emphasize helpful facts which were minimized in the direct examination
   - Establish foundation for exhibits (sometimes a hostile witness is the only source for laying the foundation for an exhibit)

2. Conducting a destructive cross:
   - Discredit the witness' credibility or competency
   - Discredit or minimize effectiveness of witness' testimony under direct
   - Expose bias, interest, or motive
   - Impeach with prior inconsistent statement (see below)

B. Preparation

1. Close familiarity with discovery documents and deposition testimony
2. For each witness, identify keys areas where favorable testimony may be elicited, or where destructive cross may be used
3. Make a list of potential questions and cross reference discovery documents and deposition testimony which relate to this topic. This preparation helps focus your cross and allows you to efficiently impeach the witness if necessary
4. Anticipate possible objections by opposing counsel. Note what response you will make as to why your question is proper

C. At Trial

1. Questioning style:
   - Ask leading questions
   - Make statement of fact, and have the witness agree to it
   - Avoid compound questions
   - Don't argue with the witness
   - Keep control over the witness (move to strike non-responsive testimony; ask court to instruct evasive witness to answer directly)
   - Don't ask the one-question-too-many. Ask only enough questions to make your points and stop. Don't ask a wrap up question. This gives the witness an opening to qualify or explain away previous answers to your questions
   - And, of course, know the probable answers to your questions before you ask them!

2. Impeaching with prior inconsistent statements
   - Use this technique only where testimony given at trial is *clearly inconsistent* with a prior statement given under oath

- Commit the witness to the fact asserted on direct
- Set the stage of the prior inconsistent statement (for example: date, time, place, circumstances of deposition)
- Confront the witness with the prior inconsistent statement by reading the statement back to the witness
- When impeaching from a transcript, read both the questions and answers verbatim

3. Watch and listen! Don't miss nuances and gradations in the witness' testimony.

II. Cross-Examination of Experts

A. The type of expert witness cross you conduct will depend upon whether you are presenting your own expert witness. If you do not have an expert, it will be up to you to conduct a robust cross to challenge the witness regarding qualifications, the scope expertise, sufficiency of data used, methodology, reliability of conclusions, and bias.

B. Preparation

1. Close familiarity of expert report (if any), deposition transcripts, and other writings by the expert on the issue at hand.
2. Read literature in the field.
3. Review the expert's resume
4. Again—determine what favorable testimony you can elicit and what discrediting cross-examination you can do

C. At Trial

1. Questioning style
   - As in any cross-examination, ask leading questions
   - Where possible, try to limit the expert to a "yes" or "no" response where this is a fair response.
   - Use hypothetical questions to lead expert to express a different opinion based on varied factual basis

2. Challenging the expert's qualifications
   - Education, training, and experience
   - Is the witnesses expertise directly applicable?
   - Scope of the expert opinion---does it exceed expert's expertise?

- Did the expert personally perform the analysis?

3. Data relied upon
   - Require expert to disclose the facts, data, and opinions underlying the opinion
   - Is the underlying accurate and complete?
   - Does opinion exclude consideration of important facts?
   - Is the opinion based upon unfounded assumptions?

4. Methodology and reliability of conclusion
   - What was methodology?
   - Was methodology reasonable?
   - Was methodology reasonably applied?
   - Errors or inconsistencies?

5. Bias and interest
   - Relationship to parties
   - Financial interest in case; compensation for services
   - Continued employment by a party
   - Prior testimony for the same party or the same attorney

6. Impeachment
   - Prior inconsistent statements, as above
   - Treatises