



Please Note:

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**Instructions to Attorney:** As you go through the deposition of the adverse expert- be sure to have the adverse expert completely explain - on the record - any exhibits, spreadsheets, or data summaries he/she has prepared. You want to be able to prepare to attack it if it is used as a summary or demonstrative evidence. You also want your own expert to be able to read this deposition's transcript and be able to completely understand any exhibits, spreadsheets, or data summaries the adverse expert has prepared. (You do not want your expert to say at trial that he/she needed you to explain the exhibit. Be sure the deposition transcript of the adverse expert does the needed explanation.)

**§ 16.06 Form: checklist for deposing the adversary's fee expert**

**Cross Examination, Expert Witness on "Reasonable Attorney Fee"**

**Files and Records**

Did you bring to this deposition, as requested, all your files and records in this case? [Before the deposition make a request in the nature of our form § 8.5 Form: Notice of Items Adverse Expert is to Bring to Deposition.]

[Make sure you have a copy of everything that the expert has brought with him, even if he/she is not using it or says he/she has not considered it.]

Did you **not** bring any item that we requested you bring?

If witness withholds any documents: ask if he/she has "considered" it. [Either in determining what was relevant, in forming his opinion or in preparing for the deposition.]

Identify any withheld items with great particularity, even if he/she says he/she has not considered it. Not only ask what it is, who wrote it or received it, and its date; but also ask the expert to specify number of pages, color or black and white, typed or handwritten, stapled or loose, an original or photocopy, etcetera. Also for each withheld item, ask who else has seen the item.]

Are there any items not brought to the deposition that he/she has seen in preparing his analysis and opinions? (Even if he/she is not using the item now and does not now have it in his files.) [Notice this is not the same question as the earlier question whether the expert has brought all his files and records. E.g., an attorney may have shown him something that never was put into the expert's file.]

Now, as to anything withheld or not brought to the deposition, find out

Where is it now? (Surprising how many times it was left in the hotel room deliberately or is now in the adverse attorney's briefcase!) Why did you not bring it here?

Who told you not to bring it here?

**Fee Contract in the Underlying Matter.**

Has he/she seen the attorney - client fee contract of the attorney whose work is being evaluated for a "reasonable fee"

If he/she has not seen it, why not?

If a fee a contract does not exist, has the expert considered the state or ethics rules that require fee contract. [E.g., Texas Professional Code Rule 1.04 says: "© When the lawyer

has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.”]

### **The Records of Time Expended in the Underlying Matter.**

Has the expert *seen*:

- the actual time slips?
- a copy of the computer raw data records of time?
- a computer print out of the time entries?
- bills of the billing attorney whose work is being evaluated for a reasonable fee?

Has the expert received:

- copies of the actual time slips?
- a copy of the computer raw data records of time?
- a computer print out of the time entries?
- bills of the billing attorney whose work is being evaluated for a reasonable fee?

In attorney fee disputes, the hourly time sheets of the attorney under investigation is important. Be sure that you have every time record that was considered by the adverse expert.

Has he/she seen the actual time slips? (Get them!)

Once you have the physical time records or other records of work done, ask if anyone has explained those records to him. Get everything the expert was told. Importantly, if the expert was not told anything about the meaning of the written words (e.g., "Research") on a time record, obtain admissions that the expert does not know anything more about the words (E.g, what was researched, or whether the mode of research meant reading an entire book on constitutional law or just reading a court rule that a beginning lawyer should know, or doing a keyword search on Westlaw.)

Does the expert's own firm routinely record time the attorneys' work each day on matters?

Why or Why Not does his own firm record attorney's time?

What method does his firm use to record time?

In addition to the method, find out the actual computer program they use to record time?

E.g., Time slips, Tabs3, Amicus Attorney, PCLaw.

Is the expert's own firm's computer time program one of the many in which you can activate a clock in stopwatch fashion? (That is, the user clicks the program to start the computer stopwatch, types a note describing what was done, clicks the stopwatch on an

off for interruptions, and clicks the stopwatch at the end of the work. That is all the effort needed to have a bill slip is automatically generated in the firm's computer for that client and matter.)

Is the expert's firm's computer time program capable of recording time in 1/10 hour increments?

What time increment does the experts own firm use?

What time keeping method does the attorney firm (the billing firm"whose work is being evaluate for a reasonable fee use?

Does the expert know the exact program used by the billing firm?

Does the expert know if the billing firm's computer and billing program is capable of recording time in 1/10 hour increments? In minute increments?

Does the expert know if the billing firm use the features of its computer billing program to "round up" the actual time in creating the attorney firm bills and computer print outs of the time entries the expert has seen?

Did the billing firm always use its computer program to time the work they are billing in this case?

Does the expert know of — by the expert's own knowledge — if all the time billed for in this case was accurately recorded?



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### **Opinions Are Now Final!**

Is he/she prepared to express opinions in this case?

(Is there anything he/she wants (or expects) to do to express trial opinion, but he/she has not yet done? - testimony? investigation?)

Has the attorney retaining him asked him to do any more work on the case?

Nail down that with nothing more than he/she now has in the case, he/she can express his opinions in final form.

Nail down that if he/she receives no more information, his opinions will not change.

**Description of Method Used and Work Done.**

What did the expert personally do to be able to express an opinion?

Did she have any work done by others (in his office or outside her office) so that she could express her opinions?

Did she interview the party for whom she is testifying?

What other persons have been interviewed regarding the case?



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