

Is Expert Testimony Really Needed in Attorneys' Fees Litigation?

Island Hoppers' Call for Change and Other Ways to Reduce the Burdens of Fees Hearings

by Robert J. Hauser, Raymond E. Kramer III, and Patricia A. Leonard

The Fourth District Court of Appeal's recent opinion in *Island Hoppers, Ltd. v. Keith*, 820 So. 2d 967 (Fla. 4th DCA 2002), brings to the forefront the issue of whether expert testimony should be required to support a court's award of attorneys' fees to a prevailing party which has proven its entitlement to fees. It is the opinion of these authors that this practice is cumbersome and unnecessary, and should no longer be required.

The current procedures for fee-shifting hearings can be almost as complex, time-consuming, and expensive as the underlying lawsuit on the merits. This article offers a critique of the present system, including its requirement of expert testimony, as well as suggestions for making the award of attorneys' fees a less arduous and less expensive process that still contains safeguards to litigants.

The *Island Hoppers* Case

Island Hoppers was a wrongful death action against a dive operator and two of its instructors, in which the sole appellate issue was the amount of an attorneys' fee award to which entitlement had already been established and affirmed pursuant to Florida's proposal for settlement statute.¹

Appellant *Island Hoppers* argued that the trial court erred in admitting the deposition testimony of the appellee-estate's expert fees witness, and hence the estate's fees claim lacked expert testimony to support the claim.² The Fourth DCA agreed that "Florida courts have required testimony by the attorney performing the services (for which the fees are sought) and testimony by an expert fees witness as to the value of those services."³

The appellee's expert admitted that he "spent a scant

three hours of preparation in forming his opinion regarding the reasonableness of fees" sought by the appellee's counsel, and that he had reviewed "absolutely none" of the 20 boxes of litigation materials provided to him by the appellee.⁴ In forming his opinion, the expert reviewed "a jury reporter verdict blurb, the motion for fees and the attached affidavits, the fee contract between [the appellee and its attorneys], closing arguments and opening statements from trial, and the appellate briefs from the prior appeal on the merits."⁵ The expert also discussed the case with the appellee's counsel, had some limited experience with these attorneys, and discussed their reputations with other lawyers in the community.⁶ When *Island Hoppers* objected to the admission of this expert's testimony at trial, asserting a lack of underlying factual predicate, the trial court reviewed the expert's deposition transcript, found that the expert was very familiar with the numerous issues involved in the underlying case, and admitted his deposition as supportive expert testimony.⁷

Although noting that it would have been better practice for the appellee to present an expert fees witness who was "notably more familiar with the actual litigation files themselves," the Fourth DCA held that there was no abuse of discretion in the trial court's consideration of the expert's opinion in reaching its determination about what constituted a reasonable fee.⁸

In so holding, however, the Fourth DCA questioned whether the requirement of "the corroborative testimony of an expert 'fees witness' . . . is always the best, or most judicious, practice." The Fourth DCA also questioned whether these experts provided any real assistance to the triers of fact, who were already intimately familiar with the underlying litigation and the attorneys in-

volved.⁹ The court noted that:

this practice [of requiring testimony of expert fees witnesses] has existed since at least the 1960s. *See, e.g., Lyle v. Lyle*, 167 So. 2d 256 (Fla. 2d DCA 1964). Yet, we note as our profession matures and evolves, as it has over the past forty years, and continues to do so, our trial judges have become highly experienced in all aspects of litigation, often with knowledge equal to, or in some cases far superior to, that of those attorneys who are called upon to provide expert testimony as "fees witnesses." Our trial judges see attorneys representing all levels of skill and experience in their courtroom; it is not uncommon for a trial judge to conduct multiple fee hearings practically every week. At the most basic level, we fail to see what, if any, "guidance" these "fees experts" actually provide to the well-versed trial judges of this state, who ultimately have the responsibility to determine, in their relatively unfettered discretion, whether the hours sought are reasonable, and what hourly fee(s) should be applied.¹⁰

Judge Gross, concurring specially in the *Island Hoppers* opinion, agreed that the courts were well equipped to handle the issue of attorneys' fees without the need for expert testimony:

Attorneys' fees is the single most litigated issue in civil courts. As a result, trial courts are adept at handling this issue. After six months on the civil bench, a judge has heard enough testimony to qualify as an expert on the reasonable value of legal fees in his or her community. The trial judge has also had the benefit of observing the legal work first hand in the case in which fees are sought.¹¹

Island Hoppers thus strongly suggested, but did not actually decide, that expert fees witnesses are no longer a necessary part of attorneys' fees hearings.

Evolution of the Rule Requiring Expert Testimony

In his *Island Hoppers* concurrence, Judge Gross stated that "the rule requiring an independent 'expert' in every attorneys' fee case rests on shaky theoretical grounds."¹²

There is no Florida rule of civil procedure, rule of evidence, or statute requiring expert testimony to support an award of attorneys' fees. This requirement originated in case law.¹³ In *Lyle v. Lyle*, 167 So. 2d 256 (Fla. 2d DCA 1964), *cert. denied*, 172

So. 2d 601 (Fla. 1964), the Second DCA held that expert testimony was required to prove the nature and necessity of the services rendered and the reasonableness of the charges. The *Lyle* court reversed the fee award because no expert testimony had been presented.¹⁴ In that court's opinion, the testimony of the attorney seeking fees, if not supported by expert testimony, was insufficient to support an award of fees.¹⁵

Significantly, the Second DCA did not cite any authority for its holding requiring the use of experts. Instead, *Lyle's* newly announced rule relied solely upon the following:¹⁶ 1) "the principle that the value of personal services is proven by expert witnesses"; 2) that "the elementary rules of evidence [cannot] be ignored"; and 3) that "the self-serving nature of the testimony given by an attorney who performs the services precludes the court from making an award based solely on his testimony."¹⁷ As pointed out in the *Island Hoppers* concurrence:

The [*Lyle*] court did not explain why, unlike other evidentiary issues, a finder of fact could not take the "self-serving nature of the testimony" into consideration in determining the fee award. In my view, this rationale for requiring expert testimony in all attorneys' fee cases ignores the basic precept of our adversary system that the credibility of testimony is best resolved by the finder of fact. . . . Whatever the rule requiring an independent expert has contributed to the image of lawyers, I suspect it is not so great so as to preclude modification of the rule to be more in accord with the current reality.¹⁸

Cases subsequent to *Lyle* have relied upon *Lyle* and/or its progeny as authority for requiring expert fees testimony to support an award of attorneys' fees. Like *Lyle*, a large number of these cases arose in the context of family law issues.¹⁹

Trial Courts Not Bound by Expert Testimony

Even though Florida courts currently require expert testimony for an award of attorneys' fees, trial courts are not bound by the testimony of these experts, and retain broad discretion in determining the amount of fees to be awarded.²⁰ The

fact that the trial court is not bound by the expert testimony and may disregard it suggests that expert testimony is not essential to the award of attorneys' fees. Why, then, make this testimony a requirement to the award of fees?²¹

Further, the seemingly low threshold for admitting expert testimony on fees, such as the minimal preparation by the expert in *Island Hoppers*, suggests that the courts may not put much credence into this expert testimony. Expert testimony in fees cases is often nothing more than a rubber stamp of the billing and time records submitted to the court by the party seeking fees, which is duplicative and unhelpful.

Fees Hearings Burdensome

Fees hearings can be nearly as complex, time-consuming, and expensive as the underlying lawsuit on the merits, and are unnecessarily burdensome to attorneys, courts, and litigants.

Expert testimony is just one expensive, burdensome facet of the process. Attorneys' fees hearings are often nothing less than mini-trials, which require direct and cross examination of witnesses, presentation of evidence, and discovery, including depositions of attorneys and experts. Many attorneys seeking fees wisely submit hearing memoranda, prepare exhibits, and present an opening statement and closing argument at fee hearings. Fee hearings can often take up a half day or more of hearing time before the judge. All of this preparation and presentation imposes significant burdens on both the attorneys and the courts.

Fees hearings also present a real burden on the litigants themselves, which can undermine their confidence in the judicial system. It is not uncommon for a party to obtain a favorable ruling entitling it to fees, and then be forced to wait at least several months—to allow for discovery, setting a hearing date, conducting the evidentiary hearing, and awaiting a ruling—before being informed of the amount of fees to

which it is entitled. During this time, a prevailing lawyer can expect to have his relationship with his client undermined with argument that he billed too much money and/or spent too much time vanquishing his opponent. Moreover, fees awards are frequently appealed, which results in additional delays and costs for the litigants.

“Fees for Fees” Problem

Further compounding the burden of fees hearings is the law in Florida that attorneys’ fees expended in litigating the amount of, rather than the entitlement to, attorneys’ fees to be awarded generally are not recoverable,²² denying a successful litigant the “make whole” remedy to which he is obviously entitled. The justification for this principle is that “the attorney’s time spent litigating the amount of attorneys’ fees inures solely to the attorney’s benefit.”²³ However, this rationale has been justifiably criticized.²⁴ The amount of attorneys’ fees awarded in a fee-shifting hearing obviously benefits the client, because often it determines how much the client will be responsible for paying his or her attorney. In many instances, the fees hearings themselves, because of their complex requirements, can cost close to the amount of attorneys’ fees at issue in the underlying matter.

Denying recovery of fees for fees, in combination with the requirement of expert testimony in attorneys’ fees hearings and other costs attendant to such hearings, keeps litigants from being made whole. Attorneys’ fees for litigating fees which are not awarded by the court become the responsibility of the prevailing party rather than his opponent.

Reducing the Burdens of Fees Hearings

There are several possible methods of decreasing the burden and expense of fees hearings on the litigants, the attorneys, and the courts. The authors submit the following:

1) *Do away with the requirement of expert testimony.* First, as suggested by the Fourth DCA in *Island Hoppers*, the requirement of expert

fees testimony should be eliminated, giving litigants the freedom to choose whether expert testimony will help their case on fees.²⁵ Although it is clear that an award of attorneys’ fees must be supported by competent substantial evidence,²⁶ it should be up to the parties to decide which evidence to offer. As noted above, the use of expert testimony is often duplicative of testimony given by the attorney who performed the work, and often adds little to that which the trial judge already knows about prevailing rates in the community and about the issues raised and argued in the underlying litigation on the merits. Usually, the attorney performing or supervising the work is in the best position to explain why he or she did or did not spend a certain amount of hours on a particular task.

2) *Reduce discovery disputes over fee documentation.* In preparing for fees hearings, lawyers often find themselves embroiled in discovery disputes over the production of fee agreements, invoices, checks, and related documentation of fees charged and/or paid. The situation is often complicated by claims of privilege, some of which may be spurious and dilatory. These discovery disputes are costly and time-consuming, and detract from the seemingly simple objective of determining a fair amount of attorneys’ fees to be awarded. Fortunately, these types of recurring disputes are also foreseeable and therefore preventable.

The Florida Supreme Court could help avoid some of these discovery disputes by creating a rule specifically mandating disclosure of certain items in the context of attorneys’ fees issues. Similarly, the court could promulgate form document requests and interrogatories to be used by litigants for discovery of evidence to be presented during a fee-shifting hearing.

Also adding to discovery costs in fees hearings are disputes regarding the opposing party’s time records. The party seeking fees often requests fee and cost documentation from the opposing party in an

attempt to demonstrate a comparable expenditure by the opponent. Conversely, the party opposing the fee request may seek to introduce his or her own time records to demonstrate that he spent less time in the case than the prevailing party, and thereby draw an inference that the prevailing party’s expenditures were excessive.

Unfortunately, Florida has not adopted a hard and fast rule regarding the discovery and admission into evidence of opposing counsel’s fee records in attorneys’ fees proceedings.²⁷ Case law on this issue is inconsistent, with some courts finding the opposing counsel’s time records relevant to the award of fees to the prevailing party, and other courts finding these items irrelevant and inadmissible.²⁸ Consequently, the common practice of requesting these records in discovery is often fraught with lengthy and costly disputes. The adoption of a rule directly addressing this issue, by way of either case law or statute, could substantially reduce these problems.

3) *Refer fees hearings to special masters, magistrates, or referees.* Attorneys’ fees hearings currently take up a large amount of the courts’ time. In fact, according to Judge Gross, “Attorneys’ fees is the single most litigated issue in civil courts.”²⁹ Backlogs in the current court dockets also can delay resolution of attorneys’ fee awards. Establishing a mechanism for the referral of fees hearings to special masters, magistrates, or referees could free courts to focus on issues more substantive than attorneys’ fees, and speed up the resolution of fees issues. Perhaps even a small group of special masters, magistrates, or referees could specialize in handling nothing but fee-shifting hearings, and further expedite the process.

4) *Create a “form order” to reduce reversals.* Florida’s Supreme Court has strict requirements about the findings of fact that are required in a fee judgment.³⁰ Failure to comply with these requirements has resulted in reversal of several fee awards, further delaying collection of fees by the prevailing litigants.³¹

Florida has not adopted a hard and fast rule regarding the discovery and admission into evidence of opposing counsel's fee records in attorneys' fees proceedings.

To reduce the number of reversible errors, a standardized form order for the award of attorneys' fees should be created. On a standardized form order, trial courts can enter the required findings of fact, such as the number of hours reasonably expended, the reasonable hourly rates, and the appropriateness of reduction or enhancement factors. This type of form order can ensure that trial courts consider all of the required factors and include their factual findings in their orders awarding attorneys' fees.

5) *Streamline appellate review of attorneys' fees awards.* Florida Rule of Appellate Procedure 9.400(c) provides that review of trial court orders assessing the amount of *appellate* attorneys' fees and costs awardable to a prevailing party "shall be by motion filed in the [appellate] court within 30 days of rendition." Review of trial court orders assessing the amount of attorneys' fees awardable in *trial court* proceedings, on the other hand, is governed by the general appellate briefing schedule set forth in Rule 9.110, which causes months-long delays to prevailing parties who have been awarded their trial court attorneys' fees. To alleviate this problem of the additional costs and delays attendant to the general appellate briefing process, the Florida rules should be amended to allow for appellate review by motion (a faster, less cumbersome process) of *all* trial court orders assessing the amount of awardable attorneys' fees.

6) *Award attorneys' fees for time spent litigating the amount of fees.* To help remedy the fees for fees problem, which unfairly burdens prevailing parties, the Florida Legislature should consider amending fee-shifting statutes to specifically

allow fees for fees.³² Additionally, when drafting a contract for a client and another party, attorneys can help protect a client from the high costs of attorneys' fees hearing by including an attorneys' fees clause in the contract which specifically entitles the prevailing party to fees and costs incurred in litigating both the entitlement to and the amount of fees.

Conclusion

The rigid rule requiring the testimony of an expert fees witness in every case in which attorneys' fees are sought is unnecessary and should be changed. Just as in other types of evidentiary hearings, the parties should instead decide for themselves whether an outside expert would assist them in presenting their best case for or against the award of attorneys' fees.³³

Doing away with the requirement of expert witness testimony to support the amount of an attorneys' fees award, as suggested by the Fourth DCA in *Island Hoppers*, is one small step toward streamlining the process of attorneys' fees hearings. In addition to this step, the Florida courts and legislature should actively work toward reducing the other burdens and expenses now facing attorneys' fees litigants by considering the suggestions set forth in this article. □

¹ *Island Hoppers*, 820 So. 2d at 969.

² *Id.* at 970.

³ *Id.* at 970 (citations omitted).

⁴ *Id.* at 971.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 972.

⁹ *Id.*

¹⁰ *Id.* (stating that the trial judge, who presided over both the trial and the fee hearing, surely "had considerably more

familiarity with the litigation, both the complexity of the issues involved and the skill exercised by trial counsel, than [the fees expert], who merely spent three hours reviewing secondary sources and engaged in limited and rather brief conversation with trial counsel").

¹¹ *Id.* at 977 (Gross, J. concurring specially).

¹² *Id.* at 976.

¹³ The "rule requiring the testimony of an independent expert traces back to *Lyle v. Lyle*, 167 So. 2d 256 (Fla. 2d D.C.A. 1964)." *Island Hoppers*, 820 So. 2d at 976 (Gross, J. concurring specially).

¹⁴ *Lyle*, 167 So. 2d at 257.

¹⁵ *Id.* Prior to *Lyle*, expert opinion evidence on the issue of attorneys' fees was considered permissible, but not required. See, e.g., *Baruch v. Giblin*, 164 So. 831, 833 (Fla. 1935) ("The testimony of duly qualified witnesses given as expert opinion evidence is admissible, and may be offered in support of the issue as to the value of the services of an attorney . . ."; such testimony "is strongly persuasive," but "it is not conclusive, neither is it binding on the court.>").

¹⁶ *Lyle*, 167 So. 2d at 257; see also *Island Hoppers*, 820 So. 2d at 976 (Gross, J. concurring specially) ("In support of the rule announced, *Lyle* cited no authority; the court justified the rule as a matter of public policy.>").

¹⁷ *Lyle*, 167 So. 2d at 257.

¹⁸ *Island Hoppers*, 820 So. 2d at 976 (Gross, J. concurring specially).

¹⁹ See, e.g., *Cohen v. Cohen*, 400 So. 2d 463, 465 (Fla. 4th D.C.A. 1981) (in petition by former wife to increase amount of child support and alimony, court held that the value of attorneys' fees must be proven by expert witness); *Tanner v. Tanner*, 391 So. 2d 305 (Fla. 4th D.C.A. 1980) (in postjudgment marital dissolution proceeding, award of attorneys' fees made without expert testimony to substantiate the claimed fees was error; testimony of lawyer claiming the fee was inadequate); *Lamar v. Lamar*, 323 So. 2d 43, 44 (Fla. 4th D.C.A. 1975) (in marital dissolution proceedings, attorneys' fees should not have been awarded without testimony from an expert witness; affidavits of lawyer claiming the fee were inadequate).

²⁰ See *Island Hoppers*, 820 So. 2d at 976 (Gross, J. concurring specially). See also *Southpointe Homeowners Association, Inc. v. Segarra*, 763 So. 2d 1186, 1187 (Fla. 4th D.C.A. 2000) (trial judges "are not bound by un rebutted expert testimony"; they can "based on their own familiarity with the type of litigation involved, determine that some of the work was unnecessary."); *Baldwin Piano & Organ Co. v. Dote*, 740 So. 2d 1230, 1231 (Fla. 4th D.C.A. 1999) ("trial court was not bound by the testimony of [an] expert as to the amount of a reasonable attorneys' fee, even though there was no opposing expert.>").

²¹ See *Island Hoppers*, 820 So. 2d at 977 (Gross, J. concurring specially) ("How important can it be that an award of

attorneys' fees has been 'substantiated' by expert testimony in addition to that of the lawyer claiming the fee, if the judge is free to disregard that testimony?").

²² See, e.g., *Barron Chase Securities, Inc. v. Moser*, 794 So. 2d 649, 650 (Fla. 2d D.C.A. 2001) ("Attorney's fees may be awarded for litigating the issue of entitlement to fees but not for time expended litigating the amount of fees."); *Chodos v. Kjenslie*, 781 So. 2d 1194 (Fla. 5th D.C.A. 2001) (trial court abused discretion in awarding fees for time spent litigating the amount of fees); *Seminole County v. Butler*, 676 So. 2d 451, 455 (Fla. 5th D.C.A. 1996) ("time spent litigating the correct amount of fees to be awarded is not compensable."), *reh. denied*, 686 So. 2d 581 (1996).

²³ See *State Farm Fire & Casualty Co. v. Palma*, 629 So. 2d 830, 833 (Fla. 1993) (attorneys' fees may not be awarded for litigating the amount of attorneys' fees under FLA. STAT. §627.428, because "[s]uch work inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment of the judgment."); *Seminole County v. Butler*, 676 So. 2d 451, 455 (Fla. 5th D.C.A. 1996) ("time spent litigating the correct amount of fees to be awarded is not compensable because the client has no interest in the issue of the amount of fees").

²⁴ See *Citibank Fed. Sav. Bank v. Sandel*, 766 So. 2d 302, 303 n.1 (Fla. 4th D.C.A. 2000) (agreeing that the rationale behind prohibition of fees for fees—that time spent litigating the amount of attorneys' fees inures solely to the attorney's benefit—is questionable; failure to award fees for litigating fees provides less compensation to attorneys and may make it more difficult for litigants to find counsel) (citing Marguerite H. Davis & James C. Hauser, *A Plea for Uniformity*, 64 FLA. B.J. 33 (Apr. 1990)).

²⁵ As noted in *Island Hoppers*, expert opinion "as to the current status of the market" may assist the court in "determining the propriety of a contingency multiplier," because judges may be unfamiliar with the current state of the market. *Island Hoppers*, 820 So. 2d at 972. The court distinguished such issues from "the more fundamental issues of appropriate hours expended by counsel, and the rates to be applied," over which trial judges, through their experience gained sitting on the bench, have greater insight and understanding as to what constitutes "reasonable." *Id.*

²⁶ See *Cohen v. Cohen*, 400 So. 2d 463 (Fla. 4th D.C.A. 1981).

²⁷ *Mangel v. Bob Dance Dodge, Inc.*, 739 So.2d 720, 724–25 (Fla. 5th D.C.A. 1999).

²⁸ Some Florida cases deem opposing counsel's fee records irrelevant to issue of fees sought by prevailing party. See, e.g., *Mangel*, 739 So. 2d at 724–25 (affirming order quashing subpoena seeking production of attorney billing records of nonprevailing party for purposes of comparison, finding that fees charged by

defendants' attorneys were not relevant to plaintiff's fees.). Other Florida cases find that opposing counsel's fee records are relevant to the determination of this issue. See, e.g., *Chrysler Corp. v. Weinstein*, 522 So. 2d 894, 895–96 (Fla. 3d D.C.A. 1988) (affirming trial judge's finding that the number of hours attorney expended on case were reasonable in comparison to those spent by the opposing party's attorneys); *LaFerney v. Scott Smith Oldsmobile, Inc.*, 410 So. 2d 534 (Fla. 5th D.C.A. 1982) (court found that appellant's counsel's hours did not appear excessive, even when compared to hours expended by appellee's counsel).

²⁹ *Island Hoppers*, 820 So. 2d at 977 (Gross, J., concurring specially).

³⁰ See *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985); *William Dorsky Associates, Inc. v. Highlands County Title and Guaranty Land Co.*, 528 So. 2d 411, 413 (Fla. 2d D.C.A. 1988); *Dep't of Health & Rehab. Svcs./Div. of Blind Svcs. v. Bean*, 435 So.2d 967 (Fla. 1st D.C.A. 1983).

³¹ See, e.g., *William Dorsky Associates*, 528 So. 2d at 413 (reversing and remanding award of attorneys' fees where trial court failed to set forth specific findings as to the number of hours reasonably expended, the hourly rate, and the appropriateness of the reduction or enhancement factors).

³² At present, statutes that contain this type of explicit provision are the exception. See, e.g., FLA. STAT. §112.317(8) (2001).

³³ See *Island Hoppers*, 820 So. 2d at 977 (Gross, J., concurring specially).

Robert J. Hauser, Raymond E. Kramer III, and Patricia A. Leonard are shareholders at *Beasley & Hauser, P.A.*, West Palm Beach, where they practice complex business and commercial litigation. Mr. Hauser graduated from Duke University with an A.B. in 1991 in public policy studies and received his J.D., with high honors, from the University of Florida College of Law in 1995, where he was a senior editor of the Law Review. Mr. Kramer received his B.S.F.S. in 1990 from the Georgetown University School of Foreign Service and his J.D. from Georgetown University Law School, where he was an associate editor of the American Criminal Law Review, in 1993. Ms. Leonard received her B.A. in 1988 from the University of Virginia and her J.D., magna cum laude, in 1995 from the University of Miami School of Law, where she served as senior articles editor of the Law Review.