

Communicate Now, Communicate Often

Getting Paid: Part Two

Editor's note: This is part two of a five-part series on making sure you get paid as an expert witness. Our last post discussed the importance of talking about deadlines, deliverables and costs with attorneys.

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As I mentioned in “Three Questions to ask Early and Often,” the best way to win an argument with an attorney is to avoid the argument in the first place. And when it comes to invoice disputes, the best method to avoid conflict is thorough communication regarding deliverables, deadlines and costs.

The software development industry sets the benchmark for effective project management and communicating expectations. With thousands of lines of code to write, software development teams create project management frameworks that detail who does what when and how long it should take.

Some teams utilize graphical representations of project expectations while others choose to keep track of their process through textual records. After reviewing a chart commonly used by information technology departments, the IMS team developed this chart to illustrate the process for a typical expert witness.

	Step 0	Step 1	Step 2	Step 3	Step 4
Task	Set scope Establish approach	Initial document review	Additional discovery requests	Review of discovery material and draft report	...
Deadline	March 10	April 15 (preliminary discussion of findings)	April 20	June 10	...
Expected Hours	Est. 10	Est. 45	Est. 10	Est. 60	...
Staff/Team (breakdown of hours)	Expert – 10	Expert – 10 Staff – 35	Expert – 10	Expert – 15 Staff – 45	...

This chart identifies multiple milestones that require approval to proceed and the expected outputs from each stage. It starts with step 0 to allow the expert and attorney to establish the expectations for the other steps. Often times an attorney's idea of how long something should take is completely different from an expert's.

We had a situation in which an expert was asked to perform an independent document review. To the expert, this was a 200 hour undertaking but to the attorney, it should only take 20. Although they discussed and agreed upon the activity, there was a major invoice dispute later because they failed to discuss hours.

If an expert and attorney agree on all points in the first conversation, someone is likely misunderstanding the other. Your initial conversation with an attorney *will* involve some debate over deadlines, deliverables and costs.

The ultimate goal of this type of discussion is to come to a point where you or the attorney says “no.” Once you have determined what is unacceptable, you can work towards an agreement that is satisfactory for both of you.

These conversations are not about litigation but rather the scope and approach of your work as an expert. Attorneys don’t understand the pressures, requirements and time constraints of your field and therefore need to understand what is involved in the process.

Another simple technique to avoid invoice disputes is to bill in 100 hour increments. The experts who choose this method communicate with attorneys before they begin any work to agree upon what should be accomplished in 100 hours. When those hours are completed, they meet again to review the work and establish expectations for the next 100 hours.

One extremely successful expert witness who contracted through IMS kept his clients updated through weekly written reports instead of a chart. This other method of recording and communicating expectations allowed him to meet deadlines, communicate any changes and justify costs.

His reports began with milestones completed and work in progress. They then listed any agreed upon changes, such as new requirements and shifts in expectations. The final section listed out current issues, such as delays or unexpected problems.

By periodically updating his clients, this expert avoided billing or collection issues.

One concern, however, with frequent communication is in the discoverability of these documents. Although Rule 26 of the Federal Rules of Civil Procedure now protects expert drafts, the Rule does not protect communication that relates “to compensation for the expert’s study or testimony.” You should be careful about what is included in your communications, but you should still communicate frequently.

Instead of going into great detail in your reports, you can include basic statements. For example, a detailed task such as “Began analyzing PCR product using agarose gel electrophoresis to determine the genetic profile of test subject #4” can be rewritten as “Continued PCR product analysis tests.” The goal is to avoid naming the specific processes used or the number of activities involved.

You don't want to become so afraid of discoverability and putting things in writing that you don't communicate with the attorney and client. Using verbal communication only is fraught with risk. You should make sure there is a clear paper trail that also protects against discovery. I recommend utilizing one of these project management methods to maintain open communication with attorneys throughout the litigation process to avoid invoice disputes later.