Arkansas Association of Defense Counsel

November 21, 2016

EXPERT WITNESS DEPOSITION PREPARATION FEES – WHO PAYS?

Rule 26(b)(4)(E) of the Federal Rules of Civil Procedure provides that "[u]nless manifest injustice would result, the court must require that the party seeking discovery.. pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A)," the rule that permits depositions of testifying experts. (The analogous state rule, Rule 26(b)(4)(C), is virtually identical.) There is no doubt that the rule requires that the expert be compensated for time actually spent in the deposition, but what about the time the expert spends preparing for the deposition? That's not time "spent in responding to discovery," is it? According to what has been characterized as a majority or slim majority of courts, it is indeed.

There is a surprising lack of appellate authority on the issue, including none from the Eighth Circuit or the Arkansas appellate courts. The issue no doubt rarely arises because parties generally agree that each will pay their own experts' deposition preparation fees. But what if one party does not retain an expert, or one side has more experts than the other, or one party chooses not to depose the other's expert? In these situations, the expert deposition preparation fees may be much higher on one side than the other. The usual practice of paying one's own expert's preparation fees then results in an unequal (and arguably unfair) allocation of those fees.

8A Wright, Miller et al., Fed. Prac. & Proc. Civ. § 2034 (3d ed.) (2016 update) describes the state of the law as follows:

Compensation for time spent preparing for the deposition has proved a divisive issue. As noted above, the open-ended possibility that much ordinary trial preparation might be charged to the opponent by this device warrants caution. At the same time, it is hard to deny that the deposition-preparation process, like the deposition itself, requires additional effort by the expert for which he or she is likely to insist on being paid. Some courts have allowed such preparation time to be compensated, while others have refused, although even those will allow it in extraordinary circumstances.

Id.

In *Eastman v. Allstate Ins. Co.*, 2016 WL 795881, at *4 (S.D. Cal. February 29, 2016), the Court outlined the various positions taken by courts across the country. The *Eastman* Court then rejected the position of courts that have held that the plain language of the rule requires that the opposing party pay expert deposition preparation fees, and the suggestion that this interpretation of the rule ultimately benefits the deposing party by facilitating smoother and more economical use of deposition time. *Id*. at *5. The Court correctly observed that the deposing party "has no control over how much time the expert spends preparing for a deposition" and that fee-shifting "may encourage the retained expert to over prepare, thus increasing the overall cost of the deposition." *Id.* The Court also noted the poor ability of judges to determine how much time is reasonable for an expert to spend preparing for a deposition. *Id*. Finally, the Court expressed concern that experts would use deposition preparation time to prepare to resist cross examination and prepare for trial rather than to increase the efficiency of the deposition. *Id*. at *6. Thus, the *Eastman* Court adopted the position that fee-shifting for expert preparation is the exception, not the rule, and is only required in extenuating circumstances. *Id*. The Court then found no extenuating circumstances that would justify fee-shifting in *Eastman*.

The courts that have required the deposing party to pay preparation fees tend to scrutinize the claimed fees carefully to ensure that the party seeking payment has met its burden of proving that the fees are reasonable, and to determine that the fees would not have been incurred except for the deposition. In addition to the factors that courts generally consider in determining the reasonableness of an expert's deposition appearance fee, *Heiser v. Colloradi*, 2016 WL 1559592, at *1 (S.D.N.Y. April 18, 2016), courts look at other factors when considering deposition preparation fees, including:

- the length of time between the preparation of the expert's report and the deposition, *Heiser*, *supra*, at *3, and *Nnodimele v. City of New York*, 2015 WL 4461008, at *5 ((E.D.N.Y. July 21, 2015);

- the extent to which the time was spent in preparation with the attorney who retained the expert, *Musket Corp. v. Star Fuel of Okla., LLC*, 2016 WL 1057800, at *9 (W.D. Okla. March 14, 2016), and *Nnodimele, supra*, at *4;

- the complexity of the case and the number of documents reviewed, *EEOC v. Sears, Roebuck and Co.*, 136 F.R.D. 523, 526 (N.D. Ill. 1991);

- the length of the deposition itself*, Packer v. SN Servicing Corp.*, 243 F.R.D. 39, 43-44 (D. Conn. 2007);

- whether the deposing party's conduct such as by continuing or delaying the deposition has caused excessive or increased preparation time, *Eastman, supra*, at at *6, citing *Rhee v. Witco Chem. Corp*. 126 F.R.D. 45, 47 (N.D. Ill. 1989);

- whether the deposing party has motives other than the present litigation in taking the expert's deposition, *Fiber Optic Designs, Inc. v. New England Pottery, LLC*, 262 F.R.D. 586, 594 (D. Colo. 2009);

- whether the expert used any preparation time to modify or correct facts or opinions expressed in the expert's report, *Heiser, supra*, at *3; and

- the specificity and detail the expert provides in describing the preparation for which payment is sought, *LK Nutrition, LLC v. Premier Research Labs, LP*, 2015 WL 4466632, at *3-4 (N.D. Ill. July 21, 2015).

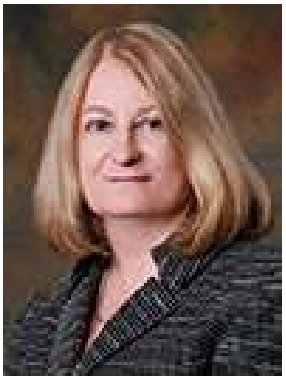
Two district courts within the Eighth Circuit have addressed the issue, although not recently. In *Hurst v. United States*, 123 F.R.D. 319 (D. S.D. 1988), the Court said that "a reasonable fee should cover the expert's time spent complying with the requested discovery." *Id.* at 321. The goal of the rule (then denominated Rule 26(b)(4)(C)) "is to compensate experts for their time in participating in litigation and to prevent one party from unfairly obtaining the benefit of the opposing party's expert work free from cost." *Id.* The rule "seeks to calibrate the fee so that plaintiffs will not be hampered in efforts to hire quality experts while defendants will not be burdened by unfairly high fees preventing feasible discovery and resulting in windfalls to the expert." *Id*. The Court allowed the expert to be compensated for his preparation time but not for time he spent on standby at his office on the day of the deposition waiting to be called to begin the deposition.

In *Hose v. Chicago and North Western Transp. Co*., 154 F.R.D. 222 (S.D. Iowa 1994), the Court allowed a treating physician to be compensated for his time reviewing medical records in preparation for his deposition. The Court noted that the expert was not retained specifically for the litigation and did not seek compensation for time spent with opposing counsel. *Id.* at 228. The Court also cited the justification, rejected in *Eastman*, that the time spent reviewing the records in advance "speeds the deposition process along, thereby saving on costs." *Id.* However, it is questionable whether that rationale would have carried the day if the expert had been retained rather than a treating physician.

To avoid a dispute and motion practice after the litigation is well underway, counsel would be well advised to address the issue of payment for expert witness preparation time at the outset of the litigation, in the Rule 26(f) conference if the case is in federal court, or before depositions are scheduled if the case is in state court. At that point, there is no good reason why both sides should not agree to follow the long-standing practice of each side paying its own experts for their deposition

preparation time, especially when that time will likely be spent for the most part with the attorney who retained the expert

The AADC thanks Teresa Wineland of Kutak Rock for writing this article.



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