

## ***One Rate to Rule Them All***

### ***Getting Paid: Part Five***

*Editor's note: This is the last installment of a five-part series on making sure you get paid as an expert witness. In articles one and two, we discussed effective communication methods while in articles three and four, we analyzed a recent turn towards alternative fees.*

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For some experts in some industries, a shift to alternative fee structures makes perfect sense. But for most experts in most industries, the billable hour is still the best fee structure.

As I mentioned in “Communicate Now, Communicate Often,” effective communication is one of the most important aspects of avoiding invoice disputes, especially for those charging by the hour. Communicating expectations and then staying contained within those limitations is extremely valuable to attorneys and clients.

In addition to proving to be a good steward of client resources, an expert can make his price tag more appealing by utilizing a single hourly rate for all work performed.

I recommend using one rate for all consulting work, travel and testimony for two reasons: it is ethically questionable to charge a higher rate for testimony and attorneys strongly prefer the simplicity of a single rate. Using this pricing strategy allows the expert to put the attorney at ease and helps avoid invoice disputes later.

With the inconvenience of traveling to the trial location and the increased stress of testimony, it is understandable why many experts charge a higher rate for deposition and trial. According to a survey conducted in 2010, nearly 60% of experts increase their hourly rates for trial and deposition testimony.

The same survey revealed that nearly 40% of experts decrease their hourly rates for travel time while another 10% increase their rates.

What most experts don't consider when establishing tiered rates are the ethical implications of charging a higher rate for testimony. In a contentious legal atmosphere, experts must do everything possible to avoid the appearance of being paid for their opinion. And charging a higher rate for deposition and trial implies that those opinions have a greater value than the ones conveyed in the expert report.

According to three experiments published in [\*Law and Human Behavior\*](#), expert witnesses are perceived by juries as “hired guns” when they testify frequently and are highly paid for their time in court. Charging a higher rate specifically for testimony only increases this perception.

As Robert Ambrogi stated in his updated code of ethics for expert witnesses, experts should avoid any financial inducements that might negatively affect an expert's ability to testify truthfully and impartially. Although this traditionally refers to contingency fees which are often illegal for expert witnesses, different fees for different types of work can also be perceived as a financial inducement to provide biased testimony.

Another aspect of utilizing tiered rates, which is often perceived as unethical, is that increased rates usually begin with deposition testimony. This results in a higher fee just at the point in which opposing counsel begins paying for the expert's time.

According to the [California Code of Civil Procedure](#), an expert is expected to provide opposing counsel with "the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation." This only states that experts must be consistent in their fee structures but implies that a change in fees is not looked upon favorably.

There are no strict rules regarding deposition rates in any state, including California, but I strongly encourage a single rate to avoid the appearance of charging opposing counsel a higher rate.

When deciding between two equally credentialed and closely priced experts, attorneys have said that they prefer the expert utilizing a single rate. Variations in rates create more complex billing structures, more complications during the initial engagement process and raise a number of ethical questions. Considering that most cases don't even make it to trial, the advantages of using one rate for all work far outweigh the disadvantages.

Once at trial, attorneys are looking for an expert that will communicate well with a jury. Experts should not give juries *any* reason, real or imagined, to believe that an expert has been "bought."