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**The Strategic Use of Experts and
the “Stuff” They Rely Upon**

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THE STRATEGIC USE OF EXPERTS AND THE “STUFF” THEY RELY UPON

I. INTRODUCTION

In many ways, the use of experts in the bankruptcy context is identical to the use of experts outside of bankruptcy. Nevertheless, the use of experts in bankruptcy involves certain legal and practical considerations different from other forms of litigation. For example, the fact that the vast majority of bankruptcy proceedings are tried to the bench rather than a jury, the accelerated timelines in bankruptcy, and the somewhat more common use of lay opinion testimony in bankruptcy proceedings.

Bankruptcy Rule 9017 makes the Federal Rules of Evidence applicable to cases under the Bankruptcy Code.¹ This rule applies not only to adversary proceedings, but to all contested matters as well.² Bankruptcy Rules 7026 and 7037, dealing with the disclosure of expert testimony, likewise apply in adversary proceedings and in contested matters.³ Given the applicability of the Federal Rules of Evidence and the Federal Rules of Civil Procedure, and, consequently, the requirements of both, no discussion of the strategic use of experts in bankruptcy can begin without a brief discussion of the general use of experts.

Part II and Part III of this article discuss the general requirements for the qualification and admission of expert testimony under the Federal Rules of Civil Procedure and the Federal Rules of Evidence, respectively. Where possible, this discussion focuses on the issues within the context of bankruptcy. Thereafter, Part IV of this article attempts to narrow the general into certain discrete and important issues that frequently arise with respect to the use of experts in bankruptcy.

II. REQUIREMENTS IMPOSED BY THE RULES OF CIVIL PROCEDURE

Bankruptcy Rules 7026 and 7037 apply in all adversary proceedings and generally in all contested matters.⁴ Rules 7026 and 7037 provide little more than that Rules 26 and 37, respectively, of the Federal Rules of Civil Procedure apply.⁵ Thus, the operative rules are Rules 26 and 37, and much of the non-bankruptcy case law interpreting and applying these rules guides and controls the issues arising in bankruptcy litigation.

A. DISCLOSURE REQUIREMENTS UNDER RULE 26

1. Duty to Disclose Generally

Rule 26 provides that, in addition to the other disclosures required by such rule, “a party shall disclose to other parties the identity of any person who may be used as trial to present evidence under Rule 702, 703, or 705 of the Federal Rules of Evidence.”⁶ “[T]his disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness.”⁷ With respect to the contents of the expert report:

The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.⁸

The purpose of Rule 26 is to prevent unfair surprise and dilatory litigation tactics.⁹ Thus, “[t]he test of a report is whether it was sufficiently complete, detailed and in compliance with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and costs are reduced.”¹⁰ Similarly, the Fifth Circuit has held that the primary purpose of the Rule 26 expert report “is to permit the opposing party to prepare an effective cross-examination.”¹¹ A side-benefit is that the expert report better enables the court to consider the qualification and admissibility of the expert’s opinions pursuant to its gate keeping duties.¹²

The test for whether an expert report is adequate is broad and discretionary. The disclosure of information considered by the expert, for example, goes beyond mere information that the expert used in the formation of his opinion, but includes also “those documents reviewed by the expert[.]” that may not have directly contributed to the expert’s opinion.¹³

2. Testifying v. Consulting Expert

Generally speaking, a party need not provide Rule 26 disclosures concerning the opinions of a consulting expert.¹⁴ This results from the language of Rule 26 itself, which speaks in terms of disclosure of “expert *testimony*.”¹⁵ However, this rule is not absolute, especially in the case of a testifying expert that relies or ‘considers’ the opinion of the consulting expert because Rule 26 mandates the disclosure of “the data or other information considered by the [expert] witness.”¹⁶ Thus, when the testifying expert’s testimony or opinions are based on the opinion of a consulting expert, the expert report must include such consulting expert’s opinion (and facts underlying it) or the party seeking to introduce the expert testimony may face the possibility of the exclusion of such testimony based on the lack of disclosure under Rule 26.¹⁷

This same principle generally applies to the assistants of a testifying expert. The expert’s assistants normally need not testify to qualify the expert or his opinion. However, “[t]he opposing party can depose [the assistants] in order to make sure they performed their tasks competently; and the expert witness can be asked at his deposition whether he supervised them carefully and whether relying on their assistance was standard practice in his field.”¹⁸ Discovery concerning assistants becomes more pertinent the more that the assistants participate as consulting experts, i.e. where the assistants employ “professional judgment.”¹⁹ Because Rule 26 disclosures should be broad, it may therefore be appropriate in certain situations to include in the expert report the work and opinions formed by the expert’s assistants. Otherwise, the party offering the expert testimony runs the risk of an objection to admittance (and possible exclusion) of such testimony under Rule 37 because the testifying expert relied on and considered the opinions of a de facto consulting expert, thereby giving rise to the requirement of disclosure under Rule 26.²⁰

3. Duty to Supplement

Not only must a party comply with Rule 26 disclosures initially, but Rule 26 imposes a continuing obligation on such party to adequately supplement its initial disclosures.²¹ Thus, a party must supplement its Rule 26 disclosures “if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.”²² Additionally,

With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party’s disclosures under Rule 26(a)(3) are due.²³

One scenario where this issue arises is during the deposition of the expert which, given the expedited timelines in bankruptcy, may take place shortly before trial. At the deposition, the expert could testify as to a completely new opinion – one not disclosed in the expert’s report. As discussed in greater detail below, the possibility exists that the expert will not thereafter be permitted to testify as to the new opinion at trial.²⁴ Thus, the lesson is that not only must counsel be aware of the continuing duty to supplement the expert report, but counsel must make his expert aware of this duty and, accordingly, instruct the expert to contact counsel as soon as the expert forms a previously undisclosed opinion so that counsel may take the necessary steps to supplement the expert’s report before any prejudice may result to the opposing party.

Additionally, since one of the purposes of the expert report is to enable the opposing party to prepare a rebuttal of the expert’s opinion, opposing expert witnesses frequently review each other’s reports. Sometimes, this may involve the consideration or consultation by the expert of additional reference materials, or the undertaking of additional experimentation. Because such consideration and experimentation is subject to disclosure in the expert’s report, counsel should instruct his expert to supplement his report if the expert has consulted additional references or undertaken additional experimentation after the preparation of his initial report.

4. Duty to Disclose Lay Opinion Testimony

Rule 26 does not require the disclosure of lay opinion testimony admitted under Rule 701 of the Federal Rules of Evidence.²⁵ Frequently, a party will attempt to introduce lay opinion testimony under Rule 701 within the guise of an expert opinion, and will use such testimony to assail the opinion of an expert qualified under Rule 702. In such a scenario, the practical effect may be that lay opinion is de facto expert opinion testimony, only that the manner of qualification is different. The weight to be accorded to the lay opinion will be weighed against the weight to be accorded a true expert opinion.

How, then, is counsel to prepare in advance for analyzing, for example, the debtor’s opinion on the value of his farm? The debtor need not provide a report from which counsel may learn that the debtor, e.g., consulted local newspapers and talked to local realtors on the sale of neighboring farms. Yet, the expert refuting the lay opinion will need this information in advance

to properly show, for example, that neighboring farms sold for only 75% of the advertised price, or that the neighboring farms came with oil leases which affected their values. The true expert may form an opinion that a recent five year drought has lowered the value of the debtor's land. This may be so self-evident to the expert that he hardly prepares himself for the reasons and responses as to *why* drought lowers land values. Yet the debtor will have the benefit of knowing the expert's opinion in advance from the expert's report. The debtor may then testify that the drought has actually not affected the value of his land because the land in question is good for growing some crop that is viable in a semi-arid environment. Suddenly, in the middle of a hearing, opposing counsel and his expert may find themselves being forced to refute this assertion, yet the expert is an expert on valuation, as opposed to agriculture. How can the expert's general testimony withstand the debtor's thirty years of experience in farming and his B.S. in agriculture, especially when the debtor delves into farming terminology, historical yields, etc.

Counsel must always be prepared for the use of lay opinion testimony by seeking proper discovery through means other than reliance on an expert report. Instead of merely asking in an interrogatory the debtor's opinion as to the value of the farm, counsel may wish to consider elaborating and also asking discrete questions as to how the debtor arrived at his opinion. In effect, counsel must be aware that pseudo-expert testimony may be given with no prior disclosure or warning, and must always prepare for such contingency by resorting to the full use of discovery to extract a de facto expert report from the lay witness.

B. PROCEDURAL REQUIREMENTS UNDER RULE 26

The expert report must be in writing, and must be signed by the expert.²⁶ Similarly, a supplement to the expert report must be in writing.²⁷ If a discovery plan that varies the requirements of Rule 26 applies, then such plan controls notwithstanding the provisions of Rule 26.²⁸ In the absence of a discovery control plan, the initial expert disclosures are due on or before ninety days before the trial date "or the date the case is to be ready for trial."²⁹ If the expert opinion is intended solely to contradict or rebut evidence on the same subject matter identified by the opposing party in its expert report, the initial expert report is due within thirty days after the opposing party provides its expert report. A supplement to an expert report must be made by the time that disclosures under Rule 26(a)(3) are due, typically within thirty days of trial.³⁰ Expert reports "must not be filed [with the court] until they are used in the proceeding or the court orders filing."³¹

The expert report "must be detailed and complete" so as "avoid the disclosure of sketchy and vague expert information."³² Thus, a report that includes no substantive opinions but instead only includes the subjects that the expert "intend[s] to research and to discuss at trial" may be inadequate.³³ Similarly, a short statement of the opinion to be provided at trial is inadequate if it fails to state the bases for such opinion and the information considered in arriving at such opinion.³⁴ Moreover, the expert report may not take the form of a preliminary report – the report must be "complete and detailed."³⁵ Nor, for that matter, may the party offering the expert opinion rely on subsequent testimony, rebuttal testimony, and supplements to the report: "[t]he purpose of rebuttal and supplementary disclosures is just that – to rebut and to supplement" an already adequate report.³⁶

C. POTENTIAL CONSEQUENCES UNDER RULE 37 FOR FAILING TO DISCLOSE

It should be noted that, while Rule 26 imposes various duties to disclose expert information and to supplement such information, Rule 26 includes no mechanism for the enforcement of such requirements or for addressing violations thereof. Rule 37 provides appropriate remedies:

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.³⁷

The most severe sanction contemplated by Rule 37 is the exclusion of the expert's testimony from trial. However, as provided for in Rule 37, and as recognized by the Fifth Circuit, expert testimony may not be excluded if the failure to disclose under Rule 26 is harmless.³⁸ If a party has in fact failed to adequately comply with Rule 26, it is that party that bears the burden of proving that such failure was harmless.³⁹ Unless the party meets this burden, "exclusion under Rule 37(c)(1) is automatic and mandatory."⁴⁰

The Fifth Circuit looks to the following four factors in determining whether a violation of the disclosure requirements of Rule 26(a) is harmless under Rule 37: (1) the importance of the evidence; (2) the prejudice to the opposing party of including the evidence; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation for the party's failure to disclose.⁴¹ While a finding that a failure to disclose was not harmless suggests that exclusion is mandatory, the issue of whether or not a failure to disclose is harmless, as guided by these factors, is itself reviewed for an abuse of discretion.⁴² Thus, given the discretion involved, it is imperative upon the party seeking exclusion to argue, above all else, that the failure to disclose prejudiced such party. Indeed, a review of published opinions suggests that, notwithstanding the burden of proof and the various applicable factors, courts look first and foremost to whether prejudice resulted, and it appears that courts are unlikely to exclude evidence in the absence of such prejudice.⁴³

Additionally, counsel must be aware that courts appear not to tolerate inaction in reliance on the potential for exclusion. Although a failure to disclose may have initially been prejudicial, if sufficient time has elapsed since counsel discovered the required information, and counsel has taken no action thereon in the belief that counsel will be permitted to exclude testimony, counsel may find that the testimony will be permitted despite his objection because the prejudice may have been cured.⁴⁴ For example, in *Harvey v. District of Columbia*, a party provided an expert report which the district court described as being "woefully inadequate under Fed. R. Civ. P. 26(a)(2)(B)."⁴⁵ The report in question consisted of little more than a brief and conclusory paragraph. However, the opposing party failed to comply with the scheduling order, which required the parties to "meet and confer regarding all discovery disputes."⁴⁶ Furthermore, the opposing party waited until the day before the expiration of the discovery deadline to object to the expert's testimony. The combination of these two failures by the objecting party led the

court to allow the expert testimony notwithstanding the obvious failure of the other party to comply with Rule 26.⁴⁷

D. WORK-PRODUCT PRIVILEGE ISSUES

1. Work-Product Privilege Generally

The modern version of the work-product privilege is set forth in Rule 26(b)(3), which provides that:

a party may obtain discovery of documents and tangible things . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.⁴⁸

“The purpose of the work product privilege is to further the interests of clients and the cause of justice by shielding the lawyer's mental processes from his adversary . . . the work product privilege looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality.”⁴⁹ While the privilege is perhaps primarily concerned with the work product of the attorney, the privilege applies to all documents “prepared in anticipation of litigation.”⁵⁰ However, “[w]ork product only protects documents produced by or for an attorney preparing for litigation.”⁵¹

2. Testifying Expert

Rule 26 states simply that a “party may depose any person who has been identified as an expert whose opinions may be presented at trial.”⁵² The testifying expert, therefore, has no work-product privilege. Moreover, “documents and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party whether or not the expert relies on the documents and information in preparing his report.”⁵³ Numerous courts have concluded that this same principle applies to otherwise privileged information: if the testifying expert considers otherwise privileged information, such information generally loses its privilege whether work-product privilege or core privilege (i.e. attorney-client).⁵⁴

As explained by one bankruptcy court:

[D]isclosure of information to an expert witness assumes that privileged or protected material will be made public and effectively works as a waiver the attorney-client privilege. . . Rule 26(a)(2)(B) requires disclosure not only of work product but also other privileged or protected material, supplied by the party to its testifying expert. Even the courts requiring the expert witness to have actually reviewed the materials before they are subject to the discovery rule, put the burden on the party resisting discovery to prove that the expert witness did not read or review any of the materials. . . Courts must be careful to not allow the testifying expert's opinion to be a conduit for the attorney's opinion or allow the

testifying expert to be influenced by the attorney or non-testifying experts. Without discovery of these types of materials, there would not be the opportunity for a full and fair cross-examination of the expert witness.⁵⁵

The lesson for counsel is to always remain on guard about the information that is provided to a testifying expert lest such information lose its privileged status. Moreover, because the bankruptcy judge is typically the trier of fact, a motion that relates to whether a privilege applies will be heard by the bankruptcy judge, who will then possibly review the privileged information as part of the determination as to whether or not the privilege applies, the effect of which may be the disclosure of the privileged information to the fact finder irregardless of the judge's ruling on the privilege issue.

3. Consulting Expert

Unlike with a testifying expert, Rule 26(b)(4)(b) generally extends the work-product privilege to the work of a consulting expert, thereby rendering information about a consulting expert generally non-discoverable. In pertinent part, Rule 26(b)(4)(b) provides that a party may:

discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial . . . only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.⁵⁶

Initially, there is some disagreement as to whether the Rule 26 privilege is a work-product privilege: "Rule 26(b)(4)(B) is unrelated to the work product privilege. The Rule protects discovery of information held by non-testifying experts for reasons entirely independent of the work product doctrine."⁵⁷ Whether or not this is accurate is irrelevant; clearly, Rule 26 generally protects from discovery the work of a consulting expert.

The purpose of this rule is to prevent a party "from building his case on the diligent preparation of his adversary."⁵⁸ Furthermore, "[t]he rule is intended to allow litigants to consult experts in order to evaluate a claim without fear that every consultation with an expert may yield grist for the adversary's mill."⁵⁹ Nevertheless, as stated by the text of the rule itself, the work-product privilege with respect to a consulting expert is not absolute; discovery of the privileged information may be available upon the requisite showing being satisfied. While the burden that must be met in order to meet the 'exceptional circumstances' exception is great, the burden may be met where the object or condition observed by the consulting expert in arriving at his opinion has changed considerably and is no longer observable by another expert,⁶⁰ or where the cost of reconstructing particular circumstances would be so high that it would be unduly burdensome or judicially prohibitive.⁶¹

However, even if a court finds that exceptional circumstances exist, the rule is permissive as opposed to mandatory. In other words, the court need not permit discovery of the consulting expert's data. To this end, some courts have identified several factors that may be used to determine whether discovery should be permitted, including: (1) the interest in allowing counsel

to obtain the expert advice they need in order to properly evaluate and present their client's positions without fear that every consultation with an expert may be used as ammunition by the opponent; (2) the view that each side should prepare its own case at its own expense; (3) the concern that it would be unfair to the expert to compel testimony and that experts might become unwilling to serve as consultants if they suspected their testimony would be compelled; and (4) the risk of prejudice to the party who retained the expert as a result of the mere fact of retention.⁶²

Additionally, as with privileges in general, the work-product privilege may be waived. As discussed earlier, a testifying expert must disclose the information considered by such expert, and the documents and information disclosed to such expert are generally discoverable.⁶³ Thus, if the testifying expert considers the report or opinion of a consulting expert in connection with his own expert opinion, the work-product privilege normally accorded the consulting expert is waived and information about him and his opinion becomes discoverable.⁶⁴

Finally, there is some disagreement regarding whether a consulting expert, who is an employee of the party, can qualify for the work-product privilege. The problem concerns Rule 26's application of the privilege to an expert "who has been retained or specially employed . . . in anticipation of litigation or preparation for trial."⁶⁵ Thus, in *In re Shell Oil Refinery*, the defendant utilized in-house experts to investigate an accident to assist in its defense, and then resisted attempts to obtain discovery concerning such in-house experts arguing that they were consulting experts.⁶⁶ The court held that whether an expert has been retained or employed in anticipation of litigation is an issue that must be decided on a case-by-case basis.⁶⁷ *In re Shell Oil* concluded that the experts in question were retained within the requirements of Rule 26, and that, consequently, the work-product privilege applied. The court based its decision on its findings that: (1) the employees were engaged by the defendant's outside attorneys to assist in the defense; (2) the employees prepared preliminary reports at the direction of the defendant's in-house legal department; (3) copies of the reports were provided only to the defendant's outside attorneys; and (4) although the employees might have studied the issues anyway as a part of their jobs, their jobs did not usually include litigation assistance.⁶⁸

4. Waiver of Privilege

The work-product privilege can be waived. As discussed above, the privilege may be waived if a testifying expert considers and relies upon the work of the consulting expert in forming his own opinion. Disclosure of work product to the testifying expert, however, is not the only way to waive the privilege: "[w]aiver of work-product protection results where, because of the circumstances surrounding disclosure to another, it is likely that the contents of the work-product are no longer secret or it would be an abuse of the doctrine to keep them secret."⁶⁹ This does not mean that all disclosures of work product result in waiver. If the disclosure is made to a co-party in furtherance of a joint strategy, for example, and if such disclosure is not otherwise "inconsistent with maintaining secrecy against opponents," the work-product privilege will continue to protect the disclosed information from discovery by the opponent.⁷⁰

However, when the disclosure is made to one adversary, the work product privilege generally does not protect the otherwise privileged information from discovery by other adversaries – including future adversaries.⁷¹ Waiver of work product may also result where a

party fails to timely object to discovery of the privileged information.⁷² As explained by one court, “when notified of defendants’ intention to depose [plaintiff’s consulting experts], plaintiff failed to move for a protective order. She thus waived her right to rely on the restrictions of Rule 26(b)(4)(B).”⁷³ Clearly, counsel should not merely ignore a request for discovery of information to which privilege applies in the belief that the privilege requires no response to such request. Instead, counsel should immediately move for a protective order or undertake such other action as will prevent a waiver not only of the privilege, but also of the ability to object.

Moreover, the work-product privilege applies to discovery, as opposed to testimony or the admissibility of privileged information: “[t]he rule does not address itself to the admissibility at trial of the testimony of such an expert which is elicited by the opponent.”⁷⁴ Thus, if a party intentionally or inadvertently waives a work-product privilege, such party will not thereafter be able to prevent the admission of written evidence or testimony that may initially have been protected from discovery as work product.⁷⁵

E. PAYMENT OF FEES

Typically, the party retaining the expert pays for the expert’s fees and costs. However, pursuant to Rule 26(b)(4)(C)(i), a party’s expert is entitled to a “reasonable fee” for time spent to responding to a discovery request unless “manifest injustice would result.” Thus, for example, a debtor may be required to reimburse a creditor’s expert for the debtor’s Rule 2004 examination of the expert.⁷⁶ The reasonableness of the expert’s fees, when such fees are to be paid by the opposing party under Rule 26, is guided by the following factors: (1) the witness’ area of expertise; (2) the education and training that is required to provide the expert insight that is sought; (3) the prevailing rates for other comparably respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the cost of living in the particular geographic area; and (6) the expert’s fee arrangement with the party that originally retained him.⁷⁷

Additionally, Rule 26(b)(4)(B) permits a party to compel discovery concerning a consulting expert in exceptional circumstances, in which case such party may be required (unless manifest injustice would result) to “pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.”⁷⁸

In the event that the court appoints an expert under Rule 706 of the Federal Rules of Evidence, the rule provides for the payment of such expert’s fees “by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.”⁷⁹ While the precise proportion of such expert’s fees to be borne by a party is discretionary, it should be noted that a bankruptcy court may tax the court-appointed expert’s fees against a losing party as otherwise permitted by federal law.⁸⁰

III. REQUIREMENTS IMPOSED BY THE RULES OF EVIDENCE

A. PURPOSE OF EXPERT OPINIONS

The rules generally provide that “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”⁸¹ The only way for a witness who does not have personal knowledge to testify is if such

witness qualifies as an expert. Similarly, a witness is normally precluded from testifying in the form of an opinion, unless the opinion qualifies as a lay opinion based on “the perception of the witness.”⁸² Thus, only an expert may testify in the form of an opinion that is not based on personal knowledge.

Additionally, as contemplated by Rule 702 of the Federal Rules of Evidence, the purpose, indeed the prerequisite for the admission, of expert testimony is to “assist the trier of fact to understand the evidence or to determine a fact in issue.”⁸³ Thus, as stated by the Supreme Court, one of the purposes of expert testimony is to explain for the fact finder issues outside of common knowledge, i.e. scientific, technical, and other specialized knowledge outside of the average person’s common sphere of knowledge and understanding.⁸⁴

In many instances, the purpose of expert testimony in bankruptcy is the same as the purpose of such testimony outside of bankruptcy, since bankruptcy courts will frequently adjudicate otherwise non-bankruptcy causes of action that may require expert testimony. There are, however, issues peculiar to bankruptcy which frequently require the use of expert testimony as part of a party’s burden of proof, since such party cannot meet its burden through the use of non-expert testimony. For example, issues concerning present value and feasibility within the plan confirmation process are both: (1) issues that are not susceptible to personal knowledge; (2) highly technical issues; and (3) subjective issues which an expert can apply significant knowledge and skill to provide the most accurate, albeit subjective, opinion.

B. PERMISSIBLE BASES OF EXPERT OPINIONS

1. Basis for Formation of Expert Opinion

Rule 702 of the Federal Rules of Evidence sets forth the general rule for the admissibility of testimony by an expert witness:

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 principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.⁸⁵

Rule 702 may initially be broken down into two separate inquiries: first, will the expert testimony assist the trier of fact; and second, is the expert testimony sufficiently reliable to permit presentation thereof to the trier of fact. These two issues are similar, i.e. if the expert testimony is unreliable, it will not assist the trier of fact.

The qualification of an expert requires that the expert has specialized knowledge or skill above that of the average person which qualifies him to explain an issue or a fact and to render an opinion on such issue or fact. With the Supreme Court’s test for the qualification of an expert as pronounced in *Daubert* and its progeny (as discussed below), the issue has perhaps moved somewhat away from the personal ‘worth’ of the expert, meaning the achievements and professional and academic standing of the expert, to an emphasis on the reliability and honesty of

the expert's methodology and analysis. The issue of the expert's 'worth' now involves primarily the weight to be accorded the expert's opinion. Nevertheless, whether explicit or implicit, and whether going to qualification or weight of opinion, an expert's status is important and at times crucial.

As an example, how can one who has never heard of post-modern art form an 'expert' opinion on the monetary value of a post-modern painting? He need not be an expert in art to open a book on recent sale prices for the painters' similar paintings. This would be an example of methodology which, presumably, may qualify the person to offer his opinion on the value of the painting notwithstanding his lack of knowledge concerning the underlying subject matter. While such an opinion may be admissible, conversely, is the opinion of a renowned expert on post-modern art as to the value of the painting admissible when the expert merely testifies that x is his opinion of the value because that is the price that he would pay for the painting, without being able to justify such an opinion on any proper or objective methodology?⁸⁶

While parties frequently look solely to *Daubert* on the issue of the qualification of an expert – and while *Daubert* is certainly crucial to such issue – parties should not forget that the personal qualifications of the witness may be equally as important. As explained by one court, “[i]f the trial court determines that the expert is qualified in the relevant field, *then* the court must exercise its gate-keeper function as provided in *Daubert* and *Kumho Tire*.”⁸⁷ Regardless, it is clear that a court may refuse to qualify an expert if the expert is not personally qualified (i.e. able) to render a reliable opinion:

The Court finds that O'Donnell does not possess the qualifications to render a causation opinion in this case. Although he holds himself out as a doctor and a pharmacologist, he has never earned an M.D., a Ph.D., or any degree in pharmacology. In fact, his only claim to the title of doctor is based upon the completion of a one-year 'Pharm.D.' program in 1971. O'Donnell admits that he took just one course related to pharmacology during his year-long Pharm.D. program. Although he is listed as an Assistant Professor of Pharmacology at the Rush Medical College, he offers only a single class there as an unpaid, volunteer lecturer, spending roughly a half-day a week in connection with the job. The class . . . can hardly be described as primarily scientific or pharmacological in nature.⁸⁸

Thus, the basis of an expert's opinion is important not only in the sense of methodology, but also in the sense of the personal qualifications of the expert. Rule 702 provides that “a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify” in the form of an opinion if the witness has applied appropriate methodology.⁸⁹ Rule 702 makes it clear that a witness need not have advanced post-graduate degrees to qualify as an expert. Rather, a witness may be qualified under Rule 702 if the witness has specialized knowledge, skill, etc., obtained through practical experience: “defendants would have us ignore the fact that Evidence Rule 702 permits expert testimony although the source of the witness' expertise is not limited in the formal ways sought to be emphasized by defendants – instead that Rule expressly refers to a witness' expertise acquired by knowledge or experience or training as well . . . defendants can of course attempt to discount the weight of that testimony through appropriate cross-examination and argument to the jury.”⁹⁰

2. Admissibility of Underlying Data Used by Expert

Rule 705 of the Federal Rules of Evidence provides that an expert may testify in the form of an opinion without first testifying as to the underlying data used by the expert, but that the “expert may in any event be required to disclose the underlying facts or data on cross-examination.”⁹¹ The underlying facts or data used by the expert generally need not themselves be admissible.⁹² Rule 705, therefore, creates the potential that otherwise inadmissible evidence will be de facto admitted into evidence when testified to by the expert.

This, of course, is an issue that is most relevant in jury trials. Yet, in a jury trial, a judge may take certain steps to prevent contamination of the jury through the introduction of inadmissible evidence, such as by removing the jury from the courtroom while the expert testifies on voir dire. The vast majority of trials in bankruptcy courts are tried to the bench, where the judge has no alternative but to hear potentially inadmissible evidence within the context of ruling on the experts’ qualification. The judge may have greater ability than the jury to ignore evidence that he knows to be inadmissible, but, hearing certain inadmissible evidence may tip the balance in one’s mind so that, without relying on the inadmissible evidence per se, one may nevertheless either consciously or unconsciously use such inadmissible evidence in reaching a conclusion. Worse yet, the inadmissible evidence could help explain certain admissible evidence so as to make the admissible evidence clearer and perhaps more compelling.

Fortunately, while this is certainly a concern, bankruptcy judges tend to be mindful of the rules and especially vigilant when it comes to ignoring inadmissible evidence. Unfortunately, there is precious little that bankruptcy litigators can do to counteract any concern that the bankruptcy judge may be tainted by inadmissible evidence. One suggestion is to file expert related objections as early as possible, and attempt to have them heard well before trial so that the judge will hopefully not recall much of the expert’s testimony or underlying facts by the time that trial commences. Furthermore, while the expert is permitted to rely on inadmissible evidence in forming his opinion, this is true only if such inadmissible evidence is “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”⁹³ Accordingly, counsel may find it useful to begin any examination concerning inadmissible evidence with the question not of what such evidence is, but with whether such evidence, whatever it is, is relied upon by experts in the particular field.

Additionally, while “[a]n expert is permitted to disclose [inadmissible evidence] for the limited purpose of explaining the basis for his expert opinion,” the expert is not permitted to disclose such inadmissible evidence “as general proof of the truth of the underlying matter.”⁹⁴ Unlike with the discovery of information that the testifying expert *considers* under Rule 26, otherwise inadmissible evidence may not be elicited from the testifying expert on cross examination unless the “testifying expert bases his present opinion on, or testifies directly from” the inadmissible evidence, e.g. the report of a consulting expert.⁹⁵ Thus, counsel faced with an opposing counsel’s attempt to de facto introduce inadmissible evidence through an expert should object, not only on the basis that the evidence is inadmissible, but on the basis that the testifying expert did not actually rely on the inadmissible evidence in forming his opinion, thereby obviating, perhaps, the need to actually hear what the inadmissible evidence is because it does not matter what such evidence is if it was not relied upon by the testifying expert.⁹⁶

3. Discovery of Underlying Data Used by Expert

The discovery of the data and information used by a testifying or consulting expert is governed by Rule 26 of the Federal Rules of Civil Procedure, and is discussed in detail in part II of this article. A party may discover any and all of the information considered by a testifying expert in forming his opinion. Indeed, the opposing party has an affirmative duty to disclose any and all such information as part of its Rule 26 disclosures and may be sanctioned for any failure to do so. With respect to discovery of the underlying data used by a consulting expert, the general rule is that the work-product privilege (or the version thereof embodied by Rule 26(b)(4)(B)) protects from discovery the opinions, reports, etc. of the consulting expert, although this general rule is subject to certain important exceptions discussed in greater detail above.

C. QUALIFICATION OF EXPERT

1. Court as Gatekeeper / Duties of Court

The trial court's role in the admission or exclusion of expert testimony is likened to that of a gatekeeper. It is the court's duty to prevent the admission of unreliable or irrelevant evidence so as to avoid poisoning the fact finder with such evidence: "[t]he objective of the gatekeeper requirement is to make certain that an expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."⁹⁷ The role of the trial court is to "ensure that only reliable and relevant expert testimony is presented to the jury."⁹⁸ Although case law has developed certain well defined factors to guide the issue of whether an expert's testimony is reliable and relevant, the trial court retains significant discretion in ruling on the admissibility of expert testimony and is reviewed by the Fifth Circuit for an abuse of such discretion.⁹⁹

This does not mean, however, that the trial court is to decide whether the expert is correct or not in his conclusions. As the Fifth Circuit has cautioned, "experts sometimes reach different conclusions based on competing versions of the facts . . . [the rules are] not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other."¹⁰⁰ As further explained by the Fifth Circuit,

It bears reminding that the trial court's role as gatekeeper [] is not intended to serve as a replacement for the adversary system. Rather . . . vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. Thus, while exercising its role as a gate-keeper, a trial court must take care not to transform a *Daubert* hearing into a trial on the merits. In this case, we conclude that the standard of reliability that the district court applied to Dr. Coco's testimony was overly stringent. The fact-finder is entitled to hear Dr. Coco's testimony and decide whether it should accept or reject that testimony after considering all factors that weigh on credibility, including whether the predicate facts on which Dr. Coco relied are accurate.¹⁰¹

Thus, counsel should remember that the gatekeeper role of the court is not to address the truth or accuracy of a particular expert opinion, but rather to address the basic reliability of such opinion

while the fact finder ultimately determines truth and accuracy. Accordingly, the arguments that counsel should use to address admission of expert testimony may not necessarily be the same that counsel should use to attack the accuracy of such testimony.

2. Daubert and its Progeny

Prior to the Supreme Court's 1993 decision in *Daubert*, many courts applied the "general acceptance test" for the admissibility of expert testimony as set forth in the 1923 *Frye* opinion.¹⁰² Under *Frye*, an expert opinion was admissible if it was based upon techniques and principles that were "well recognized" in the expert's field of expertise.¹⁰³ Reviewing the text of Rule 702 and noting its "general approach of relaxing the traditional barriers to opinion testimony" in the form of the "general acceptance test," *Daubert* squarely rejected any continuing reliance on *Frye* or on the "general acceptance test" and held that "the *Frye* test was displaced by the Rules of Evidence."¹⁰⁴

Notwithstanding its abrogation of *Frye*, the Court did not abrogate the trial judge's general duty to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."¹⁰⁵ The Court recognized that whether expert testimony is reliable depends on a case by case analysis, and is accordingly incapable of a precise definition. The Court did, however, identify certain factors that may help guide the inquiry, including:

- (1) testing – whether a theory or technique underlying the expert's opinion has been, or is capable of, empirical testing;
- (2) peer review and publication – "publication (or lack thereof) in a peer reviewed journal will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised"; not dispositive because the Court recognized that some theories or techniques may be "too new, or of too limited interest to be published";
- (3) error rates – "in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error"; and
- (4) acceptability – while disapproving of *Frye's* general acceptance test as dispositive, the Court nonetheless found that general acceptance has a place under Rule 702: "acceptance can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support within the community may properly be viewed with skepticism."¹⁰⁶

The Supreme Court expressly limited *Daubert* to expert opinions based on "scientific knowledge."¹⁰⁷ With its 1999 opinion in *Khumo Tire*, however, the Court left no doubt that its *Daubert* opinion and the principles enunciated therein apply "to all expert testimony."¹⁰⁸

With respect to the qualification of an expert, *Daubert* and the Rules make it clear that it is not only the expert that must be qualified, but it is also the expert opinion itself that must be qualified. As is well recognized by case law, nothing in *Daubert* or the Rules requires a court "to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert."¹⁰⁹ An expert may be highly respected in his field; may have published numerous

articles that have been reviewed by his peers; and may have been honored with a multitude of academic distinctions, but it is not enough for such an expert to provide an opinion which is based on nothing more than the expert beating his chest and pontificating: 'I'm a genius, and that's my genius opinion' . *Daubert* and the Rules require more; they require, at a minimum, that the opinion is empirically and rationally connected to existing data.¹¹⁰ In fact, some courts have suggested the expert's potential lack of personal achievement, as opposed to his opinion's lack of qualification, is an issue that should be considered by the fact finder as an issue that goes to weight and credibility.¹¹¹ Nevertheless, a professional education is not a prerequisite to qualification as an expert. As provided for by Rule 702, and as held by the Fifth Circuit, a witness may qualify as an expert based on practical experience.¹¹²

Even if the expert applies the proper methodology, but an incorrect factual premise, a court may exclude the expert's opinion. Similarly, Rule 702 requires that the expert testimony assist the trier of fact to understand or to determine a fact in issue.¹¹³ Even an absolutely valid expert opinion is inadmissible if it does not assist the trier of fact. *Daubert* included an example of this distinction:

The study of the phases of the moon, for example, may provide valid scientific knowledge about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent credible grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule 702's helpfulness standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.¹¹⁴

3. Challenges to Qualification

The primary issue that every litigator must remember is that an otherwise valid objection to the qualification of an expert, or to the admission of expert testimony, may be waived if not timely asserted.¹¹⁵ As provided by Evidence Rule 103:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.¹¹⁶

A *Daubert* objection may not be made for the first time on appeal.¹¹⁷ Moreover, absent a timely objection, a trial court has no independent duty to insure the qualification of opinion testimony.

A party may choose from several available mechanisms to challenge the qualification of an expert, unless a scheduling order or local rule provides an applicable timeline and mechanism for objecting to the qualification or admission of expert testimony. Normally, a party files a motion to exclude expert testimony, a motion in limine, or a motion objecting to the use of the expert at trial. However the motion is styled, it is, in essence, a *Daubert* motion; a motion that

challenges the qualification or admission of expert testimony based on Rule 702 as applied by *Daubert*.

If permitted by the scheduling order and the local rules, especially in smaller trials or at a hearing on a motion, a party may wish to wait until the hearing itself to challenge expert testimony. In this respect, the party may take the expert on voir dire before the expert testifies to insure that the expert is qualified, or the party may wait until after the expert offers an opinion before challenging such opinion based on information revealed through cross-examination. In fact, one potential benefit of waiting until the hearing to challenge the qualification of an expert (once again, only if permitted by a scheduling order) is to catch the other side by surprise and perhaps unprepared. If the challenge is successful, the other side will not have the ability to find another expert.

Alternatively, some practitioners feel that perhaps the most strategic challenge to an expert is not a *Daubert* challenge at all. A party may know well in advance that the opponent's expert is completely unqualified, and that the party would likely prevail on a *Daubert* motion. Nevertheless, the party may forgo such objection and permit the opponent to introduce the expert testimony. Thereafter, on cross examination, the party may proceed to undercut the expert's opinion without actually having moved for the exclusion of the opinion. In certain situations, this strategy can have two very effective results. First, the opposing party may not know in advance the weaknesses of their expert's opinion; and second, it is sometimes more effective to permit a judge to hear unreliable evidence, and then to discredit the evidence, because the judge may find himself questioning other evidence introduced by such party.

4. Special Considerations of Expert Qualification in Bench Trials

While the rules applicable to the qualification of an expert are the same in bench trials as they are in jury trials, it nevertheless appears that certain practical and perhaps sometimes unstated differences exist with respect to bench trials – an issue that becomes all the more important in bankruptcy where the vast majority of matters are tried to the bench. The paradox is simple: if it is the purpose of the judge's gatekeeping role to prevent poisoning the fact finder with unreliable or unduly prejudicial testimony, yet the judge must hear such testimony in the context of a *Daubert* motion, voir dire, or other expert qualification procedure, then, theoretically, hasn't the judge as the fact finder been poisoned? Should the judge recuse himself?

Clearly, this result is neither desirable nor realistic. Perhaps somewhat paternalistically, the law presumes that a judge will ignore inadmissible or unreliable testimony despite hearing such testimony, whereas the likelihood that a juror could do the same is less, thereby requiring a gate keeper. This, however, begs the question of why a bankruptcy judge, as the finder of fact, should ever need to conduct a *Daubert* hearing or otherwise address the qualification of an expert. After all, if a purported expert opinion is unreliable, opposing counsel can bring such deficiency to light through cross-examination or through the use of his own expert – and the judge can ignore the testimony offered by the patently unqualified expert (whereas a juror may not be able to do so).

Generally speaking, two basic and sometimes countervailing rules and policies govern the qualification and admissibility of expert witnesses: the expert testimony must assist the trier of fact, i.e. it must be reliable, and the expert testimony must not be unduly prejudicial.¹¹⁸ When trial is before the bench, both of these considerations diminish. As noted by the District of Columbia Circuit, “[t]he district court was the sole factfinder in this case and thus particularly well-suited to make the determination as to whether expert testimony would be ‘helpful.’”¹¹⁹ “When the role of the gatekeeper to admit or exclude evidence (the judge) and the role of the factfinder to assess and weigh the evidence that was admitted (the jury) are one and the same, the judge who becomes the factfinder as well as the gatekeeper must be given great deference.”¹²⁰ Moreover, a bankruptcy judge is under no obligation to rule based on the testimony of an expert – even the unrebutted testimony of an expert. As explained by one bankruptcy judge, the court “is not bound to accept the values contained in the parties’ appraisals; rather, it may form its own opinion of the value of the subject property after considering the appraisals and expert testimony.”¹²¹

Litigators are naturally concerned about the introduction of inadmissible and hostile evidence if for no other reason than to protect the record. But, litigators may frequently find that bankruptcy judges admit obviously inadmissible opinion or expert testimony. While bankruptcy judges differ, it has been the experience of some bankruptcy practitioners that a bankruptcy judge may admit expert evidence that the bankruptcy judge knows to be inadmissible, if for no other reason than to give the litigant the impression of ‘his day in court,’ and if for no other reason than to avoid a potential basis for appeal. Indeed, if the judge admits patently inadmissible expert evidence, yet rules for the other side, neither side is likely to appeal the judge’s evidentiary ruling. Moreover, what appellate court would reverse a judge’s ruling with respect to a questionable expert opinion if the judge specifically states on the record or in his opinion that he placed no reliance whatsoever on such opinion?

D. USE OF LAY OPINION TESTIMONY

The Federal Rules of Evidence permit a witness to present an opinion notwithstanding the fact that such witness has not been qualified as an expert under Rule 702, in which case such witness is referred to as a lay witness, and in which case the lay witness’ opinion is referred to as a lay opinion. In this respect, Rule 701 provides the following:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Additionally, the Fifth Circuit has made it clear that lay opinion testimony admitted under Rule 701 may go to the ultimate issue or fact in the case just as testimony admitted under Rule 702.¹²²

1. Basis for Formation of Lay Opinion

Rule 701 requires that the lay opinion be reached without resort to any specialized knowledge, and that such lay opinion could accordingly be reached by any ordinary person.¹²³ If specialized knowledge is required, the witness should testify as an expert qualified under Rule 702. The lay opinion must be based on the “perception of the witness.” This can become a tricky issue given possible disagreement over the meaning of perception: is a lay opinion, based on second hand information, inadmissible as not having arisen as a result of the witness’ perception? An expert qualified under Rule 702 may include hearsay and second hand information as bases for the formation of his opinion.¹²⁴ A lay opinion, however, may not.

As determined by the Fifth Circuit, the witness offering a lay opinion “must have personal knowledge of the facts from which the opinion is said to derive.”¹²⁵ Thus, unlike the case with an expert qualified under Rule 702, the lay opinion may not be based on hearsay.¹²⁶ Nor may the lay opinion be based on speculation or conjecture: “speculative opinion testimony by lay witnesses – i.e., testimony not based upon the witness’s perception – is generally considered inadmissible.”¹²⁷

In addition to the requirement that the witness offering a lay opinion have personal knowledge of the facts from which the opinion derives, the Fifth Circuit imposes two further requirements: a rational connection must exist between the opinion and the facts upon which it is based; and the opinion must be helpful, either in understanding the testimony or in determining a fact in issue.¹²⁸ With respect to there being a rational connection between the opinion and the perceptions, the Fifth Circuit has elaborated by specifying that “the opinion must be one that a normal person would form from those perceptions.”¹²⁹

Aside from the question of the admissibility of lay opinion testimony is the separate issue of the weight to be accorded such opinion. In this respect, a bankruptcy court is not bound to rule based solely on lay opinion testimony, even if uncontraverted. Thus, where the court concludes that the lay witness offered an opinion “just pulled out of the air,” the court is certainly free to accord little if no weight to the opinion.¹³⁰ A lay opinion is therefore susceptible to the same type of credibility scrutiny applied to the expert opinion – even more so, perhaps, given the frequent self-serving nature of lay opinion. Counsel offering lay opinion should accordingly advise the witness to be prepared in advance for questions concerning the basis of the opinion and should be prepared to answer with something more than a naked assertion to the effect that ‘that’s just my opinion.’ For example, a debtor may wish to introduce tax or insurance appraisals of his property (if admissible) in an attempt to elevate his opinion from one admissible solely under Rule 701 to one more readily recognized under Rule 702.

2. Valuation Issues

One of the most common uses of lay opinions in bankruptcy deals with valuation issues. In this respect, the law in the Fifth Circuit is that an owner of property may testify as to his opinion of the value of such property.¹³¹ This principle may apply even though the owner is the president of a corporation that actually owns the property in question.¹³² Thus, especially in Chapter 7 consumer cases, and in Chapter 12 and Chapter 13 cases, where the debtor most likely does not have the resources to hire an expert appraiser, the debtor will frequently offer his

opinion as to the value of property as the sole evidence in response to, e.g., a motion to lift the stay.

The general principle that an owner may testify as to the value of property is not based solely on Rule 701. Instead, this principle overlaps with Rule 602, which provides that a witness may testify regarding matters within personal knowledge, and with Rule 702. With respect to Rule 602, the value of property may be within the personal knowledge of the owner if, for example, the owner recently purchased the property and neither economic fluctuations nor depreciation is a factor. The owner may also qualify as an expert under Rule 702 even though the owner may have no specialized scientific knowledge on valuation. As noted by the Advisory Committee's Note to Rule 702, within the scope of the rule "are not only experts in the strictest sense . . . but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values." Indeed, the owner of a homestead will frequently keep abreast of the selling prices of homes in his area and of the general housing market and may thereby obtain a certain degree of specialized knowledge, albeit on a micro-economic level. For this reason, though, a court should normally not permit a lay witness to offer an opinion regarding the value of property outside his micro-economic sphere.

As suggested above, a separate question which frequently arises in the context of lay opinions as to the value of property concerns the admissibility of hearsay or other inadmissible evidence that may form the basis of the lay opinion. This issue is different from the question of whether the lay opinion may be based on hearsay evidence; rather, the issue elevates the hearsay evidence one step further – to de facto admissibility. An expert qualified under Rule 702 generally may include otherwise inadmissible evidence as part of his testimony for the limited purpose of explaining his opinion. With valuation, a true expert may, for example, testify that he consulted neighbors who described the state of the debtor's property and the debtor's care thereof, or that he consulted local newspapers for the prices of similar properties. Similarly, a debtor may testify on cross-examination that his opinion is based on hearsay or other inadmissible evidence. Unlike with the case of an expert qualified under Rule 702, where counsel can do little to prevent the introduction of inadmissible evidence, counsel may be able to use the debtor's use of such inadmissible evidence to exclude his opinion.

In this situation, counsel may wish to consider taking one of two positions. First, as discussed above, a witness may offer a lay opinion only if it is based on the witness' personal knowledge, meaning that a lay opinion may not be based on hearsay. Thus, counsel may wish to object to the debtor's valuation of his property as being outside the scope of admissibility under Rule 701. Alternatively, recognizing that a debtor may testify as to the value of his property under Rule 701 or Rule 702, and that an opinion admissible under Rule 702 may be based on inadmissible evidence, counsel should attempt to argue that: (1) the debtor's opinion is based on hearsay; (2) therefore the debtor must be qualified, if at all, under Rule 702 to provide such opinion; (3) therefore, as an expert testifying under Rule 702, the debtor was obligated under Rule 26 of the Federal Rules of Civil Procedure to provide the necessary disclosures regarding his opinion. Since the debtor most likely would not have provided the required disclosures, counsel should argue that the debtor's failure to disclose the fact that he will testify as an expert, and his failure to disclose the data underlying his opinion, is prejudicial and that Rule 37 accordingly requires the exclusion of the debtor's opinion.

3. Plan Confirmation Issues / Feasibility

The plan confirmation hearing is, to a large degree, an evidentiary hearing where the plan proponent must meet a factual burden vis a vis the requirements of confirmation. Since evidence must be introduced to meet such burden, issues will often arise as to the type of witness needed to provide such evidence. The use of lay opinion testimony in this regard depends on the complexity of the particular plan confirmation issue in question. There is little need, for example, for a Chapter 13 debtor to offer expert testimony in the plan confirmation process. The Chapter 13 debtor may, either under Rule 602 or Rule 701, testify as to value of his non-exempt assets to prove that creditors will obtain a greater return under the plan than under Chapter 7. The Chapter 13 debtor may likewise testify either under Rule 602 or 701 as to what his monthly expenses and income are, and hence what the amount available to fund a plan is.

Similar issues in the context of Chapter 11, however, may require opinions over and above those admissible under Rule 701, depending on the size and complexity of the debtor and of the plan. A liquidation analysis may be fairly straightforward, if the debtor owns one item of tangible property, the value of which the debtor's owner may be permitted to provide his opinion. Conversely, if the debtor owns intangible assets, such as accounts receivable, expert testimony may be required. In affirming the bankruptcy court's confirmation order where the value of an intangible asset was at issue, the Fifth Circuit placed great emphasis on the expert opinions introduced regarding such value:

The bankruptcy court heard testimony from several other experts on the value of the corporate lawsuit. Also, the debtors called three attorneys, Mr. Boyd, Mr. Hytken, and Mr. Sheldon, who testified as to the value of the lawsuit. In addition to the testimony of Trustee Stewart, who was an attorney actively involved in the Texas Extrusion bankruptcy proceeding, the proponents of the Plan called Mr. Price, an attorney from Trustee Stewart's law firm whom Mr. Stewart had earlier consulted in valuing the corporate lawsuit. The court also heard the testimony of Richard Pickens and had the benefit of examining numerous exhibits submitted by the parties.¹³³

With respect to feasibility, no expert testimony should be required if the plan proponent testifies under Rule 602 that the plan is a liquidating plan and that all of the cash required to fund the plan has already been collected. However, if the plan proposes to provide notes payable over a period of years, and is therefore dependant on future cash flow, or if a liquidating plan is based on projections of the proceeds of future sales, an expert opinion may be required to prove feasibility. The Ninth Circuit, for example, found it important that a plan proponent presented evidence by way of "experts [who] testified that the Debtor's assets are attractive and in demand."¹³⁴ An expert may also be required to rebut the debtor's opinion under Rule 701 as to feasibility: "[t]his Court has reviewed the testimony of the Government's agricultural market expert regarding the yields, prices and costs which debtors can expect and finds that it provides an ample basis . . . to deny confirmation on the basis of § 1129(a)(11)."¹³⁵ The present value analysis is an issue that may particularly require the testimony of an expert.¹³⁶

Two additional points are worth mentioning. First, it is difficult to envision how a party objecting to confirmation on factual grounds could introduce evidence as to the requirements of

confirmation without the use of an expert, since such objecting party is unlikely to have personal knowledge of many of the issues. Second, the plan proponent may find itself denied confirmation because the court – which has an independent duty to insure compliance with all plan confirmation requirements – may not be satisfied that evidence introduced by a non-expert sufficiently meets the plan proponent’s burden of proof, especially with respect to factual issues that are outside of personal knowledge or that are outside of the average person’s abilities to render an opinion:

the values which the debtors would ask the court to accept as the minor premise of this inexorable logic are . . . nearly 40% lower than the values which they admitted their property to have when they filed their petition for relief only some 10 months ago. Their explanation for this vast difference is that there has been a literal ‘crash’ in the value of farm property over the course of the intervening 10 months. But, *in the absence of some truly expert testimony on this issue*, the court could not conclude that such a drastic reduction in the value of farm property has taken place.¹³⁷

Thus, even where confirmation is not contested, and even where rebuttal evidence is not expected, a plan proponent may wish to offer expert testimony on those issues that typically require the testimony of an expert to prove.

IV. STRATEGIC USES OF EXPERTS IN BANKRUPTCY

A. REQUIREMENTS IMPOSED BY THE BANKRUPTCY CODE

1. Court Approval of Employment – When it is Required; When it is Not

Section 327 of the Bankruptcy Code requires court approval of professionals employed by the estate, thereby raising the issue of whether an expert witness is a professional, the retention of whom requires court approval.¹³⁸ In this context, the majority of courts hold that an expert witness is not a professional within the meaning of Section 327.¹³⁹ As aptly explained by one bankruptcy court:

In order to be considered a professional person within the meaning of § 327, it is not enough that the party be a professional by education or training. Instead he or she must also play an integral role in the administration of the bankruptcy case. The professional could assist the trustee with important activities, such as obtaining post-petition financing, negotiating creditor claims or formulating a plan of reorganization. It is these types of activities that rise to the level necessary to be considered a professional person under § 327(a). In the instant case, the experts employed by Special Counsel merely assisted her with the prosecution of the State Court Action. These experts in no way assisted the Trustee with the administration of the bankruptcy case. Therefore, . . . these experts were not professional persons within the meaning of § 327(a).¹⁴⁰

Case law therefore draws a distinction between professional hired by the estate for purposes of reorganization or liquidation, and professionals hired by the estate to serve as expert witnesses. Furthermore, the estate’s other professionals, such as the trustee’s counsel or special

counsel, likewise may retain an expert witness without the necessity of court approval.¹⁴¹ This is due, in part, to the fact that the employment of counsel and special counsel itself requires court approval under Section 327. Such approval is required in part because the position carries with it responsibility and discretion to effectively carry out necessary litigation. These responsibilities include engaging necessary expert witnesses for the litigation.”¹⁴²

Added to the general view that an expert witness is not typically a professional within the meaning of section 327 is the policy view that:

It seems somewhat improper for the Bankruptcy Court to be intimately involved in directing and overseeing litigation which is to be brought before it, or before the District Court. The Trustee and the Attorney for the Trustee are in a better position to evaluate the merits and the possible return to the estate. It therefore appears that this is an area where the Court should maintain some discrete distance if there are not countervailing factors requiring the Court’s intrusion. In this way, the Court may avoid the appearance of impropriety, partiality, or influence.¹⁴³

Moreover, requiring court approval for the retention of an expert witness “could lead to possible abuse.”¹⁴⁴ An adverse party would have advance knowledge of the estate’s expert witness, and an adverse party may even have a say in the retention of the estate’s expert witness, thereby raising serious concerns over what is best for the estate and what is best for such adverse party.¹⁴⁵

At least one opinion has indicated that a potential conflict that may exist between an expert witness and the estate, such as would preclude employment of the expert witness as a professional under Section 327, nevertheless does not disqualify the witness as an expert hired by the estate solely as a testifying expert because, since approval of such employment is not required under Section 327, the rigorous standards of Section 327 as to eligibility for employment by the estate do not apply.¹⁴⁶

A minority of courts suggest that, in the limited instances where the expert witness is retained directly by the trustee, as opposed to the trustee’s counsel, or where the expert witness has a direct contractual relationship with the trustee, court approval of the expert witnesses’ retention may be necessary.¹⁴⁷ Additionally, where the expert assumes a role above that of a witness and instead becomes an advisor for the estate, it is more likely that the expert will be viewed as a professional within the meaning of Section 327 thereby requiring court approval of employment, even though the expert may also be expected to testify as an expert witness.¹⁴⁸

But, where the expert witness has a contractual relationship with the trustee’s counsel, i.e. the expert witness was retained solely by the counsel and is to be paid by counsel, the concerns raised by the minority are not applicable.¹⁴⁹ This raises the interesting question of which party, the estate or the estate’s counsel, is contractually obligated to pay the expert witnesses’ fees and expenses. An attorney may not retain an expert witness on a contingency fee basis. Yet, the fee arrangement of court-approved counsel may be likened to a contingency fee, inasmuch as court-approved counsel under Section 327 requires court approval for the payment of services. If such counsel enters into a contact with an expert witness whereby the expert witness is to be paid only

if counsel is paid, has counsel violated the prohibition on retaining an expert on a contingency fee basis?

Despite the apparent lack of any published opinion addressing the application of Section 327 to the retention of expert witnesses, in the Fifth Circuit, practitioners may find that local rules and procedures and some bankruptcy judges consider expert witnesses to be professionals within the meaning of Section 327, therefore requiring court approval of employment. In perhaps the only opinion to have touched upon this issue, the Bankruptcy Court for the Southern District of Texas cited with approval a case that stands for the proposition that an expert witness is not a professional within the meaning of Section 327.¹⁵⁰ However, in the Northern District of Texas, General Standing Order 2000-7 provides that:

A professional employed under § 327 may not employ, and charge as an expense, another professional (*e.g.*, *special litigation counsel employing an expert witness*) unless the employment of the second professional is approved by the Court prior to the rendering of service.¹⁵¹

Accordingly, counsel is warned that court approval of the employment of expert witnesses may be required notwithstanding the majority view and, out of an abundance of caution, counsel should consider seeking such approval.

2. Court Approval of Compensation and Reimbursement

The fact that an expert witness may be retained by the estate without the necessity of court approval under Section 327 does not, however, mean that such expert's compensation and reimbursement of expenses is not subject to the requirements of Section 330, which generally mandates court approval of compensation and reimbursement.

The compensation and reimbursement of expert witnesses is typically considered within the context of court approval of the reimbursement of fees requested by an attorney whose employment was previously approved by the court under Section 327. In this respect, “[t]he court does not rule on the amounts which [special counsel] owes to each of the experts. That is a contractual matter between [special counsel] and each expert over which this court has no jurisdiction. This court will merely decide how much the estate will be permitted to pay to [special counsel] by way of reimbursement.”¹⁵²

With respect to the amount of reimbursement from the estate, Section 330 provides that the court may award “reimbursement for actual, necessary expenses.”¹⁵³ Since the fees and expenses of an expert witness are typically viewed as counsel's expenses, the well developed and frequently employed factors and tests set forth by the courts with respect to other categories of expenses apply with respect to reimbursement by the estate for the costs of expert witnesses. Thus, for example, a court may deny the time spent by a purported legal expert on researching the basic law of his purported expertise: “[t]he estate should not have to bear the expense of educating an ‘expert’ .”¹⁵⁴ The court may also guard against the needless duplication of work; if counsel retained two expert witnesses on the same issue, counsel may have to justify the need for two such experts before a court will approval reimbursement for both.¹⁵⁵

B. LEGAL EXPERT OPINIONS IN BANKRUPTCY

1. Legal Opinions in General

Generally speaking, “[i]t is the function of the trial judge to determine the law of the case. It is impermissible to delegate that function to a [fact finder] through the submission of testimony on controlling legal principles.”¹⁵⁶ Accordingly, expert legal testimony is rarely admissible.¹⁵⁷ While Rule 702 does not expressly prohibit expert legal testimony, and while Rule 704 permits an expert opinion on an ultimate issue, courts recognize that there can be only one legal expert in the courtroom: “[t]he danger is that the jury may think that the ‘expert’ in the particular branch of the law knows more than the judge – surely an inadmissible inference in our system of law.”¹⁵⁸ A preferable course when faced with an uncertain question of law is for the court to invite a disinterested opinion in the form of a *amicus curiae* brief.¹⁵⁹

However, notwithstanding the general prohibition on expert legal testimony, much of the concerns present with respect to such testimony in the case of a jury trial disappear when the trial is to the bench. In this respect, one may find bankruptcy judges more likely than their non-bankruptcy counterparts to admit legal expert testimony, especially on foreign or obscure legal issues, not necessarily for the purposes of determining the guiding law through the expert’s opinion thereon, but rather to point the court to the appropriate source of law and to the applicable opinions, with the judge, thereafter, making the determination as to the guiding law.

2. Legal Opinions on Application of Foreign Law

One potentially permissible example of the use of expert legal testimony relates to issues arising under foreign law. Courts have recognized that, with respect to foreign law, the legal opinion of an expert may indeed be helpful given a court’s unfamiliarity with, or inability to review, foreign law.¹⁶⁰ This is an issue that may be applicable to large bankruptcy cases where the debtor may have a presence, and therefore potential liability, in numerous jurisdictions around the world. This issue may also be of particular importance in cases filed under section 304 of the Code (cases ancillary to foreign proceedings).¹⁶¹

The actual determination of foreign law, while a potentially permissible domain of expert opinion, is rarely an issue, however, in bankruptcy court. Many cases based on foreign law are presumably adjudicated at the district court level, or else the cases are dismissed, transferred, or abstained from for a variety of reasons.¹⁶² Nevertheless, the determination of foreign law may become an issue with respect to, e.g., contract actions litigated in bankruptcy court but based on the law of a foreign jurisdiction. If the court is called upon to make this type of determination, there is no reason why the court should refrain from resorting to an expert legal opinion – if for no other reason than to point the court in the proper direction for the source of the foreign law.¹⁶³ The court could, and would, always retain for itself the exclusive right to eventually determine the foreign law.

The issue may also arise, for example, in the context of estimating tort claims for plan purposes when the tort claims are based on foreign law. Granted, a bankruptcy judge may be able to determine the foreign law, as well as the right of a claimant to recover under such law, but how is a bankruptcy judge able to determine an unliquidated claim based on foreign tort law?

Unless the judge has litigated numerous tort cases under the foreign law, and has therefore experienced numerous court awards, the judge would have no basis from which to estimate the amount of the claim under the foreign law. Expert testimony by a witness that has such knowledge, however, and who can accordingly estimate the potential award under the foreign law, would certainly “assist the trier of fact . . . to determine a fact in issue,” in this case being the estimated recovery of the claimant.¹⁶⁴ Moreover, in this example, the bankruptcy judge would not necessarily be required to determine foreign law. Rather, the judge would be required to determine the applicability of such law to the facts of the case; an issue that is perhaps a mixed question of law and fact, but one that certainly contains a factual element.

A leading case that relied upon expert legal testimony in this respect is *Dow Corning*.¹⁶⁵ In *Dow Corning*, the debtor filed a petition under Chapter 11 for the primary purpose of addressing thousands of claims arising from alleged tort claims stemming from the debtor’s manufacture and sale of silicon-gel breast implants. The claimants resided in numerous foreign jurisdictions and based their claims on the tort laws of such foreign jurisdictions. The issue before the court was the classification of claims under Section 1122 of the Code; namely, whether the claimants – all general unsecured creditors – could be separately classified into different unsecured classes based, in part, on the respective tort laws of the foreign jurisdictions. Claimants from certain countries would be paid a lesser percentage than claimants from other countries, with United States claimants receiving the highest percentage recoveries. An additional issue was whether such separate classification and the recoveries under the plan were fair and equitable.

Dow Corning began by “noting a fairly obvious point upon which there is virtually no disagreement: all breast-implant claims, both domestic and foreign, are substantially similar . . . The real question is whether there is a legitimate reason for classifying breast-implant claims in three separate classes . . . the answer to this question is yes.”¹⁶⁶ The legitimate reason for the separate classification in *Dow Corning* was the differing abilities of the internationally diverse claimants to recover differing amounts from their foreign legal systems on what were, essentially, identical alleged injuries, i.e. a claimant in country x may recover only 25% of the amount that a claimant with identical injuries may recover in the United States. Thus, the lesser recovery to the foreign claimant was fair and equitable, because such foreign claimant would be entitled to a lesser recovery under his legal system.

The court admitted the expert testimony of several witnesses who were qualified as experts on foreign laws and on the recoveries under such laws.¹⁶⁷ One legal expert, for example, testified that the factors leading to lower tort awards in foreign legal systems include:

the availability of strong social security system payments in foreign countries; that most tort cases in foreign countries are tried by judges, not juries; that punitive damages are typically not available in foreign countries or are available in only limited instances; that foreign countries lack American-style contingency fees; that foreign countries exhibit lower tort awards, and different, less plaintiff-friendly standards of liability; that cultural factors in foreign countries lead to a diminished propensity to litigate; that more plaintiffs proceed in foreign countries on a pro se basis; and that significant weight is given in foreign countries to semi-official medical reports completed at the direction of the government.¹⁶⁸

Also revealing is the reason why the *Dow Corning* Court rejected comparable expert legal opinions from the objecting parties' witnesses: "[t]he foreign objectors' witnesses were also unhelpful in this regard. For instance, the Shainwald Claimants presented the testimony of Edward Kellogg. It was apparent on cross-examination that Mr. Kellogg has minimal practice experience in the English tort system, and minimal knowledge of average recovery amounts in the English tort system."¹⁶⁹

The court did not rely on the legal experts so much for an opinion as to *what* the foreign law was, but on the *application* of such law vis a vis real and hypothetical claimants – the kind of opinion that requires experience and that is arguably factual in nature. A court armed with sufficient resources and a good law clerk may be able to find that a silicone-gel implant claimant in country x may be able to recover an unlimited amount of damages from the judge. But how, other than through expert testimony, could a bankruptcy judge that has never litigated a similar case in the foreign country know the likely amount that the foreign judge would award? While *Dow Corning* relied on expert legal testimony to provide this information in the context of plan classification and plan confirmation, legal opinions on foreign law and on foreign recoveries are equally as appropriate and necessary in other bankruptcy related issues, chief among which perhaps is the estimation of claims for plan purposes.

3. Claims Estimation

While not directly at issue in *Dow Corning*, *Dow Corning* nevertheless provides the obvious example of the use of expert legal testimony with respect to the estimation of a claim subject to liquidation under foreign law. This principle, however, is not limited to an application of foreign law, but applies instead to the estimation of claims subject to domestic law – an area that an expert is typically prohibited from encroaching upon.

In this respect, bankruptcy courts (and district courts) frequently permit expert testimony with respect to the estimation of contingent and unliquidated claims under Section 502(c) of the bankruptcy code. Indeed, it is difficult to envision how a court could otherwise reasonably estimate mass tort claims. For example, courts have resorted to the use of experts to estimate present and future mass asbestos and mass Dalkon Shield claims.¹⁷⁰

With respect to the estimation of mass claims under Section 502(c), courts do not accept expert testimony for the purpose of proving or estimating the validity of any given claim, e.g. an expert testifying that the debtor was negligent with respect to the manufacture of a product. Rather, courts rely on expert testimony that blends legal, statistical, and factual issues to arrive at an estimation of the value of any given claim, or on the aggregate value of a number of claims, i.e. assuming the debtor's negligence in designing a product, what would be the likely value of the resulting tort claims.¹⁷¹ As noted by one court, "large numbers of asbestos tort claims are routinely analyzed and their value estimated by experts on the basis of epidemiology and statistics."¹⁷² When estimating mass tort claims, "the bankruptcy court would estimate [] total liability by statistical means. It could employ epidemiological studies to determine the future incidence of asbestos-related disease, and then study the data from the 3,500 claims against [the debtor] that have already reached judgment or settlement to determine the average cost of each claim."¹⁷³

Thus, when estimating certain claims under section 502(c), the court must consult numerous potential sources and must analyze potentially thousands of records and then, from such empirical bases, construct a statistical model. Clearly, this kind of undertaking is outside the scope and the resources of the average court, but it is exactly the type of undertaking where expert witnesses can play – and in fact must play – a crucial role. Whether such expert opinions are legal opinions, or are better classified as statistical or mathematical opinions, is irrelevant – they are admissible and even required.¹⁷⁴

Examiner Reports

Pursuant to Section 1104(c) of the Bankruptcy Code, the court has the power to appoint an examiner “to conduct such an investigation of the debtor as is appropriate.”¹⁷⁵ The examiner typically prepares and files a report detailing his findings.¹⁷⁶ The question may arise, therefore, whether the examiner qualifies as an expert such that he may offer his opinions and report in the form of testimony. Case law provides little guidance on this issue, although the little case law that exists suggests that the default position (i.e., absent court order) appears to be that the examiner’s report does not have the evidentiary effect of an expert’s report or opinion.¹⁷⁷

One court has suggested that a bankruptcy court-appointed expert under Rule 706 of the Rules of Evidence would lack the investigative powers of an examiner.¹⁷⁸ Yet, in that case, the court sua sponte appointed an examiner.¹⁷⁹ It is somewhat curious that the court did not appoint the examiner both under Section 1104 of the Bankruptcy Code and under Rule 706 – an examiner and a court-appointed expert. In that opinion, however, the court was not necessarily interested in receiving expert opinions or expert testimony. Rather, the court was interested only in “an independent investigation to develop information which is essential to the court’s evaluation of the confirmation requirements and the debtor’s good faith.”¹⁸⁰

It appears likely that an examiner would not be qualified to testify in the form of an opinion under Rule 701 because the examiner would not have personal knowledge of the documents examined and because, unlike a trustee, an examiner would not succeed to the legal status of speaking with ‘personal knowledge’ for the debtor. However, there appears to be no explicit bar against the examiner qualifying as an expert witness under Rule 702 which permits the expert to form an opinion based on inadmissible evidence (assuming that the examiner is otherwise qualified to offer the opinion). In one case where the court appointed an examiner, the court, albeit without saying so, de facto appointed the examiner an expert under Rule 706 or else a priori considered the examiner an expert:

The court also needs aid in understanding some of the rather arcane concepts employed in the utility rate-setting regulatory world in order to properly perform its duties. The court is really caught between two complete legal systems and will need the examiner as an interpreter if nothing else, i.e., the court perforce has to act with the concepts coming not only from the reorganization world but also from the utility regulatory world. . . The examiner will be useful, either directly or through counsel, in literally examining witnesses from a neutral, disinterested standpoint so that the record is clear and understandable to non-experts including this court.¹⁸¹

While the court’s proposed use of the examiner arguably crosses the threshold between permissible investigator and potentially impermissible special master, this case clearly stands for the proposition that the examiner may be used by a court as an impartial expert so as to explain the issues and facts to the fact finder – the very definition of an expert qualified under Rule 702 or under Rule 706.

However, there are arguments against the wisdom of clothing an examiner with the powers of an expert under Rule 702. First, as suggested above, it is not entirely clear that a bankruptcy court has the authority to appoint a special master to determine complicated or arcane issues. Such is not even the purpose of an examiner because the expertise of the examiner on such an issue, e.g. public utility pricing structures, has little to do with the investigation of the debtor and its affairs. Appointing an examiner to act as the expert witness for the court would, in effect, be appointing a special master because the court would likely place more faith in the examiner given his supposed impartiality. Additionally, one of the key purposes of an examiner is to enable someone whose impartiality is beyond doubt to provide an honest and unbiased review. For this reason, for example, an examiner is per se prohibited from serving as a Chapter 11 trustee or a Chapter 7 trustee in the case; the suggestion that the potential of serving as trustee may taint the examiner’s report to recommend the appointment of a trustee, might raise serious doubts as to the report’s impartiality given the examiner’s interest in potentially becoming the trustee.¹⁸² The same situation could potentially arise were the examiner permitted to testify as an expert. The argument could be made that, in such a situation, the examiner may taint his report so as to make it particularly useful to one of the parties in the hope that such party would thereafter pay the examiner hundreds of dollars per hour to testify as its expert.

¹ FED. R. BANKR. P. 9017.

² See, e.g., *In re Owens*, 269 B.R. 794, 797 (Bankr. N.D. Ill. 2001).

³ FED. R. BANKR. P. 7026; FED. R. BANKR. P. 7036; FED. R. BANKR. P. 9014.

⁴ See *id.*

⁵ FED. R. BANKR. P. 7026; FED. R. BANKR. P. 7036.

⁶ Fed. R. Civ. P. 26(a)(2)(A).

⁷ FED. R. CIV. P. 26(a)(2)(B).

⁸ *Id.*

⁹ See, e.g., *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995).

¹⁰ *Reed v. Binder*, 165 F.R.D. 424, 429 (D.N.J. 1996).

¹¹ *Hoover v. United States*, 611 F.2d 1132, 1142 (5th Cir. 1980).

¹² See, e.g., *id.* (“By requiring the parties to follow the disclosure procedure under Federal Rules of Civil Procedure 26(a)(2), the court will have before it a complete statement of the opinions to which the expert will testify and the factual basis. This material, supplemented by memoranda addressed to the evidentiary issues, will provide a helpful record for rulings under Rule 104(a)”).

¹³ *Karn v. Ingersoll Rand*, 168 F.R.D. 633, 635 (N.D. Ind. 1996).

¹⁴ See, e.g., *Hoover*, 611 F.2d at 1141.

¹⁵ FED. R. CIV. P. 26(a)(2)(B) (emphasis added).

¹⁶ *Id.*

¹⁷ *Shapardon v. West Beach Estates*, 172 F.R.D. 415, 417-18 (D. Haw. 1997) (excluding expert testimony where expert’s Rule 26 report did not adequately disclose reliance by the expert on the opinion of a consulting expert).

¹⁸ *Dura Auto. Sys. of Ind. Inc. v. CTS Corp.*, 285 F.3d 609, 613 (7th Cir. 2002).

19 *Id.*

20 *See, generally, In the Matter of James Wilson Assocs.*, 965 F.2d 160, 172-73 (7th Cir. 1992).

21 *See* FED. R. CIV. P. 26(e).

22 FED. R. CIV. P. 26(e)(1).

23 *Id.*

24 *Grassi v. Information Res. Inc.*, 63 F.3d 596, 603 (7th Cir. 1995).

25 *See* Fed. R. Civ. P. 26(a)(2)(A) (requiring disclosure of those persons who will present evidence under Rule 702, 703, or 705 of the Federal Rules of Evidence; lay opinion testimony is permitted by Rule 701); *Harms v. Laboratory Corp. of Am.*, 155 F. Supp. 2d 891, 903-04 (N.D. Ill. 2001).

26 *See* FED. R. CIV. P. 26(a)(2)(A).

27 *See* FED. R. CIV. P. 26(e)(1).

28 *Id.* (providing that rule applies “[e]xcept as otherwise stipulated or directed by the court”); *Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002).

29 FED. R. CIV. P. 26(a)(2)(C).

30 FED. R. CIV. P. 26(e)(1); FED. R. CIV. P. 26(a)(3)(A).

31 FED. R. CIV. P. 5(d).

32 *Sierra Club Lone Star Chapter v. Cedar Point Oil Co. Inc.*, 73 F.3d 546, 571 (5th Cir. 1996) (internal quotations omitted).

33 *Id.*

34 *See id.*

35 *See id.* *See also* *Brumley v. Pfizer Inc.*, 200 F.R.D. 596, 603 (S.D. Tex. 2001) (“Preliminary reports do not satisfy the express terms of Rule 26”).

36 *Sierra Club, Lone Star Chapter*, 73 F.3d at 571.

37 FED. R. CIV. P. 37(c)(1).

38 *See* *Heidtman v. County of El Paso*, 171 F.3d 1038, 1040 (5th Cir. 1999).

39 *See id.*; *Mid-America Tablewares Inc. v. Mogi Trading Co. Ltd.*, 100 F.3d 1353, 1363 (7th Cir. 1996).

40 *Mid-America Tablewares Inc.*, 100 F.3d at 1363.

41 *Texas A&M Research Found. v. Magna Transp. Inc.*, 338 F.3d 394, 402 (5th Cir. 2003); *United States v. \$9,041,598.68*, 163 F.3d 238, 252 (5th Cir. 1998).

42 *See* *Texas A&M Research Found.*, 338 F.3d at 402.

43 *See, e.g., Mid-America Tablewares Inc.*, 100 F.3d at 1363 (affirming denial of motion to exclude expert testimony for failure by expert to comply with Rule 26(a) because moving party failed to explain how the experts’ failure to so comply caused prejudice).

44 *See* *Texas A&M Research Found.*, 338 F.3d at 402.

45 949 F. Supp. 874, 877 (D.D.C. 1996).

46 *Id.*

47 *See id.* at 878.

48 FED. R. CIV. P. 26(b)(3).

49 *In re Grand Jury Subpoena*, 220 F.3d 406, 408-09 (5th Cir. 2000) (internal quotations omitted).

50 *In re Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000).

51 *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991).

52 FED. R. CIV. P. 26(b)(4)(A).

53 *In re Pioneer Hi-Bred Int’l Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001).

54 *See id.*; *Herman v. Marine Midland Bank*, 207 F.R.D. 26, 29 (W.D.N.Y. 2002) (and cases cited therein). *But see* *Nexus Prod. Co. v. CVS N.Y., Inc.*, 188 F.R.D. 7 (D. Mass. 1999) (holding that core privilege is not waived although the privileged information was considered by the expert).

55 *Tri-State Outdoor Media Group Inc. v. Official Committee of Unsecured Creditors (In re Tri-State Media*
Group Inc.), 283 B.R. 358, 365 (Bankr. M.D. Ga. 2002) (internal citations and quotations omitted).

56 FED. R. CIV. P. 26(b)(4)(B).

57 *In Vanguard Sav. And Loan Ass'n v. Banks*, 1995 U.S. Dist. LEXIS 2016 (E.D. Pa. Feb. 17, 1995).

58 *In re Shell Oil Co.*, 132 F.R.D. 437, 440 (E.D. La. 1990).

59 *Agron v. Trustees of Columbia Univ.*, 176 F.R.D. 445, 449 (S.D.N.Y. 1997).

60 *See, e.g., Delcastor, Inc., v. Vail Assoc.*, 108 F.R.D. 405 (D. Colo. 1985).

61 *See, e.g., In re Agent Orange*, 105 F.R.D. 577 (E.D. N.Y. 1985).

62 *See, e.g., Rubel v. Eli Lilly and Co.*, 160 F.R.D. 458, 460 (S.D. N.Y. 1995).

63 *See, e.g., In re Pioneer Hi-Bred Int'l Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001).

64 *See Herman v. Marine Midland Bank*, 207 F.R.D. 26, 31 (W.D.N.Y. 2002); *Shapardon v. West Beach Estates*,
172 F.R.D 415, 417 (D. Haw. 1997).

65 FED. R. CIV. P. 26(b)(4)(B).

66 132 F.R.D. 437, 442 (E.D. La. 1990), *clarified*, 134 F.R.D. 148 (E.D. La. 1990).

67 *See id.* 132 F.R.D. at 442.

68 *See id. But see Dallas v. Marion Power Shovel Co., Inc.*, 126 F.R.D. 539 (S.D. Ill. 1989) (holding that an "in-
house expert" should be treated as an ordinary witness).

69 *Latin Inv. Corp. v. L & L Constr. Assocs. Inc. (In re Latin Inv. Corp.)*, 160 B.R. 262, 263 (Bankr. D.C. 1993).

70 *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

71 *See Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1429 (3d Cir. 1991).

72 *See, generally, Agron v. Trustees of Columbia Univ.*, 176 F.R.D. 445, 449 (S.D.N.Y. 1997).

73 *Steele v. Seglie*, 1986 U.S. Dist. LEXIS 27569 *9 (D. Kan. 1986).

74 *gron*, 176 F.R.D. at 449.

75 *See id.*

76 *See In re Valley Forge Plaza Assoc.*, 109 B.R. 669, 676 (Bankr. E.D. Pa. 1990).

77 *See, e.g., Mathis v. Nynex*, 165 F.R.D. 23, 24 (E.D. N.Y. 1996); *Bowen v. Monahan*, 163 F.R.D. 571, 573-74
(D. Neb. 1995); *Goldwater v. Postmaster Gen. of the United States*, 136 F.R.D. 337, 340 (D. Conn. 1991).

78 FED. R. CIV. P. 26(b)(4)(C)(ii).

79 FED. R. EVID. 706(b). Rule 706 provides for the payment of a court-appointed expert's fees from public funds
in certain situations most likely inapplicable in the bankruptcy context.

80 *See, e.g., Baehr v. Touche Ross & Co. (In re Philadelphia Mortgage Truste)*, 930 F.2d 306, 308 (3d Cir. 1991).

81 FED. R. EVID. 602.

82 FED. R. EVID. 701.

83 FED. R. EVID. 702.

84 *See Salem v. United States Lines Co.*, 370 U.S. 31, 31-33, 82 S. Ct. 1119, 1120-21 (1962).

85 FED. R. EVID. 702.

86 *See, e.g., Fedor v. Freightliner Inc.*, 193 F. Supp. 2d 820 (E.D. Pa. 2002) (excluding testimony of experts who
failed to offer any discernable methodology upon which they based their opinions).

87 *Newton v. Roche Labs. Inc.*, 243 F. Supp. 2d 672, 676 (W.D. Tex. 2002) (emphasis added).

88 *Id.* at 677 (internal citations and quotations omitted).

89 *Id.*

90 *Atkinson v. General Research of Electronics Inc.*, 24 F. Supp. 2d 894, 898-99 (N.D. Ill. 1998).

91 FED. R. EVID. 705.

92 FED. R. EVID. 703 (facts or data used by the expert need not be admissible if "of a type reasonably relied upon
by experts in the particular field in forming opinions or inferences upon the subject").

93 *Id.*

94 *Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349, 1356 (5th Cir. 1983).

95 *Polythane Sys. Inc. v. Marina Ventures Int'l Ltd.*, 993 F.2d 1021, 1207 (5th Cir. 1993).

96 *See id.*

97 *Munoz v. Orr*, 200 F.3d 291, 301 (5th Cir. 2000) (quoting *Kuhmo Tire Co. v. Carmichael*, 119 S. Ct. 1167, 1176 (1999)).

98 *Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 506 (5th Cir. 1999).

99 *See, e.g., United States v. Fullwood*, 342 F.3d 409, 412 (5th Cir. 2003).

100 *Pipitone v. Biomatrix Inc.*, 288 F.3d 239, 249 (5th Cir. 2002).

101 *Id.* at 250 (internal quotations omitted).

102 *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579, 585-86, 113 S. Ct. 2786, 2793 (1993).

103 *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

104 *Daubert*, 509 U.S. at 589, 113 S. Ct. at 2794.

105 *Id.*, 509 U.S. at 589, 113 S. Ct. at 2795.

106 *Id.*, 509 U.S. at 593-94, 113 S. Ct. at 2796-97 (internal citations and quotations omitted).

107 *Id.*, 509 U.S. at 590 n.8, 113 S. Ct. at 2795 n.8.

108 *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 147, 119 S. Ct. 1167, 1174 (1999).

109 *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 277 (5th Cir. 1998).

110 *See, e.g., Black v. Food Lion Inc.*, 171 F.3d 308, 311 (5th Cir. 1999).

111 *See, e.g., In re Piece Goods Shops Co.*, 188 B.R. 778 (Bankr. M.D.N.C. 1995).

112 FED. R. EVID. 702; *Southern Cement Co. v. Sproul*, 378 F.2d 48, 49 (5th Cir. 1967).

113 FED. R. EVID. 702.

114 *Daubert*, 509 U.S. at 591, 113 S. Ct. at 2796.

115 *See, e.g., Lindsey v. Navistar Int'l Transp. Corp.*, 150 F.3d 1307, 1315 (11th Cir. 1998).

116 FED. R. EVID. 103(a)(1).

117 *See, e.g., Diefenbach v. Sheridan Transp.*, 229 F.3d 27, 29-30 (1st Cir. 2000); *Lindsey*, 150 F.3d at 1315.

118 *United States v. Hall*, 969 F.2d 1102, 1109-1110 (D.C. Cir. 1992).

119 *Id.* at 1110.

120 *Meinhardt v. Unisys Corp. (In re Unisys Sav. Plan. Litig.)*, 173 F.3d 145, 158 (3d Cir. 1999).

121 *In re Smith*, 267 B.R. 568, 572-73 (Bankr. S.D. Ohio 2001) (citing *In re Abruzzo*, 249 B.R. 78, 86 (Bankr. E.D. Pa. 2000); *In the Matter of Buckland*, 123 B.R. 573, 578-79 (Bankr. S.D. Ohio 1991)).

122 *See Soden v. Freightliner Corp.*, 714 F.2d 498, 511 (5th Cir. 1983).

123 *See Doddy v. Oxy U.S.A. Inc.*, 101 F.3d 448 (5th Cir. 1996).

124 *See* FED. R. EVID. 703.

125 *Soden*, 714 F.2d at 511 (internal quotations omitted).

126 *See, e.g., Meder v. Everest & Jennings Inc.*, 637 F.2d 1182, 1188 (8th Cir. 1981).

127 *Washington v. Department of Transp.*, 8 F.3d 296, 300 (5th Cir. 1993).

128 *See Soden*, 714 F.2d at 511.

129 *Id.*

130 *In re Brown*, 244 B.R. 603, 612 (Bankr. W.D. Va. 2000).

131 *See South Central Livestock Dealers Inc. v. Security State Bank of Hedley Tex.*, 614 F.2d 1056, 1061 (5th Cir. 1980).

132 *See United States v. 10,031.98 Acres of Land*, 850 F.2d 634 (10th Cir. 1988).

¹³³ *Texas Extrusion Corp. v. Lockheed Corp. (In the Matter of Texas Extrusion Corp.)*, 844 F.2d 1142, 1158 (5th Cir. 1988).

¹³⁴ *Acequia Inc. v. Clinton (In re Acequia Inc.)*, 787 F.2d 1352, 1364 (9th Cir. 1986).

¹³⁵ *See Cothran v. United States (In the Matter of Cothran)*, 45 B.R. 836, 838 (S.D. Ga. 1984).

¹³⁶ *See, generally, In re Cornwall Personal Ins. Agency Inc.*, 2003 Bankr. LEXIS 831 (Bankr. N.D. Tex. 2003) (reviewing competing opinions by experts with respect to present value analysis).

¹³⁷ *In the Matter of Duncan*, 58 B.R. 169, 170 (Bankr. W.D. Mo. 1985) (emphasis added).

¹³⁸ 11 U.S.C. § 327(a) (2003).

¹³⁹ *See, e.g., In re Napoleon (Napoleon I)*, 233 B.R. 910, 913-14 (Bankr. D.N.J. 1999) (and cases cited therein). *But see In re The Marlin Oil Co.*, 83 B.R. 50 (Bankr. D. Colo. 1988) (denying post-petition fees to expert witness retained as such without court approval under Section 327 on the unaddressed assumption that the expert witness was a professional within the meaning of Section 327).

¹⁴⁰ *Napoleon I*, 233 B.R. at 913-14.

¹⁴¹ *See id.*

¹⁴² *In re That's Entm't Mktg. Group Inc.*, 168 B.R. 226, 230 (N.D. Cal. 1994).

¹⁴³ *In re Babcock Dairy Co. of Ohio Inc.*, 70 B.R. 691, 693 (Bankr. N.D. Ohio 1987).

¹⁴⁴ *Id.* at 694.

¹⁴⁵ *See id.*

¹⁴⁶ *See In the Matter of First Am. Health Care of Ga. Inc.*, 208 B.R. 996, 996 (Bankr. S.D. Ga. 1996).

¹⁴⁷ *See Napoleon I*, 233 B.R. at 914-15; *In re The Marlin Oil Co.*, 83 B.R. 50 (Bankr. D. Colo. 1988).

¹⁴⁸ *See In re Acands Inc.*, 297 B.R. 395, 402-03 (Bankr. D. Del. 2003) (finding that expert was a professional within the meaning of Section 327 given its extensive involvement as advisor to the estate).

¹⁴⁹ *See Napoleon I*, 233 B.R. at 914-15.

¹⁵⁰ *See In re Lowry Graphics Inc.*, 86 B.R. 74, 79 (Bankr. S.D. Tex. 1988) (citing *In Re Babcock Dairy Company of Ohio, Inc.*, 70 B.R. 691 (By. N.D. Ohio 1987) and stating parenthetically that "expert witness was not a professional person").

¹⁵¹ General Standing Order 2000-7, *Guidelines for Compensation and Expense of Professionals*, III.H., Bankr. N.D. Tex. (emphasis added).

¹⁵² *In re Napoleon (Napoleon II)*, 1999 Bankr. LEXIS 816 *3 (Bankr. D.N.J. 1999); *In re Babcock Dairy Co. of Ohio Inc.*, 70 B.R. 691, 693 (Bankr. N.D. Ohio 1987).

¹⁵³ 11 U.S.C. § 330(a)(1)(B) (2003).

¹⁵⁴ *Napoleon II*, 1999 Bankr. LEXIS 816 at *7.

¹⁵⁵ *See, generally, id.* at *7-*9.

¹⁵⁶ *See United States v. Zipkin*, 729 F.2d 384, 387 (6th Cir. 1984).

¹⁵⁷ *See Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997).

¹⁵⁸ *See Marx & Co. Inc. v. Diners' Club Inc.*, 550 F.2d 505, 512 (2d Cir. 1977).

¹⁵⁹ *See, e.g., Jason's Food Inc. v. Peter Eckrich & Sons Inc.*, 774 F.2d 214, 216 (7th Cir. 1985).

¹⁶⁰ *See, e.g., Nieves-Villanueva v. Soto-Rivera*, 133 F.3d at 99 ("The one well-recognized exception is for questions of foreign law, where the judge may be aided by the expert's assistance"); *Jason's Food Inc.*, 774 F.2d at 216; *In re Initial Public Offering Sec. Litig.*, 174 F. Supp. 2d 61, 65 (S.D.N.Y. 2001).

¹⁶¹ *See, e.g., Haarhuis v. Kunnan Enters. Ltd.*, 223 B.R. 252 (Bankr. D.D.C. 1998).

¹⁶² *See Shley v. Dow Corning Corp. (In re Silicon Gel Breast Implant Prod. Liability Litig.)*, 887 F. Supp. 1469 (N.D. Ala. 1995) (dismissing foreign tort claimants' diversity cases on the basis of *forum non conveniens* for liquidation in the claimants' respective home jurisdictions).

¹⁶³ *See, e.g., Haarhuis*, 223 B.R. at 255-56.

¹⁶⁴ FED. R. EVID. 702.

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- ¹⁶⁵ *In re Dow Corning Corp.*, 244 B.R. 634 (Bankr. E.D. Mich. 1999).
- ¹⁶⁶ *Id.* at 658.
- ¹⁶⁷ *See id.* at 659-60 & n.13.
- ¹⁶⁸ *Id.* at 660 n.16.
- ¹⁶⁹ *Id.* at 660-61.
- ¹⁷⁰ *See In re A.H. Robins Co. Inc.*, 880 F.2d 709, 720 (4th Cir. 1989) (noting that estimation of Dalkon Shield claims “was arrived at after testimony by expert witnesses”); *In re Eagle-Picher Indus. Inc.*, 189 B.R. 681, 690-91 (employing expert opinions in estimating present and future asbestos related claims).
- ¹⁷¹ *See In re A.H. Robins Co. Inc.*, 880 F.2d at 720; *Official Comm. of Asbestos Pers. Injury Claimants v. Sealed Air Corp. (In re W.R. Grace & Co.)*, 281 B.R. 852, 864 (Bankr. D. Del. 2002); *In re Eagle-Picher Indus. Inc.*, 189 B.R. at 683-84.
- ¹⁷² *In re W.R. Grace & Co.*, 281 B.R. at 864.
- ¹⁷³ *In re A.H. Robins Co. Inc.*, 880 F.2d at 720 n.13 (quoting *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 Harv.L.Rev. 1121 at 1128-29 and 1132-33 (1983)).
- ¹⁷⁴ *See In re A.H. Robins Co. Inc.*, 880 F.2d at 720; *In re Eagle-Picher Indus. Inc.*, 189 B.R. at 690-91.
- ¹⁷⁵ 11 U.S.C. § 1104(c) (2003).
- ¹⁷⁶ *See id.* § 1106(b).
- ¹⁷⁷ *See, e.g., In the Matter of Baldwin United Corp.*, 46 B.R. 314, 316 (Bankr. S.D. Ohio 1985).
- ¹⁷⁸ *In re Landscaping Servs. Inc.*, 39 B.R. 588, 591 n.4 (Bankr. E.D.N.C. 1984).
- ¹⁷⁹ *See id.* at 591.
- ¹⁸⁰ *Id.*
- ¹⁸¹ *In re Public Serv. Co. of New Hampshire*, 99 B.R. 177, 182 (Bankr. D.N.H. 1989).
- ¹⁸² *See* 11 U.S.C. § 321(b).