Discovery of Opposing Counsel's Billing Records

By Ted Babbitt

With the increased use of the Offer of Judgment rule and statutes which provide for the taxing of attorney's fees, Courts are increasingly faced with the determination of the reasonableness of a request for Court awarded attorney's fees. Counsel seeking such fees have often requested production of opposing counsel's billing records in an effort to show the reasonableness of the moving party's request for fees. Courts have been reluctant to allow production of such records, because of the fear that such production would disclose privileged information in the form of work product or attorney client information.

In HCA Health Services of Florida, Inc., v. Hillman, 28 Fla. L. Weekly D2758 (Fla. 2nd DCA Dec. 3, 2003), the court ruled that opposing counsel's billing records were not discoverable, not only because they could contain attorney client information or work product, but also because they would be irrelevant to a determination of the reasonableness of the moving party's request for fees.

In Old Holdings v. Taplin, Howard, Shaw & Miller, P.A., 584 So. 2d 1128 (Fla. 4th DCA 1991), the Fourth District found nondiscoverable, records which showed a description of services which could reveal the mental impressions and opinions of attorneys. In Mangel v. Bob Dance Dodge, Inc., 739 So. 2d 720 (Fla. 5th DCA 1999), the Fifth District found no abuse of discretion in the trial court's refusal to permit production of the time records of opposing counsel.

In the recent case of Brown Distributing Company of West Palm Beach v. Marcel, 29 Fla. L. Weekly D438 (Fla. 4th DCA, Feb. 19, 2004), the Fourth District was faced with an analogous but somewhat different issue. That case was a request for fees in a successful age discrimination case under the Florida Civil Rights Act. The plaintiff carefully restricted the request for production to only those records which showed the time of opposing counsel as opposed to the amount charged or any privileged information. The request specifically provided for the redaction of any information as to the activities performed by opposing counsel with respect to any information which could be considered work product or protected by the attorney client privilege. The trial court permitted production on this limited basis and the Fourth District affirmed. The opinion specifically finds that the amount of time spent by opposing counsel in defending the case is relevant as to the reasonableness of the time spent by the party requesting attorney's fees. The Court cites numerous opinions where appellate courts have utilized just such information in justifying an award of attorney's fees.

> We agree entirely with the trial court's decision in this case that this information was relevant. *State Dept. of Transp. v Skidmore*, 720 So. 2d 1125 (Fla. 4th DCA 1998) (approving hours spent by counsel for property owner in condemnation case and noting that it was not inconsistent with hours spent by the DOT's counsel); *Shudlick v Shudlick*, 618 So.2d 740, 741 (Fla. 4th DCA 1993) (affirming fee award to wife, noting it was not 'out of line' with husband's legal fees); *Chrysler Corp. v Weinstein*, 522 So.2d 894 (Fla. 3d DCA 1988) (affirming a finding that counsel's hours were not excessive when compared to opponent's counsel's hours).

It is not at all unusual in cases where fees are requested for the defending party to take the position that the amount of time which the movant contends it took to prosecute the case is unreasonable. This decision makes such an argument far more difficult when the defending counsel's records indicate that an equal or greater amount of time was spent in the defense of the case. While this decision may be at odds with the Second District's opinion in Hillman, supra, which questions the relevance of this information, it is controlling in the Fourth District and requires the production of these records under the circumstances outlined above.

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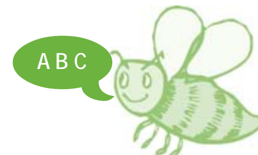

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