STOPPING EXCESSIVE DEPOSTION WITNESS FEES

by Mark Lienhoop

The deposition fees being charged by treating physicians and expert witnesses are getting outrageous. Whether because of a reluctance to become involved or because of greed, it seems that treating physicians and experts are trying to test the limits of what they can extract for their testimony.

For years depositions of treating physicians and experts had been set between counsel with little or no court involvement. Instead of applying to the court for an order, one office just called another and the deposition times and places were arranged by agreement. The treating physician or expert expected to be paid for their time and billed the deposing party after the deposition at a reasonable professional rate. This is how it should be.

Often defense counsel is now expected to sign and return some sort of agreement before dates for the deposition will be given. This agreement often requires a promise to pay in advance for a minimum preparation time, travel time, and a minimum deposition time. On top of that the rate may be something like five hundred dollars ($500.00) per hour.

The law does not require Defendants to concede to such outlandish demands. Relief can be found in the Indiana Trial Rules.

Note that Ind. Code 34-1-14-12 provides that an expert may be compelled to appear and testify to their expert opinion in any court in the county of their residence or an adjoining county, without any special compensation. However, it can be argued that I.C. 34-1-14-12 does not apply to depositions, only testimony in court. It can also be argued that the statute has been superseded by Trial Rule 26 regarding discovery from a party's expert.

Although treating physicians may qualify as experts under Indiana Rules of Evidence 701, they are not considered experts for purposes of discovery. Discovery from "experts" is controlled by Trial Rule 26 (B)(4). That provision refers to facts known and opinions held by experts, acquired or developed in anticipation of litigation or for trial. Facts known by treating physicians, and their opinions regarding those facts, are acquired and developed in the regular course of their treatment, not because of litigation. Thus, for discovery purposes treating physicians are treated like any other occurrence witness, and not as an "expert" as that term is used in Trial Rule 26.

Therefore, under Indiana law a treating physician is not entitled to any fee for giving a deposition, other than the statutory fee due any witness deposed. Indiana Rules of Procedure, Trial Rule 45(G) provides that a non-party deponent is required to attend a deposition upon service of a subpoena and tender of fees for one day's attendance and the mileage allowed by law. In civil cases the statutory fee for one day's attendance is five dollars ($5.00). I.C. 33-19-1-6. The mileage is round trip at the same rate paid to state officers. *Id*.

As a practical matter, mileage usually does not apply. Trial Rule 45 (D) (2) provides that, unless the court orders differently, someone can be deposed only in the county where they live or work. Consequently, the deposition is almost always taken at the doctor’s office.

Even though Trial Rule 45 does not require it, to be fair and not overly burdensome to occurrence witnesses it is customary to pay for their lost wages. For professionals this is usually their professional hourly rate. However, the existence of this custom does not mean that the deposing party is required to pay whatever fee is demanded by a treating physician.

In contrast to treating physicians, the Trial Rules require payment of a reasonable fee for

the deposition of those witnesses considered "experts" for purposes of discovery. Again, however, this does not mean that the deposing party is required to pay whatever fee is demanded by the expert to be deposed.

Trial Rule 26 (B)(4)(a)(i) provides that parties may discover facts known and opinions held by experts and acquired or developed in anticipation of litigation through interrogatories. Trial Rule 26 (B)(4)(a)(ii) provides that upon motion the court may order further discovery by other means, and this would include depositions.

It has become commonplace for either party in litigation today to take the deposition of the opposing party's expert. This practice is so universally accepted by counsel and allowed by the courts that any lawyer with litigation experience does not bother to move for an order of the court. Counsel for the parties just arrange for the deposition between themselves. This includes agreeing to the amount the expert will charge for their time.

Trial Rule 26 (B)(4)(c) provides that the court shall require defendant to pay plaintiff's expert a "reasonable fee for time spent in responding " by way of the expert's deposition. When the plaintiff's expert wants an unreasonable fee, defense counsel can apply for an order compelling the deposition and setting the fee.

Although there is no reported Indiana state court appellate case on point, the federal district courts have addressed this issue. It is well settled that in the absence of state court decisions the Indiana appellate courts will look to federal decisions for guidance in interpreting our rules of procedure because they are similar to the federal rules. *E.g., Jackson v. Russell*, 491 N.E.2d 1017, 1018 (Ind. Ct. App. 1986).

Federal district courts have interpreted the requirement to pay an expert a reasonable fee

for a deposition as excluding preparation time, travel time, and minimum deposition time. The courts have also set forth several factors to consider in determining a reasonable fee.

The defendant's refusal to pay for the expert's preparation time was upheld in *Rhee v. Witco Chemical Corp.*, 126 F.R.D. 45 (N.D. IL. 1989). The court reasoned that exclusion of preparation time is supported by the lack of a provision for compensation for time spent by experts in responding to interrogatories under Rule 26 (B)(4)(a)(i). In addition, the court found that preparation time was also inappropriate because the case was not unusually complex, involving a single plaintiff and a single defendant.

Finally, the court in *Rhee* found that time spent "preparing" for a deposition entails not only the expert's review of the expert's conclusions and their basis, but also consultation between the responding party's counsel and the expert to prepare the expert to best support the responding party's case and to anticipate questions from the seeking party's counsel. In this regard, the court noted, an expert's deposition is in part a dress rehearsal for the expert's testimony at trial and thus the expert's preparation is part of trial preparation. The court concluded that one party need not pay for the other party's trial preparation. *Id.*, at 47.

As to travel time, this was denied in *Rosenblum v. Warner & Sons, Inc.*, 148 F.R.D. 237 (N.D. IN 1993). In *Rosenblum* the court stated as follows:

> In the present case, it is clear that Mr. French is entitled to compensation for the actual time he spent attending his deposition, and there appears to be no dispute as to the reasonableness of his hourly rate of $65. The court, however, does not consider it reasonable or appropriate to honor Mr. French's claim for time spent traveling between his office in Granger, Indiana, and the deposition at the office of Warner's counsel in nearby South Bend.

Id., at 241. As stated above, traveling time is usually not an issue anyway. It is almost always cheaper for defense counsel to travel to the expert than vice versa.

Rosenblum also impliedly addressed the issue of a minimal deposition time. The court held that the expert was entitled to compensation for "the actual time he spent attending his deposition." Therefore, the defense should not have to pay for a minimum deposition time but only for the time the deposition actually takes.

Finally, there is the issue of the reasonableness of the hourly fee. How the court determines a reasonable fee for an expert's time, when the parties cannot agree on the fee, was discussed in *Dominguez v. Syntex Laboratories, Inc.*, 149 F.R.D. 166 (S.D. IN. 1993). In deciding this issue, the court in *Dominguez* cited with approval the opinion in *Jochims v. Isuzu Motors, Ltd.*, 141 F.R.D. 493 (S.D. IA 1992) . The court in *Jochims* framed the issue as follows:

> This matter is before the court on the increasingly troublesome question of the reasonableness of the fee charged by an adverse expert witness to the opposing party for the expert's deposition.

Id., at 494.

> Continuing escalation of expert witness fees and the all too frequent attitude of experts that their fees should be set at the maximum-the-traffic-will-bear is of great concern.

Id., at 497.

The court in *Jochims* then went on to set forth seven factors a court is to consider in determining the reasonableness of an expert's fee. As set forth also in *Dominguez* these are:

1. the witness's area of expertise;
2. the education and training that is required to provide the expert insight which is sought;
3. the prevailing rates of other comparably respected available experts;
4. the nature, quality and complexity of the discovery responses provided;
5. the fee actually being charged to the party who retained the expert;
6. fees traditionally charged by the expert on related matters; and
7. any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26.

Id., at 167.

One quick comment about factor number five (5) above is that it should be an upper limit but not a lower one. Obviously, the reasonableness of the fee being charged defense counsel for a deposition is questionable if the same expert is charging plaintiff a lower fee, especially if it is substantially lower. On the other hand, what one party is willing to pay to get the expert of their choice to testify on their behalf is no indication that what they are willing to pay is reasonable.

Therefore, pursuant to Trial Rule 26 (B)(4)(a)(ii) and 26 (B)(4)(c), and the federal court decisions interpreting similar federal provisions, Indiana trial courts can enter an order allowing the defense to take the deposition of plaintiff's expert, determining that the defense is only required to pay for the expert's actual time spent in deposition, and setting what the expert is allowed to charge the defense for the deposition.

Although not required to pay a treating physician anything beyond the statutory witness and mileage fee, the same procedure for compelling an "expert's" deposition and setting a reasonable professional fee for it can be used regarding treating physicians. Obviously, where treating physicians subject to an Indiana subpoena refuse to appear for their deposition they can be held in contempt and sanctioned like any other witness.

In addition, regarding "experts", pursuant to Trial Rule 37 and the cases interpreting it, the court can further order that if plaintiff does not produce plaintiff's expert under the terms ordered by the court, then plaintiff's expert will not be allowed to testify at trial. This would seem to be a particularly appropriate sanction if the plaintiff's expert is not subject to an Indiana subpoena. It is well settled that a trial court can refuse to allow an expert to testify as a discovery

sanction. See Trial Rule 37; *Beird v. Figg & Miller Engineers, Inc.*, 516 N.E.2d 1114, 1123-1124 (Ind. Ct. App. 1987); *Brown v. Terre Haute Regional Hospital*, 537 N.E.2d 54 (Ind. Ct. App. 1989) In fact, a trial court can even dismiss a plaintiff's case as a discovery sanction. *E.g., Mulroe v. Angerman*, 492 N.E.2d 1077 (Ind. Ct. App. 1986)

In summary, treating physicians can be treated like any other witness for purposes of discovery. However, in all fairness they should be treated like experts and paid a reasonable professional fee for their time. Those witnesses recognized as "experts" under the discovery rules must be paid a reasonable fee for their time and when the deposing party and expert cannot agree on what is reasonable, the court can set the fee and enforce its decision with appropriate sanctions.

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