THE USE OF EXPERTS - SELECTED ISSUES

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I. Introduction

The use of experts to assist in the resolution of disputes in the insolvency area is a topic capable of filling a treatise. Many of the issues related to the use of experts are similar in both the bankruptcy and nonbankruptcy arenas. Some issues, however, are relatively unique to the workout context. What follows is a discussion of selected issues which are important to a solid understanding of what an expert can and cannot provide in furtherance of a client's cause. As will be noted below, in spite of a common predicate, the law governing the use of experts is unsettled on several key points, so the controlling law of your jurisdiction should be consulted before moving forward in every case.

II. Statutory Predicates for Expert Witness Testimony

The Federal Rules of Evidence are applicable to cases arising under Title 11 pursuant to Federal Rule of Bankruptcy Procedure 9017. Federal Rule of Evidence 702 sets forth the 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.

Rule 702 provides a statutory exception to the restriction on opinion testimony applicable to lay persons set forth at Rule 701.[1] Rule 104(a) provides that it is the court which shall determine the qualifications of an individual to be an expert witness in accordance with Rule 702. Such determinations are to be made by the court by a "preponderance of proof." See Bourjaily v. United States, 483 U.S. 171, 175-76 (1987). Review of a federal court's decisions regarding the admissibility of expert testimony is conducted utilizing an "abuse of discretion" standard. See General Elec. Co. v. Joiner, 118 S. Ct. 512 (1997).

Rule 703 provides the permissible bases for opinion testimony by experts:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

This provision provides a loophole for the expert's conclusions predicated upon evidence which might otherwise be inadmissible. See In South Central Petroleum, Inc. v. Long Bros. Oil Co., 974 F.2d 1015, 118-19 (8th Cir. 1992)(conclusions based upon triple hearsay determined to be admissible because such information was "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject").

Rule 705(a) provides that an expert may offer opinion testimony without first testifying as to the bases for such opinion:

> The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 705(a) represents a break from the common-law tradition of laying the foundation for the opinions offered by an expert. Pursuant to Rule 705(a), an expert may testify as to his conclusions without first presenting the bases for his opinion at trial. Of course, the bases of an expert's opinions and conclusions are a proper subject for cross-examination.

Rule 705 was modified in 1993 to resolve an arguable conflict with Federal Rule of Civil Procedure 26(a)(2)(B) (Federal Rule of Bankruptcy Procedure 7026)[2], which requires, in essence, that a testifying expert provide the "other party":[3]

1) a written report prepared and signed by the expert;

2) containing a complete statement of all opinions to be expressed and bases and reasons for the opinions;

3) the data and other information considered by the expert in forming the opinions; and

4) any exhibits to be used as a summary for the opinions.

Moreover, there is an ongoing duty to update and amend disclosures once they are made.[4] Thus, a party may not use an expert to "ambush" an opponent at trial with data or materials which have not been previously disclosed. Pursuant to Federal Rule of Civil Procedure 37, evidence may be excluded for failure to comply with these disclosure requirements.

III. Daubert and Progeny

A. Daubert

Prior to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), decided by the Supreme Court in 1993, a conflict existed among the courts as to the proper application of Rule 705.[5] Some courts still adhered to the "general acceptance test" enunciated in Frye v. United States, 293 F. 1013, 1013 (D.C. Cir. 1923), which stated that conclusions based upon a scientific theory were admissible as evidence provided that they were based upon techniques or principles which were "generally accepted" by the particular field to which they belonged. Although the Frye "general acceptance" standard became the dominant test for admissibility of scientific testimony, some courts regarded it as too restrictive.

In reaction to Frye, the courts in several circuits adopted what became known as the "relevancy approach," which admitted testimony based upon its relevance weighed against its probative value.[6] Under the relevancy approach, the determination of the reliability of testimony was left largely to the jury. Critics of the relevancy approach accused the test of allowing "junk science" into the courtroom as admissible evidence.

The Daubert Court expressly declared that Frye had been superseded by the Federal Rules of Evidence. The Supreme Court outlined the salient issues regarding the admissibility of

scientific testimony: 1) whether the expert will be testifying as to scientific knowledge; 2) whether the testimony based upon scientific knowledge will assist the trier of fact in determining the ultimate issue; and 3) whether the method has demonstrated validity or reliability. Daubert, 509 U.S. at 589-90. In determining reliability, the Court adopted four "general observations" to consider: 1) testing – the degree to which a theory or technique can be tested, or has been tested; 2) peer review – whether the theory has been subjected to peer review or publication, which aids in determining flaws in the method; 3) error rates – whether there exist standards to control the use of the technique; and, a remnant of Frye, 4) acceptability – the degree to which the technique is generally accepted in the relevant community. Daubert, 509 U.S. at 593-93. Although Daubert is widely credited as providing a remedy against the admissibility of "junk science," the Court actually fashioned a melded version of both the Frye test and relevancy approach to determine the reliability, and hence admissibility, of the scientific testimony.[7]

B. Subsequent Refinement

Although Daubert was expressly limited by the Supreme Court to "scientific knowledge,"[8] recent refinement has resulted in the application of the Daubert principles to other types of expert testimony, including "technical or other specialized knowledge."[9] In Kuhmo Tire Co. Ltd. v. Carmichael, 119 S. Ct. 1167 (1999), the Supreme Court stated unequivocally that the Daubert standard "applies to all expert testimony."

The Kuhmo holding was anticipated by the several courts which excluded testimony offered by valuation experts who employed speculative methods. In Fymire-Brinate v. KPMG Peat Marwick, 3 F.3d 183 (7th Cir. 1993), the Court of Appeals for the Seventh Circuit found that a CPA expert's testimony regarding the value of a partnership interest was inadmissible because the CPA employed an unorthodox valuation technique. More recently, in Target Market Publishing, Inc. v. ADVO, Inc., 136 F.3d 1139 (7th Cir. 1998), a Deloitte & Touche accountant and business appraiser's testimony regarding the value of damages arising from an alleged breach of an advertising contract was excluded by the district court applying the Daubert standard. In upholding the district court's ruling on the validity of the expert's report, the court of appeals stated that:

> [N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Target, 136 F.3d at 1144.

IV. The Expert Witness

A. The Written Report

As noted above, Rule 26 requires a testifying expert to supply to the "other parties" a written report setting forth the expert's opinion and the bases therefore, including "data or other information considered by the witness." FED. R. CIV. P. 26(a)(2)(A) & (B). The timetable for such disclosures may be set by the court, or, in the absence of a scheduling order, Rule 26 provides that the report must be made available 90 days before trial. Id. at (C). Failure to

disclose the basis for an expert's opinion is grounds for a spectrum of remedies, from orders to compel, sanctions, and disallowance of the expert's testimony pursuant to Rule 37.[10] Rule 37(c)(1) provides, in pertinent part, that:

> A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be 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.

The Advisory Committee Note to Rule 37 states that it is to be a "self-executing, automatic sanction [which] is designed to provide a strong inducement for disclosure of 26(a) material."

A party *moving* for exclusion, however, based upon inadequate disclosure may be well-advised to do so sooner rather than later. In Harvey v. District of Columbia, 949 F. Supp. 874, 878 (D.C. 1996), a party offered an expert report which the district court described as being "woefully inadequate under FED. R. CIV. P. 26(a)(2)(B)." The "report" was a brief and conclusory paragraph containing several syntax errors.[11] The objecting party did not observe the court's scheduling order requirement that the parties "meet and confer regarding all discovery disputes." Moreover, the objecting party did not move to disallow the expert's testimony until the day before the court-imposed discovery deadline, even though the "report" was offered a month earlier. Under these circumstances, the court declined to strike the expert's testimony. Id. at 878.

The scope of the required disclosure is broad. In Karn v. Ingersoll Rand, 168 F.R.D. 633 (N.D. Ind. 1996), a party sought to exclude certain material from disclosure on the premise that although the experts had "considered" the materials, the experts did not "rely" on the documents in forming their opinions. The district court did not adopt the more restrictive application of the statute, and found that all documents reviewed by the experts were "considered" by the experts, thus requiring disclosure. Id. at 636. Obviously then, some care must be taken in exposing an expert to certain materials.

B. Challenges to the Qualification

In Haarhuis v. Kunnan Enterprises, Ltd., 177 F.3d 1007 (D.C. Cir. 1999), a Taiwanese defendant sought an injunction pursuant to § 304 of the Bankruptcy Code against a breach of contract claim brought in the United States against the Taiwanese entity because the Taiwanese entity was a party to an insolvency proceeding in Taiwan. The plaintiffs challenged the bankruptcy court's expert qualification of a professor who testified regarding the relationship between United States and Taiwanese law because the expert did not have a specific background in insolvency law. The professor had graduated from Harvard Law School, had published several books on Chinese law, and was a professor of international and Chinese law at the University of Maryland. The court of appeals, citing Kumho, reiterated the rule that "the decision whether to qualify an expert witness is within the broad latitude of the trial court and is reviewed for abuse of discretion". Id. at 1015. The court of appeals upheld the bankruptcy court's qualification of the professor as an expert.

An example of a less esoteric, though perhaps unusual, use of expert testimony, occurred in In re Tamen, 22 F.3d 199 (9th Cir. 1994), where the debtor-plaintiff in an adversary proceeding was qualified by the bankruptcy court as an expert to testify on the profits lost from a soured land deal. The defendants challenged the propriety of allowing the debtor-plaintiff to testify on the issue, but the court of appeals upheld the expert designation. The Ninth Circuit noted the discretion of the bankruptcy court to determine qualification, the fact that the subject matter of the testimony was specifically provided for in the Advisory Committee's Notes to Rule 702, and the bankruptcy court's ability to measure the credibility of the testimony. In a footnote, the court of appeals also noted that the defendants had not availed themselves of the opportunity to call an expert of their own on the lost profits issue. Thus, the Tamen decision suggests that the most effective challenge to expert testimony might be a rebuttal expert. Other courts have responded similarly to challenges to qualification. See, e.g., Amplicon, Inc. v. Fuller, Civil Action No. 90-5525,1991 U.S. App. LEXIS 13554 (6th Cir. 1991)(suggesting rebuttal experts and cross-examination "to demonstrate to the finder of fact the limitations of [an opposing expert's] knowledge and experience").

Challenges to the qualification of an expert are not, however, always unsuccessful. In In re Tasch, Inc., 1999 U.S. Dist. LEXIS 12368 (E.D. La. 1999), the plaintiff-debtor retained a consultant to testify as an expert regarding certain disputed contracts and lost profits. The consultant's formal post-high school education was limited to a university semester and a two-day seminar at LSU. The consultant also claimed extensive construction and construction financing experience. The consultant prepared and tendered to the defendants a report analyzing the facts and contracts underlying the dispute, and analyzing the damages issues. The defendants challenged the consultant's qualifications and moved to exclude the consultant's report and testimony because they would "not assist the trier of fact".

The court recited Daubert and Rule 702 and quoted from the Advisory Notes for the Rule:

> Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute."[12]

Moreover, the court cited to precedent holding that expert testimony should be excluded if it "does nothing more than 'mirror' the testimony of fact witnesses." Following these rules, the court held that the consultant was not qualified to testify as to the contract issues and other fact issues, as these matters would be presented and argued during the ordinary course of the presentation of the plaintiff's case. The court did conclude, however, that the consultant could offer his opinions as an expert on the damages issues. The court found that the consultant did employ "some methodology" in his calculations, in spite of his lack of a formal accounting background. The court concluded that the defendants' recourse was "vigorous cross-examination, not exclusion." The Tasch court's reasoning is consistent with the general rule that "doubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility." Larabee v. MM&L Int'l Corp., 896 F.2d 1112, 1116 n.6 (8th Cir. 1990).

C. Potential Liability of Experts

Due to a variety of economic factors, litigation support services provided by financial professionals have significantly grown in recent years.[13] The market response to "non-traditional accounting firm services-litigation/expert witness services" has lead, perhaps inevitably, to a rise in suits against financial professionals hired as expert witnesses.

In Mattco Forge v. Arthur Young & Co., 60 Cal.Rptr.2d 780 (Cal. Ct. App. 1997), plaintiff Mattco Forge sued General Electric in federal district court. Mattco hired Arthur Young and others as damage consultants and as expert witnesses to calculate lost profits for the purpose of quantifying damages. Mattco lacked complete records for some time periods. Mattco and Arthur Young recreated the missing data by estimating figures from existing data. The recreated and estimated data were eventually tendered to General Electric during discovery with other relevant documents. Arthur Young had not informed Mattco's counsel that some of the responses to General Electric's requests for production were recreations based upon estimates. When the questionable integrity of the produced documents came to light during further discovery, the federal district court found that Mattco had "created and produced fraudulent documents" and ordered Mattco to pay General Electric $1.4 million in sanctions.[14] Id. at 785. The suit in federal district court was dismissed.

Mattco then sued its former expert, Arthur Young, in Los Angeles Superior Court for fraudulent misrepresentation, accounting malpractice, professional negligence, and fraudulent concealment. The trial court granted Arthur Young's motion for summary judgment, in part, because of California's statutory "litigation privilege". Id. The court of appeal reversed, stating that the "litigation privilege does not exist to protect one's own expert witnesses, but to protect adverse witnesses from suit by opposing parties after the lawsuit ends." Mattco Forge v. Arthur Young & Co., 6 Cal.Rptr.2d 781, 789 (Cal. Ct. App. 1992). Following a jury trial upon remand, Mattco was awarded $27,690,000 in punitive damages, $13.2 million in compensatory damages, and nearly one million dollars in "out-of-pocket expenses and interest."

On appeal, the damage awards were reversed due to a "prejudicial instructional error." Mattco Forge, 60 Cal. Rptr. 2d at 783. The reported case history of this matter ends with the denial of review in 1997. The original federal lawsuit was brought by Mattco against General Electric in 1985. What began as an engagement for expert accounting and consulting services morphed into a legal quagmire lasting over a decade. Along the way, Arthur Young brought suit against Mattco's former counsel, alleging fraud and seeking indemnity.[15]

Distilled, it appears that Arthur Young's error was in judgment rather than an intent to assist Mattco in deceiving General Electric. Arthur Young had pitched itself to Mattco as having "litigation support professionals [who] were specially trained in legal procedures." Id. at 784. Unfortunately, Arthur Young assigned the matter to an individual with "no training or experience in litigation support." Id. at 784. Mattco Forge is instructive. First, Mattco basically forfeited a cause of action due to its misplaced trust in the expert consultants it hired. It is incumbent upon those seeking and those providing expert consulting services to investigate and verify the qualifications and experience of those persons who will actually be engaged. Finally, the bases for Mattco's complaint against Arthur Young were state-based causes of action brought in state court. It is worthy of note, however, that Arthur Young's liability to Mattco was incurred during a

proceeding at the federal district court level. Thus, it is not a stretch to imagine a similarly unfortunate scenario arising from a bankruptcy case.

D. Privilege Issues

1. Discovery of Information Provided to Experts

The availability of discovery for facts and opinions held by experts is dependent on whether the expert is expected to testify in the trial. Federal Rule of Civil Procedure 26(b) governs the discovery of information provided to or known by experts. As noted herein, an expert who is expected to testify must submit a report to the "other parties" containing opinions that may be proffered and the facts upon which those conclusions rely. FED. R. CIV. P. 26(a)(2). Once the expert's report is provided to the other party, the other party may depose the party's experts. FED. R. CIV. P. 26(b)(4)(A). Facts or opinions known by an expert who is not expected to testify are not discoverable unless the requesting party shows exceptional circumstances that make it impractical to independently obtain the expert information. FED. R. CIV. P. 26(b)(4)(B).

2. Work-Product Privilege

The work-product privilege codified in Federal Rule of Civil Procedure 26(b)(3) was first articulated by the Supreme Court in Hickman v. Taylor, 329 U.S. 495, 512 (1947):

> [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative 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. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The party seeking to assert a work-product privilege has the burden of showing (1) that the privilege exists and (2) that it has not been waived. See von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987). Because the use of privilege has been held to be contrary to the "overriding goals of liberal discovery," privileges are "disfavored and generally to be narrowly construed." See, e.g., Bowne of New York City, Inc., v. AmBase Corp., 150 F.R.D. 465, 473 (S.D. N.Y. 1993).

The work-product privilege applies only in an adversarial context. See In re International Systems & Controls Corp., 693 F.2d 1235, 1239 (5th Cir. 1982)("the

work product privilege is based upon the existence of an adversarial relationship."). In In re Standard Fin. Management Corp., 79 B.R. 97 (Bankr. Mass. 1987), the debtor's sole stockholder refused to cooperate with special counsel appointed for the debtor by asserting the Fifth Amendment and other privileges. As an alternative tactic, the special counsel sought the production of documents from the debtor's former counsel to assist in investigation of the debtor's prepetition activities and in the administration of the debtor's estate. The special counsel, acting as the debtor's representative, was able to waive all debtor claims of privilege. The debtor's former counsel refused to tender certain documents, although they were prepared for the debtor, claiming that the work-product privilege is "personal to the attorney." The court posed the issue: "[C]an an attorney assert against its own client in a non-adversarial context the so-called work product privilege and deny the client the discovery and analysis accumulated while working for and being paid for by the client."? The court noted that the Hickman-based privilege was designed for the protection of information and materials "in the course of preparation for possible litigation." Id. at 99 (quoting Hickman v. Taylor, 329 U.S. 495, 497 (1946)). The court concluded: "To protect counsel from his own client trying to recapture background detail is a perversion of the privilege unsupported by text writers or cases and in no way comporting with the Hickman rationale for such a privilege." Id. The court ordered the turnover of the requested documents by the debtor's former counsel. Of course, the identity of the "client" had changed significantly because of the pending bankruptcy, but the court regarded the change as having no legal significance.

3. Testifying Expert

For an expert who is expected to testify, there is a split of authority as to whether a work product privilege even exists or to what degree it exists. The controversy centers around whether all fact and opinion materials should be discoverable, or whether the work-product privilege still protects an attorney's opinions and mental impressions. Most of the rulings "resolving" the controversy rely upon, at least in part, a single passage in the 1993 Advisory Committee's Notes to the revised Rule 26, which placed an affirmative duty of disclosure upon a testifying expert:

> The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions–whether or not ultimately relied upon by the expert–are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Some courts have read the "data and other information" statement to refer only to factual materials considered by an expert, exclusive of protected work product

materials, while several courts have focused on the quoted language stating that "litigants should no longer be able to argue that materials furnished to their experts . . . are privileged or otherwise protected" to require full disclosure of all information and documents provided to a testifying expert regardless of whether those materials would otherwise constitute privileged material.

Even the "experts" are divided on the issue. Compare 8 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2016.2 (1994)("At least with respect to experts who testify at trial, the disclosure requirements of Rule 26(a)(2), adopted in 1993, were intended to pretermit further discussion and mandate disclosure despite privilege.") with 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 26.80[1] (3rd ed. 1998) ("nothing in the advisory committee notes to the 1993 amendments suggests that Rule 26(b)(4)(A) was intended to abrogate the enhanced protection for opinion work product recognized by the Supreme Court in Upjohn Co. v. United States, 449 U.S. 383, 401 (1981)."). To add to the confusion, some courts have read the initial phrase of Rule 26(a)(2)(B), "Except as otherwise stipulated or directed by the court", as providing the courts with the option to "opt out" of the mandatory disclosure requirements altogether. See Stephen D. Easton, Ammunition for the Shoot-Out with the Hired Gun's Hired Gun: A Proposal for full Expert Witness Disclosure, 32 ARIZ. ST. L.J. 465, 528-29 (Summer 2000).[16]

In Karn v. Rand, 168 F.R.D. 633 (N.D. Ind. 1996), the defendant sought production of a medical chronology prepared by the plaintiff's counsel and provided to the plaintiff's expert. The plaintiff objected, in part, based upon a claim that the materials constituted work-product privileged information. The court noted the changes made to Rule 26 in 1993 regarding the issue, and conducted a detailed analysis of pertinent case law. The court concluded that "the text of the new Rule itself, combined with its supporting commentary, mandate disclosure of all materials reviewed by an expert witness." Id. at 639.

In support of the adoption of a bright line rule, the court quoted from the Advisory Committee Notes which state that "litigants should no longer be able to argue that materials furnished to their experts . . . are privileged or otherwise protected from disclosure." In addition, three policy grounds were laid out by the court in support of a bright line rule: (1) access to all materials provided to an expert witness will allow for a more effective cross examination of expert witnesses because the expert-retaining counsel's influence will be more easily detectable; (2) the rationale underlying the work-product privilege of fostering the development of "new legal theories or in enhancing the conducting of a factual investigation" will not be violated by a requirement of total disclosure; and (3) there will be no uncertainty for counsel when considering what documents will be discoverable. On this final point, the court concluded: "the 'bright-line' view actually preserves opinion work product protection in that there is no lingering uncertainty as to what documents will be disclosed. Counsel can easily protect genuine work product by simply not divulging it to the expert." Id. at 641.

The breadth of the Karn position on the discovery of materials provided to a testifying expert was explored by the court in B.C.F. Oil Ref., Inc. v. Consolidated Edison Co., 171 F.R.D. 57 (S.D. N.Y. 1997). In B.C.F., the defendant sought production of documents exchanged between plaintiff's counsel and the plaintiff's expert expected to testify. Some of the documents reviewed by the expert contained classic Hickman-type material — "the mental impressions, opinions, and, in some cases, litigation strategies of plaintiffs [sic] attorneys." Id. at 63. The court recognized the difficulty of the question, as it placed the traditional protections of the work-product doctrine in direct conflict with the disclosure requirements of post-1993 Rule 26. The B.C.F. court adopted the Karn reasoning and position on the issue, and held that all materials reviewed by a testifying expert were discoverable, including attorney opinions and litigation strategy materials provided to the expert. In addition to the rationales supporting the bright line rule provided by the Karn court, the B.C.F. court noted that Rule 26(b)(3), the codification of the work-product privilege, specifically states that it is "subject to" Rule 26(b)(4), which requires that an expert expected to testify may be deposed without condition. Finally, the B.C.F. court held that conversations between an attorney and his experts were discoverable through deposition, although the attorney notes which purported to summarize the conversations were not discoverable, unless the notes themselves had been shown to the expert. Id. at 67 ("there does not seem to be a principled difference between oral and written communications between an expert and an attorney insofar as discoverability is concerned.").

Other courts, interpreting and applying the same Rules, have attempted to maintain the work product privilege for all attorney opinions and mental impressions, even those provided to a testifying expert. In Haworth, Inc. v. Miller, 162 F.R.D. 289 (W.D. Mich. 1995), the defendant sought discovery of all communications between the expert and plaintiff's counsel. While deposing the expert, the defendant's counsel asked the expert questions about conversations the expert had with plaintiff's counsel regarding certain discoverable materials. The expert refused to answer upon objection from plaintiff's counsel that the conversations constituted protected work product. The presiding magistrate ordered the expert to testify as to "all communications with plaintiff's attorneys" in the case, including conversations. Id. at 291. Moreover, the magistrate sanctioned the plaintiff for failure to comply with discovery obligations. The district court reversed, ruling that all attorney opinions and mental impressions were protected by the work-product privilege, in spite of the amendments to the Rules in 1993. Citing the continuing vitality of Hickman, the court concluded: "For the high privilege accorded attorney opinion work product not to apply would require clear and unambiguous language in a statute . . . [n]o such language appears here." Id. at 295. The court stated that the Advisory Committee Notes relied on in Karn, taken as a whole, should be read to mean only that all factual information considered by the expert must be disclosed. See also All W. Pet Supply Co. v. Hill's Pet Prod., 152 F.R.D. 634 (D. Kan. 1993)(an early post-amendment case which required a party to show a Rule 26(b)(3) "substantial

need" to overcome the work product privilege for protected materials disclosed to a testifying expert).

In a more recent decision treating the issue, the court in Nexxus Prod. Co. v. CVS N.Y., Inc., 188 F.R.D. 7 (D. Mass. 1999), concluded that core attorney work product is not discoverable based upon the Advisory Committee notes. The Nexxus court also disputed the policy considerations relied upon by the courts favoring the "bright line" approach. In response to the argument that disclosure serves to root-out attorney influence, the court expressed a concern that compelling full disclosure might prevent an expert from being able to completely evaluate the issues and establish a well-founded opinion because counsel will withhold material from the expert that would enable the attorney to conduct a more objective assessment of the relevant issues. Finally, the Nexxus court stated that vigorous cross-examination and the testimony of opposing experts are adequate and proper methods for challenging the bases for an expert's opinion without delving into the role and influence of counsel.

4. Non-Testifying Expert

Federal Rule of Civil Procedure 26(b)(4)(B) provides in pertinent part:

> A party may . . . discover facts known or opinions held by an expert who has been retained or specially employed . . . in anticipation of litigation . . . who is not expected to be called as a witness at trial . . . 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.

The purpose of the rule is to prevent a party "from building his case on the diligent preparation of his adversary." In re Shell Oil Co., 132 F.R.D. 437, 440 (E.D. La. 1990). A party seeking to depose a nontestifying expert has a "heavy burden" to show exceptional circumstances. Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. Partnership, 154 F.R.D. 202, 208-09 (N.D. Ind. 1993). More than a remote possibility of litigation must exist to conclude that an expert was hired in anticipation of litigation. See, e.g., United States v. Bell, 1994 U.S. Dist. LEXIS 17408 (N.D. Cal. Nov. 9, 1994).

An issue may arise as to whether an expert can be characterized as having been "specially retained or employed . . . in anticipation of litigation" for the purposes of Rule 26(b)(4)(B) when a party utilizes "in-house" personnel to conduct investigations. In In re Shell Oil Refinery, 132 F.R.D. 437, 442 clarified by 134 F.R.D. 148 (E.D. La. 1990), defendant Shell utilized in-house engineers to investigate an accident to assist in the defense of Shell in a class action lawsuit. The plaintiffs wished to depose the engineers, and Shell resisted based upon Rule 26(b)(4)(B). The court stated that the "specially retained or employed" designation must be decided case-by-case. In Shell Oil, the court determined that the in-house experts had been "specially employed" as litigation consultants

in the case in spite of their status as general employees because: 1) the engineers had been requested by Shell's counsel to perform specific tasks to assist in Shell's defense; 2) copies of the engineer's reports were sent only to Shell's counsel; and 3) their usual duties did not include litigation defense. The court regarded the fact that the engineers had not received "additional compensation [and were not] assigned exclusively to the litigation" as inconclusive. In support of its conclusion, the Shell Oil court noted several factors in favor of allowing the "specially employed" exception for general employees. First, a contrary ruling would encourage waste by requiring a defendant to outsource expert litigation support when such a defendant has internal resources to achieve the same results. Finally, the court concluded that "[p]rotection of an in-house expert's opinions supports improved public safety and other benefits of self-analysis." Shell Oil, 132 F.R.D. at 441. For a contrary holding, 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).

Another issue of contention may exist when an expert is utilized in anticipation of litigation while simultaneously serving other purposes. In In re Kidder Peabody Securities Litigation, 168 F.R.D. 459 (S.D. N.Y. 1996), Kidder Peabody, after being swindled by one of its own traders, retained outside counsel to conduct an internal investigation to determine how the fraud had occurred and to recommend steps which might be taken in order to prevent a recurrence. In an effort to restore public confidence, a primary purpose of the investigation was to produce a published report summarizing the matter and the corrective actions to be taken by Kidder Peabody. Such a report was produced and disseminated to the public. The outside counsel was also tasked, simultaneously, with the development of legal defenses for "anticipated shareholder suits." Id. at 463. The outside counsel served as Kidder Peabody's defense counsel in subsequent shareholder suits. The shareholders sought to discover the notes and memoranda prepared by Kidder Peabody's counsel in preparation of the report. Kidder Peabody's counsel resisted, claiming the work product and attorney client privileges, and that the requested materials were prepared in anticipation of litigation. The court found that Kidder Peabody would have conducted the internal investigation whether or not litigation was looming. The court stated:

> [A] detailed and painstaking inquiry was required for pressing business purposes and thus would have been undertaken regardless of whether litigation was threatened . . . [and] . . . the notes and memoranda of the interviews, insofar as they simply recounted business statements, were created as much for their use in serving Kidder's business needs as for their utility in preparing for litigation . . ..

Id. at 466. The court determined, in evaluating the "multiple purposes" for the created information, that because the documents were not created exclusively or

even principally for litigation purposes, they were not created "in anticipation of litigation" for the purposes of Rule 26(b)(4)(B). The court ordered Kidder Peabody to produce the requested documents.

"Exceptional circumstances" entitling a party to depose a non-testifying expert are established when a party is unable to acquire equivalent information from other sources and the information is essential for a party's case. In Shell Oil, the court refused to compel the deposition of a non-testifying expert after finding that the plaintiffs could have conducted tests similar to those conducted by the defendant's experts. In re Shell Oil Refinery, 132 F.R.D. 437, 442 clarified by 134 F.R.D. 148 (E.D. La. 1990). Thus, the failure of one party's expert to conduct certain tests does not constitute "exceptional circumstances".

One situation recognized as an exceptional circumstance exists when the object or condition observed by the expert has changed considerably and is no longer observable by another expert. See, e.g., Delcastor, Inc., v. Vail Assoc., 108 F.R.D. 405 (D. Colo. 1985)(party expert who had observed a site one day after a mudslide had knowledge unobtainable elsewhere). In Bank Brussels Lambert v. Chase Manhattan Bank, 175 F.R.D. 34, 44-45 (S.D. N.Y. 1997), immediately following the discovery of certain accounting discrepancies, the plaintiff's expert had months to analyze an entity's financial records. Suit was brought more than two years later. The court permitted the deposition of the plaintiff's non-testifying expert because the plaintiff's financial condition had significantly changed since the expert's investigation and it would have been impossible to reconstruct the conditions the expert had observed.

Another recognized situation that constitutes "exceptional circumstances" is when the cost of reconstructing particular circumstances would be so high that it would be unduly burdensome. See, e.g., In re Agent Orange, 105 F.R.D. 577 (E.D. N.Y. 1985). In Bank Brussels, in addition to having almost real-time access to the entity's financial records, the expert had also spent some 10,000 hours in its investigation. The court provided as an additional basis for its allowance of the deposition of the nontestfying expert the fact that even if the reconstruction of a two-year old financial situation was possible, the costs of that reconstruction and analysis by an expert would be "judicially prohibitive." Bank Brussels, 175 F.R.D. at 45-46.

Finally, if a court determines that a party has established "exceptional circumstances", the court may then weigh the policy considerations behind Rule 26(b)(4)(B) against the exceptional circumstances before allowing discovery of the otherwise protected information. In Rubel v. Eli Lilly and Co., 160 F.R.D. 458, 460 (S.D. N.Y. 1995), these considerations were enumerated as being:

(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 yield grist for the adversary's mill; (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 also the concern 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.

Bank Brussels, 175 F.R.D. at 45. The Bank Brussels court found that these factors did not weigh sufficiently against the circumstances supporting the allowance of discovery.

5. Waiver

Generally, the work-product privilege may be waived. "Waiver 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." In re Latin Inv. Corp., 160 B.R. 262, 263 (Bankr. D.C. 1993). The party asserting the privilege has the burden of establishing nonwaiver. Nikkal Indus., Ltd. v. Salton, Inc., 689 F. Supp. 187, 191 (S.D. N.Y. 1988). The work-product privilege may be waived when the asserting party is attempting to use the privilege in an unfair way (inconsistent with the underlying principles of the privilege). Granite Partners, L.P. v. Bear, Stearns & Co., Inc., 184 F.R.D. 49, 54 (S.D. N.Y. 1999). Case law is divided, however, on whether the restrictions on discovery provided by Rule 26(b)(4)(B) are even related to the privilege or may be waived. In Vanguard Sav. And Loan Ass'n v. Banks, 1995 U.S. Dist. LEXIS 2016 (E.D. Pa. Feb. 17, 1995), the court stated:

> It is . . . clear that 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. Therefore, defendants' claim that plaintiff waived its work product privilege is wholly irrelevant and totally unpersuasive. To resolve the current conflict, it is immaterial that plaintiff may have voluntarily disclosed the [expert] report to third parties. Rather, the only question is whether plaintiff can meet the requirements set forth in Rule 26(b)(4)(B).

See also Tennessee Gas Pipeline v. Rowan Cos., 1996 U.S. Dist. LEXIS 8723 (S.D. N.Y. 1996). Other courts have held that Rule 26(b)(4)(B) protection may be waived, especially by failure to timely object to a deposition notice or discovery request. See, e.g., Argon v. Trustees of Columbia Univ., 176 F.R.D. 445, 449 (S.D. N.Y. 1997); Steele v. Seglie, 1986 U.S. Dist. LEXIS 27569 (D. Kan. March 27, 1986)(finding that plaintiff's failure to properly object to depositions of its non-testifying experts constituted waiver of Rule 26(b)(4)(B) restrictions).

6. Fees and Costs

Pursuant to Rule 26(b)(4)(C)(i), unless "manifest injustice would result", another party's expert is entitled to a "reasonable fee" for time spent to responding to a discovery request. In In re Valley Forge Plaza Assoc., 109 B.R. 669, 676 (Bankr. E.D. Pa. 1990), the bankruptcy court held that a debtor would be required to reimburse a creditor's expert for the debtor's requested Bankruptcy Rule 2004 examination of the creditor's expert. Recent case law applying this subsection is useful in determining a range of reasonableness for expert fees.

In Haarhuis v. Kunnan Enterprises, Ltd., 177 F.3d 1007, 1015-16 (D.C. Cir. 1999), the bankruptcy court had awarded fees to a retaining party from an adverse party for the deposition of the retaining party's expert. The award included compensation for travel time and for the time required for the deposition itself. The bankruptcy court found that the expert's hourly rate of $300 was "reasonable" under the circumstances. The deposing party objected, asserting that in accordance with 28 U.S.C. § 1821(b), the statutory witness fee was $40 per day.[17] The court dismissed this contention, noting that the bankruptcy court had awarded the fees pursuant to Rule 26(b)(4)(B), and not in accordance with title 28.

In determining reasonableness, a court may consider a variety of factors, including:

> (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) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26.

Mathis v. Nynex, 165 F.R.D. 23, 24 (E.D. N.Y. 1996)(citing Goldwater v. Postmaster Gen'l of the United States, 136 F.R.D. 337, 340 (D. Conn. 1991)). Of course, another relevant, but not controlling, factor is the fee charged by the party who originally retained the expert in the first place. See, e.g., Bowen v. Monahan, 163 F.R.D. 571, 573-74 (D. Neb. 1995)(rejecting retaining counsel's fee arrangement for an expert witness: "While plaintiff may contract with any expert of plaintiff's choice and, by agreement, that expert may charge unusually high rates for services, the discovery process will not automatically tax such unreasonable fees upon the defendant.").

In addition, should a party demonstrate the exceptional circumstances necessary to compel discovery of facts known by a non-testifying expert pursuant to Rule 26(b)(4)(B), the requesting party may be required to "pay the other party's fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert." FED. R. CIV. P. 26(b)(4)(C). In In

re Interco Intercorporated, 146 B.R. 447, 450-50 (Bankr. E.D. Mo. 1992), the bankruptcy court ordered a claimant to allow its non-testifying expert to be deposed by the debtor pursuant to Rule 26(b)(4)(B), due, in part, to the impracticability or impossibility of recreating certain conditions. Consequently, the claimant was entitled to a "fair portion" of the expert's fees and expenses. The court deferred an award of fees and costs until the conclusion of the deposition, and required that the claimant submit a request for payment to the court. In addition, the court directed the parties "to cooperate and attempt to agree as to an amount which constitutes a fair portion." Id. at 451.

V. Expert Witness Testimony in the Bankruptcy Context

A. Valuation and Appraisal

Valuation and appraisal is the most common topic of expert testimony in the bankruptcy context. Because valuation and appraisal testimony always contains a degree of subjectivity, the issue can be the most contentious aspect of many controversies. Even the proper method of valuation in a particular circumstance may be hotly contested. For example, should the valuation or appraisal be based upon market value, aggregate retail value, business value, disposition value, fair value, going concern value, goodwill value, insurable value, investment value, liquidation value, use value, highest and best use, or value as is?[18]

The context of the controversy will suggest the most appropriate methodology. As one commentator has noted: "Although valuation is not considered a science, it employs many scientific techniques." Sofia Adrogue & Alan Ratliff, Kicking the Tires After Kumho: The Bottom Line on Admitting Financial Expert Testimony, 37 HOUS. L. REV. 431, 459-60 (Summer 2000). Thus, courts have applied Daubert to evaluate the validity of expert testimony in a manner akin to the approach utilized for more purely scientific testimony. Case law applying Daubert to valuation testimony indicates that the apparently solid qualifications of an expert will not overcome a methodology which is either faulty, overly subjective, or untested. See United Phosphorus, Ltd. v. Midland Fumigant, Inc. 173 F.R.D. 675 (D. Kan. 1997)(valuation testimony of expert with Ph.D. in applied economics and agriculture deemed inadmissible for lack of peer review and fundamental errors in technique); see also American Tourmaline Fields v. International Paper Co., 1999 WL 242690 (N.D. Tex Apr. 19, 1999).

B. Plan Issues

1. "Cramdown" Interest Rates

Section 1129(b)(2)(i)(II) provides that a holder of a secured claim in a Chapter 11 case "shall receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest of such property." A proper interest rate must be a part of the "present value" analysis. The Bankruptcy Code provides no further guidance on the determination of a proper interest rate. The Fifth Circuit has suggested that the determination is one to be made through the use of expert testimony properly evaluated by the bankruptcy courts: "we will not tie the hands of the lower courts as they make the

factual determination involved in establishing an appropriate interest rate; they have the job of weighing the witness's testimony, demeanor and credibility." Financial Security Assurance v. T-H New Orleans Ltd. Partnership, 116 F.3d 790, 801 (5th Cir. 1997).

Several methods for the determination of a proper cramdown interest rate have been identified.[19] The "Formula Method" starts with a base of either the prime rate or the T-bill rate, and adds points based upon applicable risk factors, which are established by expert testimony.[20] The "Prevailing Market Method" utilizes expert testimony to provide the court with an estimation of the hypothetical interest rate which might be available for a loan in the relevant market with similar risks.[21] The "Tranche Method" employs expert testimony to determine the hypothetical market interest rates for different "tranches" of risk, or loan to value ratio.[22] The rates for each tranch are averaged to find the applicable rate. Finally, the "Workout Method" envisions a scenario in which the parties are "stuck" with each other, and must find a mutually acceptable rate which will compensate the lender for its forbearance.[23] Because expert testimony will likely play a role in the cramdown interest rate determination in any event, a savvy practitioner will first ascertain the methodology which has gained the most credence in the relevant jurisdiction, and attempt to retain expert assistance based upon the expert's experience and ability in accordance with the prevailing method.

2. Liquidation Analysis

The hypothetical liquidation of a debtor's assets is a necessary element of the "best interests of creditors test" set forth in Section 1129(a)(7)(ii). This subsection of the Bankruptcy Code requires that impaired creditors retain or receive property having a value of at least as much as would be retained or received in a Chapter 7 liquidation. The determination of the liquidation value of a debtor may require a comprehensive analysis, as a debtor may possess every legally recognizable type of asset, from inventory and causes of action, to goodwill and other intangibles. In cases with a variety of assets, several experts may be necessary to accurately gauge the liquidation value of a debtor's estate. In In re Crowthers McCall Pattern, Inc., 120 B.R. 279 (Bankr. S.D. N.Y. 1990), the court stated that § 1129(a)(7) contemplates "an orderly liquidation" pursuant to the provisions of Chapter 7, such as § 704(8), which authorizes a Chapter 7 trustee, with court approval, to continue operations during a liquidation. Thus, the proper analysis does not contemplate a "one day fire sale" of the debtors assets, but instead requires an expert analysis of the value obtainable in an orderly and deliberate liquidation. In Crowthers McCall the court acknowledged that liquidation analysis is not an exact science. Moreover, the court rejected a creditor's criticism of the debtor-expert's valuations because the debtor's assets were not "shopped around" to competitors to determine their value:

> It is hard to envision anything more inimical to a plan based upon a debtor's continuance as a going concern or, as here, a plan grounded on the sale of the debtor as a

> going concern. To inject into the marketplace the notion that a debtor might liquidate, even hypothetically, may sow the seed of its own destruction. Customers may consider alternatives, competitors may pounce, employees might seek more secure positions. Section 1129(a)(7)(A)(ii) . . . does not require the hypothesis to become a reality.

Id. at 298. Thus, the valuation analysis conducted by the expert must be, at times, subtle as well as well-founded. Section 1129(a)(7) is a provision which demands the skills of an experienced and sometimes versatile expert.

C. Avoidance Actions

Bankruptcy avoidance actions provide a plethora of opportunities for the utilization of expert consulting and expert testimony. See, e.g., 11 U.S.C. § 547. The statutory bases of and defenses to a preference action demand an "objective" evaluation of pertinent issues, especially with regard to the ordinary course of business defense. See 11 U.S.C. § 547(c)(2). In determining the validity of an ordinary course of business defense, for example, some courts have found that a creditor has failed to meet its burden of proof in establishing industry norms because no independent expert testimony was proffered on the issue. See, e.g., In re Fred Hawes Org. Inc., 957 F.2d 239, 246 (6th Cir. 1992); In re Schwinn Bicycle Co., 205 B.R. 557 (Bankr. N.D. Ill. 1997); In re Washington Mfg. Co.,144 B.R. 376, 380-81 (Bankr. M.D. Tenn. 1992)("there is an inherent problem with the defendant's president attempting to testify about the industry's ordinary business terms. Mr. Tinsley may be qualifiable as an expert on those terms but not in his own defense."); In re Pearson Indus. Inc., 142 B.R. 831, 844-45 (Bankr. C.D. Ill. 1992). The successful prosecution and defense of avoidance actions based upon allegedly fraudulent transactions may also turn upon the credibility of expert analysis and testimony. See Morganroth & Morganroth v. DeLorean, 213 F.3d 1301(10th Cir. 2000)(expert testimony on reasonably equivalent value basis for summary judgment against transferee defendants); In re Usery, 123 F.3d 1089 (8th Cir. 1997); Lincoln Nat'l Life Ins. Co. v. David Silver & ADS Partners, L.P. 1997 U.S. App. LEXIS 11926 (7th Cir. April 25, 1997).

VI. Court-Appointed Experts

Federal Rule of Evidence 706 allows the court to appoint an expert who will assist the trier of fact on any issue.[24] See, e.g., In re Norton, 21 B.R. 725, 727 (Bankr. W.D. Mo. 1982)(court-appointed expert retained as handwriting expert to assist in the resolution of a controversy involving allegedly forged checks). The court may do so sua sponte, or upon motion of a party. See In re Erchak, 152 B.R. 68, 72 (Bankr. N.D. W.Va. 1993)(the court refused to appoint a debtor-requested expert to construe Internal Revenue Code provisions, characterizing the debtor's request as an attempt to "embog" the proceedings). The court may choose an expert on its own or seek nominations from the parties. A court-appointed expert may be compensated.[25] Such a witness must disclose his or her findings to all parties, and may be cross-examined.

Rule 706 has not been used often, but in some cases, a court-appointed expert has greatly aided the trier of fact.[26] In In re Joint Eastern and Southern Districts Asbestos Litigation,

122 B.R. 6 (E. & S.D. N.Y. 1990), the district court was faced with the administration of the Johns-Manville Personal Injury Settlement Trust which was created for the victims of asbestos-related illnesses. Estimating the future claims against the trust required "input from many different specialized disciplines such as epidemiology, statistics, and economics." Id. at 6. To coordinate the claims estimation process and to assemble a panel of other experts to accomplish the task, the court appointed a law school professor pursuant to Rule 706. The panel was appointed pursuant to the court's order, and later submitted a written report "supported by hundreds of . . . pages of calculations, charts, graphs and tables projecting claims to the year 2049." In re Joint Eastern & Southern District Asbestos Litigation, 151 F.R.D. 540, 542 (E. & S.D. N.Y. 1993).

Interestingly, counsel for a small group of plaintiffs sought to depose the panel of experts. The court noted that Rule 706 does provide for the examination of court-appointed experts, but stated that the "requirement for formal depositions of Rule 706 experts has not been literally enforced." Id. at 544. The court found that all parties had ample opportunity to review the findings of the panel and to cross-examine the members of the panel at scheduled hearings. Moreover, the court noted that none of "the other hundreds of thousands of [claimants had] sought such depositions." Id. at 541. Finding that allowing the deposition of the panel members would be "excessively burdensome and expensive", the court issued a protective order pursuant to Federal Rule of Civil Procedure 26 precluding the deposition of the panel members.

VII. Practice Points

A. Engagement Agreements With Expert Witnesses

Once the relationship between counsel and an expert is ready to be formalized, a carefully considered engagement letter should be drafted and signed by all parties. The engagement letter should set forth the scope of the services to be provided by the expert. At the very least the letter should address, with as much specificity as is practical: whether the expert is expected to testify or to merely consult; whether the expert can expect to be deposed; the information to be analyzed and how it will be obtained and, if necessary, maintained; the methodology to be employed, as well as any assumptions which may affect the analysis; whether a written report will be required, and if so, in what format; any confidentiality expectations; and any deadlines. If indemnification is to provided to the expert based upon the retention, this should be clearly identified. Also, a clear demarcation between the responsibilities of the lawyer and those of the expert might serve to prevent misunderstandings, frustrations, and the inefficient use of time and resources. If the expert's work is standardized or subject to other professional guidelines, these specifications should be referenced.[27] The fee structure should be set forth, to include method of payment and expected timeliness of submission of invoices and payment. Finally, if any aspect of the relationship changes due to the evolution of the case or other factors, the engagement letter should be updated or superseded to reflect the changes.[28]

Wang Laboratories, Inc. v. Toshiba Corp., 762 F. Supp. 1246 (E.D. Va. 1991) is a cautionary tale of woe exploring the possible consequences of a poorly defined and documented relationship between two sets of lawyers and an expert. Wang sued NEC on a

patent infringement claim. Counsel for Wang contacted one Balde. According to Wang, Balde was retained as a consultant in the case. According to Balde, Balde declined to decide on whether he would be retained in the matter until he had had an opportunity to determine the validity of the disputed patents. No formal engagement agreement was exchanged or executed by the parties. Wang sent Balde several packages of materials, mostly confidential, for Balde's review. Balde determined that the patents were valid, and declined to assist Wang in the matter. Later in the case, NEC informed Wang that Balde would be called to testify at trial on behalf of NEC. Not surprisingly, Wang moved the court to disqualify Balde. After noting the paucity of case law treating the precise issue, the court stated that "[l]awyers bear a burden to make clear to consultants that retention and a confidential relationship are desired and intended[, and a] lawyer seeking to retain an expert and establish a confidential relationship should make this intention unmistakably clear and should confirm it in writing." Wang, 762 F. Supp. at 1248, 1250. In spite of these statements, the court did disqualify Balde, after finding that "there was persuasive evidence that [Wang's counsel] was objectively reasonable in assuming the existence of a confidential relationship and that confidential information was disclosed." Id. at 1249. In reaching its conclusion, the court noted that there was no evidence of misconduct, and that other experts were available to both parties for the purposes Balde was "engaged" to provide. The court concluded:

> Experts, strictly speaking, are not advocates; they are sources of information and opinions in technical, scientific, medical or other fields of knowledge. Yet when experts are retained in connection with litigation, they must operate within the constraints of, and consistent with, the adversary process. This dispute was a reminder of this essential fact.

Wang, 762 F. Supp. at 1250.

A. Controlling Costs

The expenses incurred by a party in the utilization of an expert witness can be a significant cost of litigation. If the costs exceed the contributions, the engagement may be perceived as a waste, leading to strained client and professional relationships.[29] One way in which cost-associated problems may be avoided is to understand the fundamental perspective of the expert witness. Many expert witnesses do not regard themselves primarily as advocates, but as consultants. Thus, the expert may be accustomed to full access to an analytical situation and support from an unopposed client in order to measure and improve.

In the contested arena of litigation support, however, the same expert may be confronted with restricted access to information and less than cooperative personnel. In order to maximize the efficiency of the expert's resources and time, the attorney must effectively communicate the client's needs to the expert and relate how the expert's opinion will fit into the full litigation picture. The court's schedule, the anticipated response by opposing counsel, and a broad understanding of the relevant legal issues will minimize inefficiently utilized resources and time, and in turn help to keep the costs of litigation under control.

B. Presentation

There are several ways to "sell" expert testimony. Because people tend to think visually, the use of visual aids is almost always conducive to getting a point across. The use of slides, charts, graphs, photographs, video, or computer animation, when appropriate, can greatly aid comprehension, maintain the attention of the trier of fact, and make a lasting positive impression. Demonstrative evidence removes the subject matter of testimony from the abstract, and gives the trier of fact a foundation for the construction of the understanding of salient and complex issues.

An expert witness must be prepared to explain an opinion in easy to understand terms. Specialized jargon, if necessary, should always be explained to the trier of fact. The courtroom is not the place for an expert to seek an ego boost. Confidence, not arrogance, should be the target demeanor. Preparation of an expert witness should not be limited to direct examination. An expert witness should not be surprised by an attack on his or her qualifications or opinions on cross-examination. The degree to which a witness remains poised and confident may be anticipated by the degree to which that witness is prepared for difficult questions. An expert should never engage opposing counsel in a confrontational manner. An argumentative witness will likely lose in a hostile exchange with opposing counsel, and credibility may be lost as well. This can most effectively be avoided if the witness is careful to answer only the questions posed, without volunteering information or digressing. Of course, an alert witness may utilize cross-examination to emphasize or to iterate an important or favorable point, but should only do so in the context of a question asked. Overzealousness can also erode credibility. Finally, consistency is the cornerstone of credibility. A witness who changes positions or who slips into self-contradiction will do more harm than good. An expert witness should aid the trier of fact in understanding an important and complex matter at issue. Without credibility, the expert will be perceived as nothing more than a hired gun devoid of integrity with mercenary loyalties.

VIII. Conclusion

Obviously, experts play a vital role in the resolution of legal disputes. In many cases the "battle of the experts" cliche is reality, as cases are won, and lost, based upon which party possesses the superior understanding of expert witness and consultant management. An expert witness should earn the designation of "expert" in representing your client's interests, by educating the court, the jury, and the adverse party on issues which are so complex or arcane that they would otherwise be misunderstood or not understood at all. Expert witness and consultant management, like every other area of advocacy, is a skill which must be affirmatively and continuously cultivated to rise above mere competency. In the final analysis, legal expertise in the understanding and approach to expert witness and consulting issues is as crucial as the knowledge and experience of the experts themselves.

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[1] "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 upon the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a

fact in issue." Federal Rule of Evidence 701.

[2] See STEVEN GOODE & OLIN GUY WELLBORNE III, COURTROOM EVIDENCE HANDBOOK 185 (1995).

[3] The Rule provides:

Except as otherwise stipulated or directed by the court, this 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. 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 in the preceding ten years; the compensation to be paid for the study and the 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.

[4] See Federal Rule of Bankruptcy Procedure 7026(e).

[5] David E. Colmenaro, Note: A Dose of Daubert to Alleviate "Junk Science" in Texas Courtrooms: Texas Adopts the Federal Standard for Determining the Admissibility of Scientific Expert Testimony, 27 TEX. TECH L. REV. 296-93 (June 1995).

[6] Id.

[7] Both the district court and circuit court, applying the general acceptance test, had held that certain scientific evidence was inadmissible. The Supreme Court vacated and remanded. Daubert, 509 U.S. at 598.

[8] "Rule 702 applies to 'technical, or other specialized knowledge.' Our discussion is limited to the scientific context because that is the nature of the expertise offered here." Daubert, 509 U.S. at 590 n. 8.

[9] See ROBERT F. REILLY, Implications of Recent Daubert-Related Decisions on Valuation Expert Testimony, AMERICAN BANKRUPTCY INSTITUTE JOURNAL 84 (June 1999).

[10] See ABB Air Preheater v. Regenerative Environmental Equip. Co. 167 F.R.D. 668 (D. N.J. 1996).

[11] The "report" stated:

Dr. Edwards will testify as to Plaintiff [sic] has suffered as a result of emotional distress. And upon further exploration, her testimony may included [sic] how Plaintiff suffered from being sexually assaulted while on the job and the continuous pattern of harassment by the perpetrators, her peers and other department employees and the extent of how such actions affected Plaintiff's employment. Such conduct has lead [sic] to an undermining of Ms. Harvey's work performance, self esteem, and resulted in post-traumatic stress disorder.

Harvey, 949 F. Supp. at 877.

[12] The Advisory Notes quote from Ladd, Expert Testimony, 5 VAND. L. REV. 414, 418 (1952).

[13] R. Michael Yesh, The CPA as Expert Witness – Does Liability Loom?, AMERICAN BANKRUPTCY INSTITUTE JOURNAL 222 (March 1995)("[M]any professionals have viewed insolvency and litigation practices as an area to increase both profits and growth. This area is often viewed as one which commands premium billing rates and generates significant revenues for an organization.").

[14] General Electric had counter-claimed. Mattco Forge, Inc., 60 Cal. Rptr. 2d at 785. The parties settled their respective suits, and sanctions were not paid. Id. at 786.

[15] See Mattco Forge, Inc. v. Arthur Young & Co., 45 Cal. Rptr. 2d 581 (Cal. Ct. App. 1997)(rejecting settlement between Mattco and Mattco's former counsel based upon action against Mattco's former counsel by Arthur Young).

[16] Courts finding an option to opt out of Rule 26(a)(2)(B) have found support in current Rule 26(a)(1), which explicitly *does* allow for opting out of Rule 26(a)(1): "Except to the extent otherwise stipulated or directed by order or local rule. . . ." Easton, 32 ARIZ. ST. L.R. at 528 n. 183. In April of 2000, the Supreme Court accepted the recommendations of the Judicial Conference of the United States for amendment to the Federal Rules, including substantial amendments to Rule 26. See Terry Carter, Rule 26 Goes to the Hill: Judicial Conference Amendments Unchanged by Supreme Court, 86 A.B.A.J. 27 (July 2000)("Most significantly, the amendments would impose uniformity on all 94 federal districts. The federal districts now can opt out of these rules in their current form, and instead use local rules. Their

expected enactment would make them mandatory nationwide."). The new Rule 26(a)(1) removes the "opt out" language of the current Rule. See FED. R. CIV. P. 26(a)(1) (proposed): "Initial Disclosures: Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to the other parties:". . . . Thus, the abrogation of the purported basis for opting out of Rule 26(a)(2) may, at the very least, persuade "opt out" jurisdictions to revisit the issue. If Congress does not act to modify or reject the proposed amendments to the Federal Rules, the new Rules will automatically become effective December 1, 2000. Carter, 86 A.B.A.J. at 27. Rule 26(a)(2) itself is not changed by the proposed amendments. For a summary of the amended Rules and their possible consequences, see Gregory P. Joseph, Civil Rules Amendments, THE NATIONAL LAW JOURNAL, March 13, 2000, at A19, and Gregory P. Joseph, Civil Rules II, THE NATIONAL LAW JOURNAL, April 24, 2000, at A17.

[17] 28 U.S.C. § 1821(b) provides: "A witness shall be paid an attendance fee of $ 40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance."

[18] Elliott W. Weinstein, The Art of Testimony: The Real Estate Appraiser, The Appraisal and the Expertise of the Expert Witness, AMERICAN BANKRUPTCY INSTITUTE Journal 550 (October 1996).

[19] William L. Medford, Finding the Proper Chapter 11 Rate of Interest, Pick Your Experts Carefully, AMERICAN BANKRUPTCY INSTITUTE JOURNAL 203 (December 1999).

[20] Id.

[21] Id.

[22] Id.

[23] Id.

[24] Federal Rule of Evidence 706(a) provides: "Appointment. The court may on its own motion or upon the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness."

[25] Federal Rule of Evidence 706(b) provides: "Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs." In In re Philadelphia Mortgage Trust, 930 F.2d 306 (3rd Cir. 1991), the trustee prevailed in an adversary proceeding and sought to have costs incurred by a court-approved expert witness taxed to the defendant pursuant to 28 U.S.C. § 1920(6), which allows for such taxation for "court appointed experts." The district court agreed that "court allowed" and "court appointed" were synonymous, for the purposes of 28 U.S.C. § 1920(6). The court of appeals reversed, finding that court appointed expert pursuant to Rule 706 must be "neutral with regard to all parties" thus justifying the taxation pursuant to the statute, whereas the trustee's court approved experts were advocates for the trustee. Id. at 310.

[26] Jeffrey W. Warren, Use of Court-Appointed Experts in Resolving Complex Claim Estimations, AMERICAN BANKRUPTCY INSTITUTE Journal 153 (May 1997).

[27] See R. Michael Yesh, The CPA as Expert Witness–Does Liability Loom?, AMERICAN BANKRUPTCY INSTITUTE JOURNAL 222 (March 1995).

[28] See American Bar Association Standing Committee on Ethics and Professional Responsibility,

Report of the Committee on Ethics, 19 ENERGY LAW JOURNAL 199, 203-04 (1998).

[29] Christopher J. Leisner, Monitoring Costs Associated with Expert Witnesses, AMERICAN BANKRUPTCY INSTITUTE JOURNAL 2704 (June 1994).