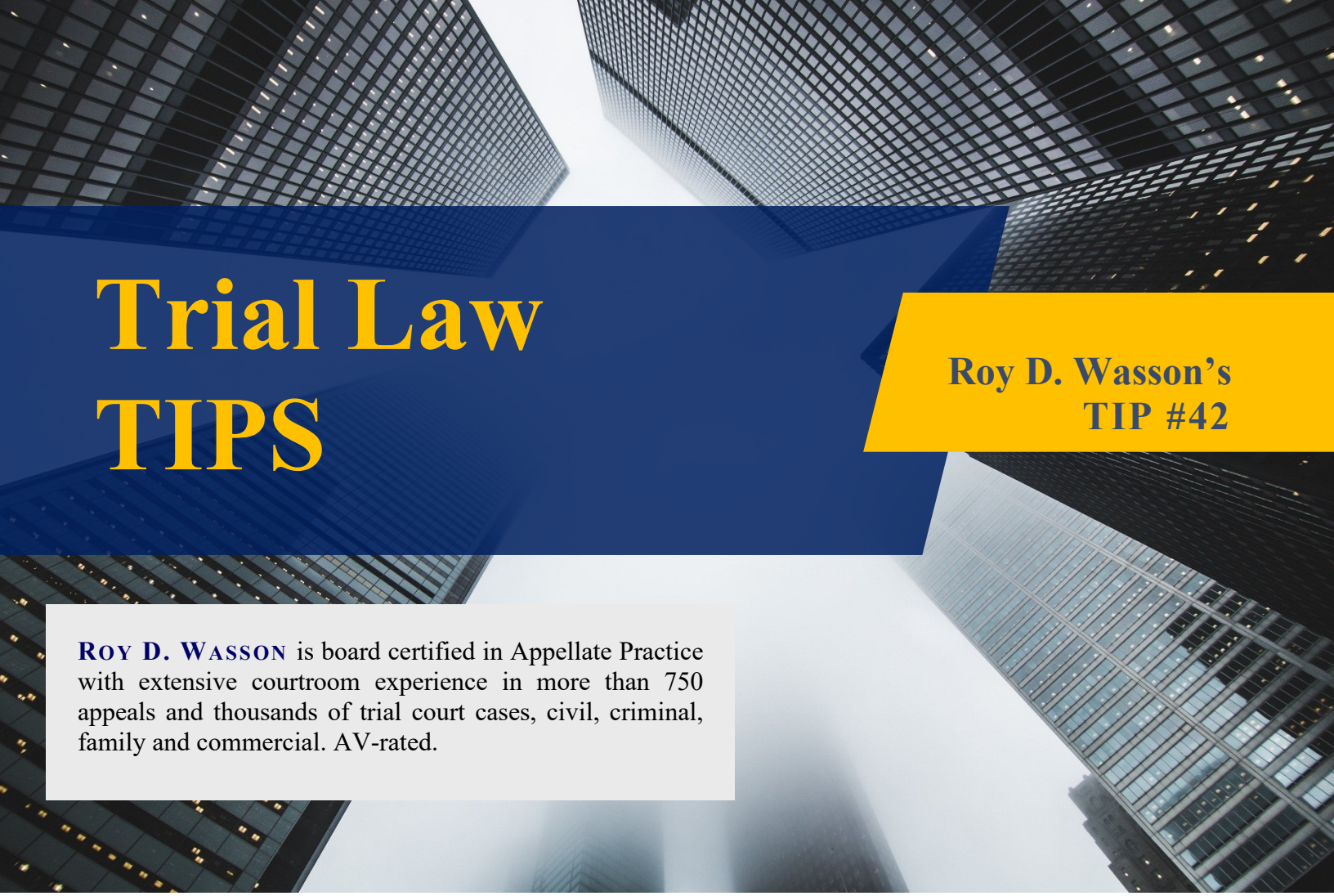

Trial Law TIPS

Roy D. Wasson's TIP #42

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Stalking Another Courthouse Legend—Award of Payment to Attorneys' Fees Expert Not Guaranteed

Introduction

Your receptionist buzzes-in to your office to tell you that another trial lawyer is holding on "line three." You don't have any cases going on with that attorney currently, so your mind clicks through a few possible scenarios as to why he or she is calling: A new referral? Maybe the other lawyer has a case like one you won recently and wants to call to brainstorm about it. It could be a voluntary bar activity or a social event being planned. Rob Paulk has not been seen in your vicinity lately, so you doubt if it is a political contribution being requested.

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"Howdy" you drawl in your best (but still not very good) Jerry Spence imitation. "What's up?"

"Fee hearing," the voice of your colleague replies, "I need an expert next Thursday. Whatcha doin' about ten?"

"Testifying for you," you respond without hesitation. "What kind of case? How much are you looking for? Why don't you buy me lunch and tell me all about it," you suggest, inviting yourself to your new lawyer-client's club.

Just what you needed to help you fund that holiday weekend you've been planning in the back of your mind, but until now had considered mostly a fantasy because your cash flow needed to pick up. "Nothing like a few hours testifying about attorneys' fees," you think to yourself, guaranteed payment by the defendant's insurance company; no pressure about winning or losing because you're just the witness for a change; it's one of those aspects of trial practice which is still fun, and easy enough that you could go through the *Rowe* and *Quanstrom* factors in your sleep.

Not so fast, multiplier-breath. Who says you're going to get paid if you testify for your friend? Contrary to courthouse legend, payment of your expert witness fee is not automatic. Here are some tips for making sure that you receive the compensation for your services which you earn and expect by agreeing to serve as an expert witness.

Legal Authority for Compensating Attorneys' Fees Experts

Even if you testify for your co-counsel and other professional colleagues on more than an occasional basis, chances are that you have rarely, if ever, thought about the legal basis for your entitlement to a court-awarded expert witness fee. Most of us just take as a given the proposition that—you testify, you get paid—it's as simple as that. Or is it?

The legal basis for you to recover your expert witness fees is not the same authority upon which your lawyer-client is generally going to be entitled to recovery of his or her attorneys' fees. When you agree to participate as an expert witness in a case, you are not appearing as an attorney or performing legal services for any party, so a statutory or contractual basis for recovery of attorneys' fees will not support your claim to expert witness compensation.

Audience participation segment—let's see a show of hands on this one: Do you know whether there is a statutory basis for recovery of attorneys' fees expert's charges as costs? No, not you again. I'm not going to call on you this time, Mr. Glass, let's give someone else a chance, okay?

You, you in the back row, do you have the answer or are you trying to ask permission to "go potty"? Yes, that answer is correct. Section 92.231, Fla. Stat. (2003). That statute provides that fees charged by an expert or skilled witness, "including the cost of any exhibits used by such witness," are taxable as costs in the proceeding.

That statute applies to taxation of the fees of an expert who testifies in an attorneys' fees proceeding. "Pursuant to Section 92.231, Florida Statutes . . . , expert witness fees may be taxed as costs for a lawyer who testifies as an expert." *Stokus v. Phillips*, 651 So. 2d 1244, 1246 (Fla. 2d DCA 1995).[1] *Accord, Murphy v. Tallardy*, 422 So. 2d 1098 (Fla. 4th DCA 1982). The statutory provision establishing an expert's entitlement to an award of fees as taxable costs is seemingly unequivocal and

[1] The provisions of a soon-to-be-effective-amendment to the expert fee statute which affects the ***amount*** of an attorneys' fees expert's fee is addressed in the section of this article pertaining to determination of the amount of such fees.

mandatory. Testify as an expert—the statute seems to say—and recover your fees from the party liable to pay taxable costs.

However, it is not that simple. The Florida Supreme Court in a 1985 case recognized and exception to the mandatory statutory provision concerning awards of experts' fees so big that you could drive Roy Glass' Escalade through it without scratching the hand detailing. Goodbye courthouse legend that attorneys fee expert's compensation is automatic. Hello *Travieso*.

The *Travieso* Travesty—Mandatory Pro Bono Is Alive and Well

For reasons only known to the Supreme Court as it was composed in 1985 the justices decided that the law concerning the recoverability as costs of an expert attorney's charges must be treated differently from the fees incurred by expert witnesses in all other fields and disciplines. In *Travieso v. Travieso*, 474 So. 2d 1184 (Fla. 1985), the Court first addressed the question whether § 92.231 applies at all to charges rendered by lawyers acting as experts, holding that "[t]he language of this statute is broad and clearly encompasses the type of expert fee sought in the present case." *Id.* at 1185. That said, the Court then made it abundantly clear that lawyers should not expect to always recover a fee for their expert witness services.

To the contrary, the Court in *Travieso* made it clear that recovery of expert witness fees by attorneys should be viewed as the rare exception, rather than the rule. Relying upon unidentified sources to establish what lawyers "generally" are willing to do in attorneys fee proceedings, and announcing without citation to any reference material what attorneys fee experts "traditionally" have done in the way of refusing compensation, the *Travieso* Court complicated attorneys fee litigation more than it already had been complicated by recent changes in the law, and pronounced the disfavor with which

claims to expert witness fees by lawyers would be viewed in the future:

> We hold that pursuant to section 92.231, expert witness fees, at the discretion of the trial court, ***may*** be taxed as costs for a lawyer who testifies as an expert as to reasonable attorney's fees. We do not hold that such expert witness fees must be awarded in all cases. ***Generally, lawyers are willing to testify gratuitously for other lawyers*** on the issue of reasonable attorney's fees. This ***traditionally has been a matter of professional courtesy***. An attorney is an officer of the court and should be willing to give the expert testimony necessary to ensure that the trial court has the requisite competent evidence to determine reasonable fees. ***Only in the exceptional case where the time required for preparation and testifying is burdensome, should the attorney expect compensation***.

Id. at 1186 (emphasis added).

Little-by-little after *Travieso*, defense lawyers started to object to awards of expert witness fees in attorneys' fees cases, and trial judges started denying such fees in many cases, based upon the Supreme Court's holding that expert fees should not be recovered except "in the exceptional case." What did that mean? What if your colleague asked you to review his or her file, conduct some research into the elements for assessing attorneys' fees under current law, then expending half a day or more cooling your heels in a courthouse hallway waiting to be called to present your opinion testimony. Nothing "exceptional" about those facts, is there? Sounds like a pretty common chain of events in the typical attorneys' fee litigation.

When you add up all the time you've expended, it will come to a full day or more out of work, which the high court apparently wants you to absorb on a pro-bono basis as a

"professional courtesy." Some lawyers cannot or will not agree to give away their time like that without compensation. Those of us who continue to accept expert witness engagements are doing things much differently.

The appellate decisions after the *Travieso* case appear to reach irreconcilable results concerning the question whether a given attorneys fee expert's services are so "burdensome" as to entitle that expert to be paid. One such case finding the burden undertaken by the Plaintiff's expert as being insufficient to support an award of expert fees may leave the reader scratching his or her head in confusion and disbelief. That case is *Orlando Regional Medical Center, Inc. v. Chmielewski*, 573 So. 2d 876 (Fla. 5th DCA 1990).

To begin with, the *Chmielewski* case was not a simple first party insurance case, or even a routine motor vehicle negligence case where a proposal for settlement had generated an entitlement to attorneys' fees. Instead, the case was a relatively-complex medical malpractice case which was tried to a judgment before a jury. The case involved the very important, but then fairly undeveloped, issue of the liability of a hospital for the negligence of its independent contractor emergency room department under the doctrine of "apparent agency."

The case made some very favorable law in that area for plaintiffs, so the details of the facts of the case and pleadings must have been significant to the plaintiff's fee expert, once the proceedings to assess fees were put into motion. There was a verdict in favor of the plaintiff which, while not huge, was significant. The plaintiff's expert sought a fee award for trial level attorneys' fees in the amount of $141,000. A lesser amount was awarded due to a feature of the plaintiff's attorney's fee agreement with his client, but the amount of work involved for the expert to render opinions about reasonable attorneys' fees in such a case had to be what most of us would call "burdensome."

The appellate decision affirming the trial court's refusal to award expert witness fees was based upon the conclusion that "the attorney witness said he spent only three hours looking at the file and made a 'cursory review.'" 573 So. 2d at 883. But how long was the expert on the witness stand presenting testimony based upon those three hours' review of the file? How much time did the expert spend conducting legal research to prepare for his or her testimony? How much time was there in consulting with the attorney-client as all experts do in such matters? Those questions are unanswered, and the *Chmielewski* case stood for considerable time as an example defense attorneys could use of a major case, but one which was not so burdensome as to support a fee award.

The upshot of that decision was to make certain that all attorneys' fees experts inserted a clause in their fee agreement with their attorney-client which acknowledged that the undertaking was expected to be "burdensome." In addition, attorney witnesses no longer could safely prepare for presenting their testimony by skimming through the file on the day before the hearing. Instead, the Court made sure that those of us who agree to testify as experts spend much longer reviewing the file than we otherwise would have done.

Partial Relief From *Travieso*'s Trap

The Second District Court of Appeal issued a line of decisions in the attorneys' fee arena reflecting a more balanced and common-sense approach in determining what cases would warrant an award of expert witness fees, and which ones would not. The "bottom line" in that Second District line of cases is that trial judges could only decline to award expert fees against the non-prevailing party where the expert really had no firm expectation that he or she would be compensated for those services.

In other words, whenever and wherever the expert entered into a fee agreement with the attorney on whose behalf the expert had been engaged, those fees would be recoverable as taxable

costs from the non-prevailing party. The rule of law in that line of cases is as follows: "Expert witness fees paid to the testifying expert are not discretionary if the attorney expects to be compensated for his testimony." *Rock v. Prairie Building Solutions, Inc.*, 854 So. 2d 722, 722 (Fla. 2d DCA 2003). *Accord, Stokus v. Phillips*, 651 So. 2d 1244 (Fla. 2d DCA 1995).

Unfortunately, however, the other DCAs have not expressly adopted the Second District approach of limiting the inquiry to the question whether the expert expected to be compensated.

For example, in *B.H. Constr. & Supply Co. v. District Board of Trustees,* 542 So. 2d 382 (Fla. 1st DCA 1989), the First District refused to equate an expectation of being compensated with an entitlement to a court awarded expert witness fee as taxable costs. The court held: "We do not construe *Travieso* as the Second District Court of Appeal did in *Strauss*. Under *Travieso*, the issue of taxing costs for the fee of an attorney who testifies as an expert as to the reasonableness of attorney's fees is discretionary, and a trial court should consider *Travieso* in exercising this authority." *Id*. at 392. Back to the "burdensomeness" analysis in the First District.

Courts seem, however, to have softened their assessment of what constitutes sufficient "burdensomeness" to support an award of expert witness fees. The Fifth District's decision in *Mangel v. Bob Dance Dodge, Inc.*, 739 So. 2d 720 (Fla. 5th DCA 1999), involves a rare case of the appellate court reversing the trial court's denial of attorneys' fees expert fees as a taxable cost. Although the amount of time expended by the expert in that case was only six hours, in reversing the denial of fees the Fifth DCA held "that attorney Fountain did not agree to expend the six hours as a matter of professional courtesy and that he has already been paid by Blau [the plaintiff]."

Plaintiff's attorneys who want their fee experts to be paid, and want the ultimate responsibility to be borne by the defendant,

would be well-advised to go ahead and pay their expert (especially if it is me) before the hearing on the matter, to demonstrate to the trial court the expert's expectation of payment. Also useful would be a written contract spelling-out the understanding of the plaintiff's attorney and the expert that services are not being provided pro bono, and that the attorneys view the expert's services as burdensome.

E. Measure of Expert's Recoverable Fee:

Once it is determined that the expert witness will be entitled to recover a fee, the question arises what factors should be used to measure the amount of that fee. Certainly factors which are relevant to establishing an expert's reasonable hourly rate in providing legal services as an attorney are relevant to the question of that person's rate when wearing the different hat an expert witness. However, unlike the situation applicable to assessing the reasonable amount of an attorney's legal fees, the assessment of the expert's fee is not dependent upon a rigid formula of factors such as those set out in the Supreme Court's decision in *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990).

The law permits recovery of the time an expert expends in preparing for his or her trial testimony and not just the amount of time involved in the court appearance itself. *See Seabrooks v. Winn Dixie Stores, Inc.*, 745 So. 2d 1039 (Fla. 1st DCA 1999). Preparation includes not only file review, but legal research and meetings with the attorney-client.

Attorneys who litigate fee matters should consider the effect of a soon-to-be-effective amendment to § 92.231 which will bear on the amount of an expert witness fee properly awardable by a court. The old version of subsection (2)—apparently unchanged since 1949—provided that an "expert or skilled witness who shall have testified in any cause shall be allowed a witness fee including the cost of any exhibits used by such witness in the amount of ten dollars per hour ***or such amount***

as the trial judge may deem reasonable, and the same shall be taxed as costs." (Emphasis added).

The amended statute apparently does away with the duty of a trial judge to assess the amount of an expert's fee and establishes the amount as that which the expert and the party retaining the expert have agreed will be paid. The pertinent portion of that amended statute (which goes into effect on July 1, 2004), states: "Any expert or skilled witness who shall testified in any cause shall be allowed a witness fee including the cost of any exhibits used by such witness ***in an amount agreed to by the parties*****,** and the same shall be taxed as costs." § 92.231 (2), Fla. Stat. (2004).

The question arises whether any expert witness fees will be taxable as costs in the absence of a firm agreement concerning the amount to be paid as between the Plaintiff and the expert. If you accept your colleague's invitation to become involved as a fee expert, and just leave hanging the question of the amount of your compensation, it would not be a big surprise for the defense attorney to argue that the judge cannot assess any amount of expert witness fees because there is not "amount agreed to by the parties." A word to the wise on that point should be sufficient.

Necessity of Evidentiary Hearing with Additional Expert Testimony

Do you need to call an expert witness to testify that the amount of your expert witness fees is reasonable and necessary? Yes, and no. In the usual case, at the end of an attorneys' fees expert's testimony, almost as an afterthought, the attorney retaining the expert will elicit the expert's number of hours expended and expected hourly rate. Although occasionally there will be some cross examination (usually about extensive preparation time and significant hourly rates), further litigation

concerning the amount of the expert's fees is "generally"[2] is unheard-of. Litigants do not make a habit of calling additional experts on the question of the reasonableness of the prevailing party's ***expert witness*** fees, although that procedure is required under Florida Law. Apparently, both sides usually tacitly agree that no such expert testimony is necessary, even though the law requires it.

Although uncommonly employed, a party contesting the award of an expert witness' fee is entitled to "a full evidentiary hearing on the reasonableness of the amount of the expert witness fee." *Dhondy v. Schimpeler*, 528 So. 2d 484, 485 (Fla. 3d DCA 1988). The elements of such a hearing include an opportunity to fully cross examine the expert, the necessity of ***testimony from a qualified witness*** that the expert's fees were reasonable and necessary, and the opportunity for the opposing party to call witnesses to refute the moving party's evidence and contentions.

However, because proceedings to assess expert witness fees are generally fairly cut-and-dried, the courts have adopted rules to permit such fees to be assessed as costs without such an evidentiary hearing unless the opposing party objects to an abbreviated procedure. *See Lafferty v. Lafferty*, 413 So. 2d 170, 171 (Fla. 2d DCA 1982)("upon the specific objection to the setting of an expert witness fee without an evidentiary hearing, the prevailing party will have to present testimony concerning the necessity and reasonableness of the fee. If no specific objection is made . . . , the judge has the authority to set the amount of the expert witness fee based upon his experience in these matters together with his observation of the witness' testimony or his review of the record.")

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[2] If the Supreme Court can, as it did in *Travieso*, simply proclaim that citation to any actual support that a given state of affairs "generally" exists, then so can this author, right?

Bad news and good news about the necessity of expert testimony to establish the reasonableness and necessity of an expert witness's fees in the Third District: The bad news is that such expert testimony is required. "The prevailing party's burden at an evidentiary cost hearing to recover an expert witness fee is 'to present testimony concerning the necessity and reasonableness of the fee.' . . . That evidence must come from witnesses ***qualified in the areas*** concerned." *Kendall Racquetball Investments, Ltd. v. The Green Companies, Inc.*, 657 So. 2d 1187, 1188 (Fla. 3d DCA 1995) (emphasis added).

Now for the good news: Your expert testimony about the reasonableness of your expert's witness fees can be the expert witness himself or herself. But, you could bring to a courthouse a third member of the Florida Bar (1) the plaintiff's attorney, 2) the plaintiff's attorney's expert witness, and 3) the expert witness' expert witness), or the original expert can testify to the reasonableness and necessity of his or her own services. "The individual experts whose charges are at issue obviously would be qualified to provide such evidence; also, another qualified expert in the same field, properly informed from the trial record, could also offer competent proof of reasonableness and necessity sufficient, in and of itself, to establish a prima facie case." *Id*. The lesson from that case is that you should not forget to offer testimony (from some lawyer) that the fees you are seeking are reasonable and necessary. Going through that formality apparently is required.

G. Conclusion:

Disabuse yourself of the belief in that Courthouse Legend that an attorneys' fees expert can automatically recover court-awarded fees from the non-prevailing party. Apply the *Travieso* elements to establish the requisite burdensomeness, the expert's expectation of being compensated, the amount of such compensation and the reasonableness and necessity thereof. It is hard enough making a living without the court overruling unambiguous

statutory language based on the unsupported conclusion that other lawyers, in other places at other times, have "traditionally" waived their right to compensation. Start laying the groundwork for recovery of expert witness fees as soon as you agree to become involved in a fee hearing. If the judge denies your request for fees, or greatly reduces the amount you are seeking, don't give up. Just . . .

Keep Tryin!

Roy

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