

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION**

IMPERIUM INSURANCE COMPANY

PLAINTIFF

V.

CIVIL ACTION NO. 1:14CV84-NBB-DAS

SHELTON & ASSOCIATES, et al.

DEFENDANTS

**SHELTON AND ASSOCIATES, P.A.,
et al.**

COUNTER-PLAINTIFFS

V.

IMPERIUM INSURANCE COMPANY

COUNTER-DEFENDANTS

ORDER

This matter is before the court on Stephen P. Livingston's motion for protective order (#161) and concerns the reasonableness of his expert witness's fee schedule. Having considered the motion, along with the briefs submitted by both parties, the court finds as follows:

I. BACKGROUND

The underlying action was filed by Imperium Insurance Company and seeks a declaratory judgment regarding whether it must indemnify the "Shelton Defendants" for certain legal malpractice actions currently pending in state court. Though not a "Shelton Defendant," Stephen P. Livingston is a named defendant in this federal action, as well as a plaintiff in one of the state court actions. Presumably to bolster his argument that Imperium owes the "Shelton Defendants" coverage for the malpractice claims, Livingston retained an expert in legal malpractice insurance, Ty R. Sagalow. Imperium has arranged to depose Sagalow on September 4th, 2015.

The present controversy stems from Sagalow's fee schedule, which provides an hourly rate of \$700.00 for trial and deposition testimony. It also provides that a minimum of eight hours will be billed for deposition testimony, regardless of the deposition's actual duration. During a recent telephonic status conference, Imperium raised concerns as to the reasonableness of Sagalow's fee schedule, prompting Livingston to file the instant motion for a protective order. Livingston's motion seeks an order requiring Imperium to reimburse Sagalow at his scheduled rate for the time spent preparing for and attending the deposition.

In response, Imperium argues that Sagalow's unreasonable fee schedule should be reduced to an amount consistent with the hourly rates charged by the other expert witnesses designated in this case. Furthermore, Imperium contends that it should only have to compensate Sagalow for the actual length of the deposition, rather than the flat, eight-hour fee outlined in his fee schedule. Lastly, Imperium seeks to limit the amount of billable preparation time to one-half of the actual length of Sagalow's deposition.

II. DISCUSSION

Based on the court's review of the pleadings, this much is not in dispute: Ty R. Sagalow is an expert witness who is entitled to reasonable compensation for the time he spends in conjunction with the deposition pursuant to Rule 26(b)(4)(E) of the Federal Rules of Civil Procedure. However, because the amount to which Sagalow is entitled to receive from Imperium is hotly contested, the court must determine whether Sagalow's fee is reasonable.¹

For a fee to be reasonable, "[t]here must be some reasonable relationship between the services rendered and the remuneration to which the expert is entitled. Unless the courts patrol the battlefield to ensure fairness, the circumstances invite extortionate fee setting." *Fiber Optic*

¹ This court has the authority to determine what constitutes a reasonable fee. *See Knight v. Kirby Inland Marine*, 482 F.3d 347, 356 (5th Cir. 2007).

Designs, Inc. v. New England Pottery, LLC, 262 F.R.D. 586, 590 (D. Colo. 2009). Furthermore, the party seeking reimbursement has the burden of demonstrating the fee sought is reasonable, and the court may use its discretion to determine a reasonable fee. *Duke v. Performance Food Group, Inc.*, 2014 WL 370442, at *6 (N.D. Miss. Feb. 3, 2014).²

According to his fee schedule, Sagalow intends to charge Imperium a flat-rate of \$5,600.00 (\$700/hour x 8 hours) for attending the deposition, plus his hourly rate for the number of hours he spends preparing for the deposition. However, the Federal Rules of Civil Procedure limit the length of depositions to a maximum duration of seven hours.³ Using Sagalow's stated hourly fee, the most Imperium could be forced to pay for the deposition is \$4,900.00.

Nevertheless, there must be a reasonable relationship between the services rendered and the remuneration sought, so Imperium shall only be liable for the time Sagalow actually spends at

the deposition. For the same reason, the court also rejects Imperium's request to have Sagalow's billable preparation time limited to one-half of the actual time spent in the deposition. In sum, Sagalow is entitled to be reimbursed for the time he actually spends at the deposition, along with the time he reasonably spends in preparation thereof.⁴

With those ancillary issues resolved, the court turns now to the predominant issue: the reasonableness of Sagalow's hourly rate. In determining what constitutes a reasonable fee, the court starts with this basic premise: "the expert's fee should not be so high as to impair a party's access to necessary...[evidence] or result in a windfall to the expert." *Grady v. Jefferson County Board of County Commissioners*, 249 F.R.D. 657, 659 (D. Colo. 2008). Though not exhaustive, courts have considered the following factors in making this determination: (1) the witness's area

² (quoting *New York v. Solid Chem. Co.*, 210 F.R.D. 462, 468 (W.D.N.Y. 2002)).

³ Fed. R. Civ. P. 30(d)(1).

⁴ *Borel v. Chevron U.S.A., Inc.*, 265 F.R.D. 275, 278 (E.D. La. 2010) (finding that an expert may be compensated for time spent preparing for a deposition).

of expertise; (2) the education and training required to provide the insight that is sought; (3) prevailing rates for other comparable experts; (4) the nature, quality and complexity of the responses provided; (5) the cost of living in a particular geographic area; and (5) the fees traditionally charged by the expert on related matters. *Duke*, 2014 WL 370442, at *6.⁵

Applying these factors, the court notes that Sagalow is a graduate of Georgetown University School of Law and subsequently received an L.L.M. from New York University School of Law. He has also practiced law and held numerous positions in the insurance industry, such as chief underwriter for two large insurance companies, as well as serving as general counsel for AIG Insurance Company and National Union Insurance Company. In light of these credentials, the first factor weighs in his favor.

The underlying action stems from a legal malpractice insurance policy issued to Jason Shelton. In essence, the issue is whether the Shelton knew or should have known that a potential claim existed in favor of Livingston when he submitted his application for insurance. If so, then Imperium is not obligated to indemnify Shelton for Livingston's claim, which is currently pending in state court. Sagalow has been retained to testify about what Shelton should have known on the date he submitted the insurance policy application. Though Sagalow appears to be an exceptionally qualified expert with respect to the machinations of the insurance industry, this inquiry turns on whether a similarly situated attorney should reasonably have expected a claim to be filed against him. Therefore, the court is not persuaded that Sagalow's extensive credentials are required to provide insight on this matter, so this factor weighs in favor of Imperium.

In addition to his analysis and findings, Sagalow provided a spread sheet showing the hourly rates of several other expert witnesses with comparable credentials and fields of expertise, and his hourly rate is comparable, if not lower, than those listed. However, in another

⁵ (citing *Magee v. The Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 645 (E.D.N.Y. 1997)).

spreadsheet, his data shows that he is currently working on two cases in neighboring jurisdictions—Alabama and Tennessee—where his hourly fee is substantially less: \$600.00 and \$625.00, respectively. To explain the discrepancy, Sagalow states that the subject matter in this case is more complex, and therefore, commands a higher rate. The court finds that factor four (prevailing rates for comparable experts) weighs in his favor. On the other hand, for the reasons set forth in the preceding paragraph, the court finds that factor six (fee traditionally charged for related matters) favors neither party.

Finally, the court finds that factor five (cost of living) weighs heavily in Sagalow's favor. Sagalow's hourly rate is slightly more than double the average hourly rate of the other expert witnesses, all of whom reside in Mississippi.⁶ According to the United States Census Bureau, the cost of living in New York, New York is more than double that of the only listed Mississippi city (Tupelo).⁷ Therefore, the discrepancy between hourly rates all but disappears after adjusting for the difference in cost of living.

III. CONCLUSION

Having applied the factors to this matter, the court holds that Sagalow's hourly rate is not unreasonable, and Imperium Insurance Company shall compensate Sagalow at this rate for the time he actually spends attending the deposition. Furthermore, the court holds that Imperium shall also be liable for Sagalow's preparation time, if any, provided that such time is reasonable.

Though Sagalow's hourly rate was found reasonable under the factors discussed, the court would point out that this is not a case where one party's expert was billing the opposing party at an inflated rate. Rather, Stephen P. Livingston has been paying Sagalow's \$700.00 hourly rate

⁶ Farish Percy = \$300.00; Tim Tackett = \$250.00; Bobby Moak = \$350.000; Cham Trotter = \$350.00 - \$450.00

⁷ See U.S. Census Bureau, Statistical Abstract of the United States: 2012, Table 728. Cost of Living Index—Selected Urban Areas, Annual Average: 2010.

since he was first retained as an expert. Therefore, fairness dictates that Imperium should not be allowed to benefit from Livingston's discovery at a discounted price.

THEREFORE, IT IS HEREBY ORDERED that Imperium shall compensate Ty R. Sagalow for the time he actually spends attending the deposition at an hourly rate of \$700.00.

IT IS FURTHER ORDERED that Imperium shall also compensate Ty R. Sagalow for the time he reasonably spends in preparation of the deposition, if any, at an hourly rate of \$700.00.

SO ORDERED this, the 8th day of September, 2015.

/s/ David A. Sanders
UNITED STATES MAGISTRATE JUDGE