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Anticipating And Avoiding Expert Deposition Fee Disputes

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Expert testimony is an indispensable component of modern litigation and often one of the costliest. The hourly rates experts charge can vary widely from a few hundred dollars to a few thousand, not counting costs for such things as testing, surveys, and other special projects providing foundation for the testimony.

Expert fees and expenses can escalate quickly even in the simplest of cases. As one federal judge lamented, "[c]ontinuing escalation of expert witness fees and the all too frequent attitude of experts that their fees should be set at the maximum-the-traffic-will-bear is of great concern." Jochims v. Isuzu Motors Ltd., 141 F.R.D. 493, 497 (S.D. Iowa 1992). Another judge went so far as to characterize skyrocketing fees as "attempts to loot the system." Anthony v. Abbott Labs., 106 F.R.D. 461, 465 (D.R.I. 1985).

As expert fees increase, so too does the frequency of fee disputes. Fee disputes can disrupt discovery and trial preparation and threaten to derail a case altogether. Often, however, fee disputes can be avoided by identifying where they might erupt and taking straightforward steps to head them off. This article offers advice on how to avoid fee disputes; (1) it identifies the origins of fee disputes and discusses how courts tend to resolve them when they do arise, and (2) it proposes steps a deposing party can take to avoid disputes altogether and to lay the foundation needed to buttress the position taken if court involvement becomes necessary.

Origins of Fee Disputes

Expert deposition fee disputes commonly arise over the following subjects: deposition time, prepayment for deposition time, preparation time, and post-deposition production of documents.

Deposition time

Rule 26(b)(4)(E)(i) of the Federal Rules of Civil Procedure requires the party taking an expert's deposition to "pay the expert a reasonable fee for time spent in responding to discovery." While intended to be an objective standard, the phrase "reasonable fee" too often means different things to different people when it comes to deposition time.

Reasonableness of a fee is heavily fact-dependent. To determine whether a fee is reasonable, courts consider the following factors: (1) the witness's area of expertise; (2) the education and training that is required to provide the expert the insight that is sought; (3) the prevailing rates of other comparably

respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the fee actually being charged to the party who retained the expert; (6) fees traditionally charged by the expert on related matters; and (7) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26. Hose v. Chi. & Nw. Transp. Co., 154 F.R.D. 222, 224–25 (S.D. Iowa 1994) (quoting Jochims v. Isuzu Motors, Ltd., 141 F.R.D. 493, 495–96 (S.D. Iowa 1992)).

Fees for deposition time can become problematic when the expert charges a disproportionately high hourly rate for depositions compared with other work. For instance, experts often charge a higher rate for time spent in depositions than in less adversarial settings such as a meeting with the retaining attorney. E.g., Anthony, 106 F.R.D. at 464–65 (finding expert's deposition fee "astronomical," in part because it was significantly higher than what he "was content to charge a (friendly) litigant").

When an expert's "fee schedule likely is based, in large part, upon with whom the expert is dealing," courts tend to view the schedule as unreasonable. Edin v. Paul Revere Life Ins. Co., 188 F.R.D. 543, 547 (D. Ariz. 1999). At the same time, courts may allow slightly higher rates for depositions and other testimony because they acknowledge that a deposition "is an obviously more stressful and tense activity" than other work the expert does. Rancho Bernardo Dev. Co. v. Superior Court, 2 Cal. Rptr. 2d 878, 880 (Cal. Ct. App. 1992). Differences in rates will pass muster as long as they have reasonable justification.

Likewise, disputes can arise when an expert charges a higher fee for videotaped depositions. Experts have been known to spike their fees for videotaped depositions, perhaps because they fear an unflattering appearance on camera and want to be paid for that risk. While experts enjoy some leeway to adjust their rates to account for the added stress, that leeway doubtfully permits them to double their usual rate simply because of videotaping. See Tomlinson v. Landers, No. 3:07-cv-1180-J-TEM, 2009 WL 2499006, at *2 (M.D. Fla. Aug. 14, 2009) (finding the expert's "doubling of said fee to $2,300 for a videotaped deposition versus an audio-recorded deposition unreasonable").

Coupling an exorbitant hourly rate with a minimum fee can intensify the problem. Courts tend to tamp down fees of experts, particularly physicians, who demand an extraordinarily high hourly rate plus a minimum fee bearing no relationship to the time actually spent in the deposition. See Mannarino v. United States, 218 F.R.D. 372, 375 (E.D.N.Y. 2003) (finding unreasonable an expert's flat fee of $3,000 for a one-hour deposition); Burdette v. Steadfast Commons II LLC, No. 2:11-980-RSM, 2012 WL 3762515, at *6 (W.D. Wash. Aug. 29, 2012) (reducing an orthopedic surgeon's deposition fee because it "is both astronomically high and includes a two hour minimum").

On the other hand, if the expert clears the calendar of other income-generating work (like seeing patients) based on the deposing party's representation about the anticipated duration of the deposition, a court will likely allow a "reasonable" minimum fee. Edin, 188 F.R.D. at 548.

When the expert's hourly rate produces an "unreasonable" hypothetical annual income, courts are more skeptical of the fee requested. One judge found a physician's hourly rate of $420 unconscionable because, "[b]ased on a standard (40 hour) work week, annualization would produce an income to [the doctor] of $840,000 yearly" in 1985 (or about $1.8 million in today's dollars). Anthony, 106 F.R.D. at 464; see id. (finding "the day has long since passed when physicians were paid by grateful patients in cords of wood or gobs of butter" and "no amount of yearning will restore that more frugal epoch").

Another judge found unreasonable a surgeon's hourly rate of $1,500, "which annualizes to a salary of over $3 million." Burdette, 2012 WL 3762515, at *6. A third found a physician's hourly rate of $800 to be

just as unreasonable. Hose, 154 F.R.D. at 225 ("Based on a standard (40 hour) work week, [the expert] would earn $1,664,000.00 a year at his requested hourly rate."). If the annualized hourly rate resembles the salary of a professional athlete, it probably is not a "reasonable fee" within the meaning of Rule 26. See Anthony, 106 F.R.D. at 464–65 (distinguishing between paying "a grown man ... a seven figure annual salary to dribble a small round ball" and a party taking the deposition of an opposing party's expert as "the rule permits").

Prepayment

Despite an agreement on the amount of the fee, a demand for prepayment of the expert's fee can create disputes. In federal court, prepayment of the expert fee ordinarily is not required. Harris v. Costco Wholesale Corp., 226 F.R.D. 675, 676 (S.D. Cal. 2005). In some state courts, however, the expert may condition appearance on prepayment of at least a portion of the fee. See, e.g., Cal. Code Civ. Proc. § 2034.460(a) ("The service of a proper deposition notice accompanied by the tender of the expert witness fee described in Section 2034.430 is effective to require the party employing or retaining the expert to produce the expert for the deposition."); Goodheardt v. Fifth Jud. Dist. Ct., No. 60441, 2012 WL 1448310, at *1 (Nev. Apr. 23, 2012) (holding that the trial court did not abuse discretion in denying a motion to strike expert or extend discovery deadline after the opposing expert refused to appear for the deposition because he did not receive prepayment as he demanded).

An expert's demand for prepayment of the fee affects not only the deposing party but also the party retaining the expert. Experts routinely require the retaining party to sign an engagement agreement defining the scope of service and spelling out billing and payment terms. Failing to fulfill those terms could wreak havoc on the retaining party's case if, as a result, the expert refuses to appear for the deposition until receiving payment.

A recent Minnesota federal case, Fagen Inc. v. Exergy Development Group of Idaho LLC, No. 12-2703 (D. Minn. May 17, 2016), illustrates this point. There, the plaintiff's expert refused to appear for his deposition because the plaintiff's attorneys failed to pay outstanding bills and a retainer. After the expert failed to appear, the plaintiff moved to modify the scheduling order to permit it to disclose a different expert. The court denied the motion, leaving the plaintiff without an expert to oppose the defendant's motion for summary judgment, all because the plaintiff's attorneys failed to pay the expert on the agreed terms.

Preparation time

"Compensation for time spent preparing for the deposition has proved a divisive issue." 8A Charles A. Wright et al., Federal Practice and Procedure § 2034 (Apr. 2016 update). While courts are split on this issue, one point is clear — the time spent and the fee charged for preparation must be reasonable and closely related to deposition preparation. See Rogers v. Penland, 232 F.R.D. 581, 582 (E.D. Tex. 2005) (requiring payment of fees only for time clearly spent preparing for the deposition, not time merely reviewing documents and formulating opinions).

Post-deposition document collection

Fee disputes can erupt even after the deposition if the deposing party requests the expert to collect and produce additional documents following the deposition. Those requests frequently trigger a dispute about the fee to be paid for the time spent completing those tasks. While those tasks are appropriately compensable, the compensation should be commensurate with the task.

That means experts may not charge the same rate for collecting and producing documents that they charge for deposition and preparation time. Courts agree that, when collecting and producing documents, experts may charge only a reduced rate, comparable to the rate paid to clerical staff. E.g., Dominguez v. Syntex Labs. Inc., 149 F.R.D. 166, 171 (S.D. Ind. 1993) ("A reasonable fee would be the same gross hourly rate [the expert] or his clinic pays his own medical records staff (clerical office workers as opposed to medical staff).").

Fee Dispute Avoidance and Resolution

A deposing party can take some simple steps to avoid fee disputes, which will also lay the foundation needed to buttress the position taken if court involvement becomes necessary.

Avoiding fee disputes starts with your own expert. "While a party may contract with any expert it chooses, the court will not automatically tax the opposing party with any unreasonable fees charged by the expert." Grady v. Jefferson Cty. Bd. of Cty. Comm'rs, 249 F.R.D. 657, 662 (D. Colo. 2008) (quoting Kernke v. Menninger Clinic Inc., No. 00-2263-GTV, 2002 WL 334901, at *1 (D. Kan. 2002)). When retaining an expert, therefore, nail down the expert's fee structure, including the fee for deposition time, and assure yourself that the fee and rate are reasonable according to the factors itemized above.

If the fee strikes you as something a court might deem unreasonable, marshal the evidence to justify it so you can present it to the court or opposing counsel if necessary. And, when it's time to pay the expert's bills, pay them in a timely manner according to any engagement agreement so the expert does not leave you abandoned at the time of the deposition.

Raise the issue of expert deposition fees with opposing counsel early in the case. A discovery planning report under Federal Rule of Civil Procedure 26(f) is an ideal place to do so. Spell out the terms that will govern payment of expert deposition fees, including the need for prepayment, payment for document collection and production, payment for travel time, and the need for an Internal Revenue Service Form W-9 if you have not encountered the expert before. At the Rule 26(f) stage, most parties do not know whom they will disclose or what their rates and fees will be. However, raising these issues early will avoid any surprises — and, ultimately, disputes — later on, and will demonstrate diligence.

When noticing the deposition, consider including the essential payment terms in the notice. Doing so will leave no doubt about the conditions of the expert's appearance. Either the expert will appear on the conditions stated or the opposing party will object so the dispute can be resolved by the court, preferably before the deposition.

Conclusion

The court in Hose observed that "[t]he escalating cost of federal civil litigation is a serious problem" and that "the cost of expert witnesses" is part of the problem. 154 F.R.D. at 228. Because of the cost, disputes are sure to develop. Knowing the origins of the disputes will enable parties to anticipate, manage and avoid them, and, in the process, slow the escalation of one of the costliest components of the case.

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