

HEADNOTES

EXPERTS

Check, Please?

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Experts are ubiquitous. There is hardly a high-stakes case that doesn't feature at least one expert witness. In a way, it's reminiscent of the town where the lone lawyer had no business until a second lawyer moved in. Where there's one expert, soon there will be two.

Federal Rule of Civil Procedure 26(b)(4)(E)(i) says that except when "manifest injustice would result," "the party seeking discovery" must "pay the expert a reasonable fee for time spent in responding to discovery." It's unclear whether by "time spent" the drafters meant the time the expert spends preparing to testify as well as the time he or she spends traveling and in the deposition itself. Theoretically,

though, it means you will pay the fees associated with deposing the other side's expert.

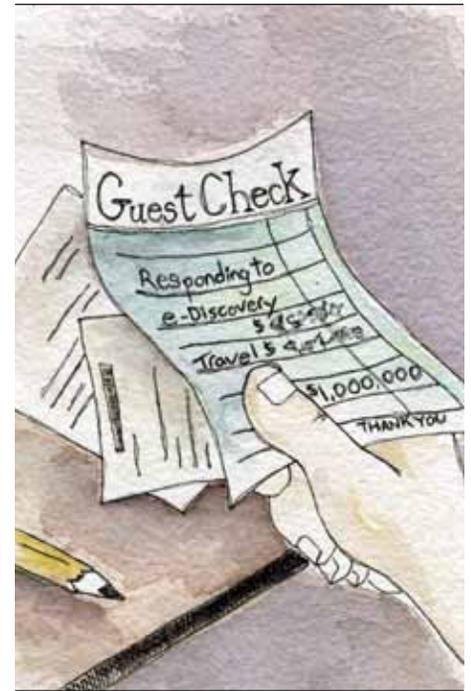
Practically, however, in my experience, it almost never works that way. Each side usually pays its own experts, figuring that if each side bears its own costs, it will all come out roughly even in the end. Usually, that's true. But what about when it isn't true at all?

I (or, more accurately, my client) once paid an expert a flat \$1 million for everything he did up to the time of trial. (It was worth every penny; our opponents caved soon after learning whom we'd hired and reading the expert's report.) In that case even more than in most, I was happy to pay my own way and have my opponents pay theirs. It would have been difficult (and, no doubt, contentious) to figure out how much of the \$1 million was spent responding to discovery, and I was not eager to share with my opponents how many of the expert's hours went into which tasks.

For my opponents, though, whose expert was a whole lot cheaper, the practice prescribed by the rules regarding expert fees might have turned out to be a very bad deal indeed. Is this what "manifest injustice" means? Could my opponents have argued that my expert's fee was not reasonable?

Maybe. The trial court has a lot of discretion in this area and, usually, no appellate court is going to second-guess the presiding judge. The lesson here is that you should not assume that your expert charges pretty much the same as the other side's. Expert fees vary widely. One survey found a range of \$75 an hour to \$7,500 an hour. See SEAK, Inc., Expert Witness Fee Study, www.seak.com/expert-witness-fee-study/. Always ask how much you are agreeing to pay before you agree to pay it.

What about the times when you don't have an explicit agreement with the other side, but you've been operating under the rule that each side pays its own? The opposing expert supplements his report



after you've deposed him, and your opponent takes the position that if you want a second deposition, you will have to pay for it. Here, the local rules may be your salvation. Usually, they say that each side pays for the other's experts unless the parties otherwise agree. You might be able to argue that the course of conduct in the case shows that each side understood that it would pay its own expert. In most instances, it won't be worth the attorney fees required to do more than make the argument to opposing counsel. In those cases, your best bet is probably to negotiate with your opponent and agree to a cap on how much your client will pay.

Distasteful? Yes, but wrangling over expert fees is slightly more palatable than wrangling over your own—something we all have to do now that every town has at least two lawyers. ■

Illustration by Gregory T. Nelson

