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EXPERT WITNESSES IN BANKRUPTCY COURT: SOME LEGAL AND PRACTICE POINTS FOR LITIGATORS

The rules and best practices applicable to expert witnesses in bankruptcy court differ in a number of respects from those in district court. The author focuses on two areas in which these differences are pronounced: the requirement that an expert furnish a written report and the practice of seeking to exclude expert testimony under Daubert *standards. After describing the legal framework governing each area, he discusses some of the tactical considerations that a litigator will need to weigh.*

By Philip Bentley *

Litigation in bankruptcy court differs from litigation elsewhere in a number of respects, and some of these differences have a direct bearing on the proper and effective handling of expert witnesses. For example:

- Much bankruptcy litigation takes place not in a full-fledged lawsuit but instead in a less formal variant known as a contested matter, in which many of the Federal Rules of Civil Procedure, including those governing expert disclosure, do not apply unless the court so orders.

- In large bankruptcies, expert testimony is often given by financial professionals who have participated as advisors in the underlying events, and who give both fact and expert testimony about those transactions.

- The great majority of evidentiary hearings in bankruptcy cases are bench trials, rather than jury trials.

Each of these characteristics of bankruptcy litigation affects the legal rules governing expert witnesses, as well as the practices best suited to handling one's own and the other side's experts. This article focuses on two aspects of expert witness practice in which the rules or best practices in bankruptcy court differ substantially from those applicable elsewhere – namely, (1) the circumstances in which an expert is required to furnish a

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