



AMERICAN
BANKRUPTCY
INSTITUTE

2018 Central States Bankruptcy Workshop

Business Track

Selecting and Advocating Expert Witnesses

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2018 ABI Central States: Working with Experts

Experts – How can they help?

The Expert's Purpose – Judge's Perspective

- Expert's sole purpose is to explain technical issues to the judge in such a way that the judge will be able to interpret the facts correctly
- It is improper for an expert witness to introduce new evidence into the record or replace judge as the ultimate decision-maker.
- However, it is permissible for an expert witness to testify as a lay witness with respect to factual events that she perceived.
 - The lay witness is subject to the same restrictions on admissibility that apply to other lay witnesses.

Experts – How can they help?

- The Expert's Purpose – Counsel Perspective
 - Strategy perspectives depending field of expertise
 - Deeper knowledge of certain technical issues or arguments
 - Consulting expert may have different purpose than testifying
 - Practice tip: Careful with assumptions provided to experts

Experts – How can they help?

- *Daubert* standard (FRE 702) - used by judges to determine whether an expert's scientific testimony is based on reasoning or methodology that is scientifically valid and can be properly applied to the facts of the case.
- Factors considered are –
 1. whether theory/technique in question can be tested;
 2. whether it is subject to peer view or publication;
 3. its known or potential error rate;
 4. existence of standards and maintenance of standards controlling its operations;
 5. whether it has widespread acceptance within a relevant scientific community.

Selecting Experts

- Consulting world;
- Academia;
- Friends;
- Industry experts;
- Referrals
 - Credibility issues
- Who should retain the expert?
 - Any party to the case;
 - *Sometimes* the judge

When and How to Bring in an Expert

- Bring them in early – whenever possible;
- FRCP Rule 26: disclosure obligations
- FRCP Rule 37: effect of failure to properly disclose or supplement
- Who pays for the expert?
 - The expert's professional fee, plus his or her related expenses, are usually paid by the party retaining the expert.
 - In some circumstances, the party who prevails in litigation may recover expert costs from the losing party.
- Disputing Invoices – Flat Fee v. Hourly
 - Experts are *generally* paid an hourly fee varying primarily by an expert's field of expertise and qualifications;
 - Some experts prefer a flat-fixed fee – especially for an initial report
 - Improper to do expert work on contingency basis

When and How to Bring in an Expert (Cont'd)

- Experts who *consult* v. experts who *testify* v. dual-purpose experts
 - Testifying Expert – must satisfy requirement of FRE 702 (*Daubert*)
 - Consulting Expert – generally hired to help the court or counsel evaluate a given case
- General Communications
 - Privilege
 - Prior to 2010 - If the expert witness testifies, privilege is no longer protected. 2010 amendments allow draft expert reports and certain communications to be exempt.
 - Facts known or opinions held by a non-testifying expert are generally discoverable only upon the showing of “exceptional circumstances” (Fed. R. Civ. P. (26))
- Court approval necessary under Section 327? (or ordinary course)

Involvement in Discovery

- Direct Communications with Client
- Preparing
 - Expert disclosure obligations under FRCP 26 (timing and consent of disclosure)
 - On the shortened, expedited hearing schedules often in play in bankruptcy cases, expert disclosure and other attendant deadlines are likely set by pre-trial order.
 - Furnishing a report – FRCP 26
 - Admissibility issues – FRCP 32
 - Qualifying your expert – FRE 702
- Responding
 - Subpoena *duces tecum* - used to obtain information directly from opposing sides' experts

Expert Reports

- Who is drafting the report & what does it contain? (Privilege Issues)
 - FRCP 26(b)(4)(B) – Draft expert reports and certain communications between testifying experts and a party's counsel are protected by attorney-client privilege and/or work product protection;
 - FRCP 26(b)(4)(C) provides that communications between a party's attorney and an expert may be protected under the work product privilege, but it specifically excepts from protection communications that relate to the compensation for the expert's study or testimony, or identify facts, data, or assumptions that the attorney provides and expert considers in forming an opinion.
 - There may many attorney-expert communications that are subject to disclosure.
 - FRE 703 – facts and data that form basis for expert opinion need not be admissible for opinion to be admitted.
 - FRE 705 – expert can state opinion without first disclosing foundational facts/data, but may be required to disclose them on cross-exam.

Expert Reports (Cont'd)

- Opinion v. advocacy
- Assumptions
- Supplemental reports – FRCP 26(a)(2)(C)
 - A party that learns of a some material aspect of information disclosed must communicate the new information to the other parties – this information extends to information in a report and provided through a deposition of an expert.
 - Must be made at the time the party's disclosures under FRCP 26(a)(3) are due, but some courts may require supplemental reports be made earlier.
 - Supplemental reports are permitted when an expert's report is a complete statement of the expert's opinion – but courts have allowed supplementations when the initial report is incomplete or incorrect.

Testimony

- What Makes Experts More/Less Persuasive?
 - Use plain language, keeping technical jargon to minimum.
 - If technical discussion is necessary, consider the use of charts or diagrams to make presentation more understanding to lay audience.
- Credibility/Dueling Experts
 - Select a neutral and well-qualified expert –
 - The more esoteric the issue – the more important it is to get an expert with the greatest experience in that particular technical area;
 - Ask – how closely does the expert's background match up to the technical issue on which he is being asked to testify? What is the prior relationship between this expert and the party calling him? Did the expert write his own report or did the attorney write it for him?

Testimony (Cont'd)

- Cross-examination
 - How discredit expert witnesses;
 - How to prepare your cross-examination – gracefully admit weaknesses – don't refuse to answer.
- Order of Witness Testimony – Where should experts fit in?
 - Expert witness should be called in order that is most helpful to the case.