Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Must Your Client Pay An Opponent's Expert For Prep Time?

By **Gregory Ruehlmann and Nicholas Mecsas-Faxon**
(July 21, 2022, 6:05 PM EDT)

Gregory Ruehlmann

Nicholas Mecsas-Faxon

The Federal Rule of Civil Procedure 26(b)(4)(E) requires a party seeking discovery from an opponent's expert to "pay the expert a reasonable fee for time spent in responding to discovery" under Rule 26(b)(4)(A).

But what exactly does "responding to discovery" entail when it comes to expert depositions? It is a given that your client would be expected to pay the disclosed hourly rate for the expert's actual testimony.[1] But are you on the hook for the time that same expert spends preparing for the deposition too?

This article surveys the state of the law on this question and then aims to highlight the most viable arguments for practitioners who don't want to be stuck with the bill for an opposing expert's prep time.

In sum, the law has trended toward awarding preparation fees with certain caveats, but the issue is not settled. And in those jurisdictions that disfavor such awards — or at least vary in answering the question — there are strong arguments available to a party seeking to avoid or at least limit such fee shifting.

Courts are divided on whether to award fees for preparation time.

The question of which party should bear the cost of an expert's preparation to testify at deposition is not new among federal district courts — unsurprisingly, the issue is not one that reaches appellate courts — yet trial courts are consistently inconsistent on its answer. A trend has gradually formed in favor of awarding preparation fees under certain conditions.[2]

But this is far from settled and often involves caveats. As the treatise "Federal Practice and Procedure" has recently explained: "Some courts have allowed such preparation time to be compensated, while others have refused ... [except] in extraordinary circumstances."[3]

No doubt, some courts are more consistent on this issue than others.

For example, district courts within the Second Circuit uniformly award fees for preparation time.[4] On the other side of the spectrum, Ninth Circuit district courts consistently decline fee-shifting demands in

this context, concluding — correctly, in our opinion — that Rule 26(b)(4)(E) does not apply to fees charged for time an expert spends preparing for a deposition.[5]

Other circuits boast decisions coming out on both sides of the issue but are decidedly trending toward awarding preparation fees. Jurisdictions that fall into this category include the Third Circuit,[6] Seventh Circuit,[7] Tenth Circuit[8] and D.C. Circuit.[9]

Strong arguments favor declining to award fees.

So long as a party is not in a jurisdiction where the issue is essentially foreclosed by the court's practice, there are strong arguments outside case law that one can deploy against fee shifting for preparation time.

First, as a straightforward textual matter, the plain language of Rule 26(b)(4)(E) — "time spent in responding to discovery" — is ambiguous at best. The text of the rule makes no mention of preparation time. Instead, it cross-references Rule 26(b)(4)(A), which provides only that "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial."

This is seemingly limited to the deposition itself. One can thus argue that only attending the deposition itself is time spent in responding to discovery compensable under the rule. There is no obvious logical connection between the reference to time spent in responding to discovery and the time a party opponent chooses to devote to preparing its own expert to testify.

This choice by the party opponent, of course, raises a particularly strong practical argument. As noted in 2011 by the U.S. District Court for the Central District of California in Rock River Communications Inc. v. Universal Music Group, unlike time spent at the deposition itself, "the deposing party has no control over how much time an expert spends preparing for a deposition."[10] Instead, the amount of time an expert will spend is often determined by retaining counsel.[11]

As a result, "the risk of unfairness is great" because "the retaining party determines how much deposition preparation it deems desirable, but the deposing party pays for it."[12]

Making matters worse, this unpredictability leaves the deposing party unable "to take the cost of such preparation into account in deciding whether to take the deposition."[13] This makes fee shifting not only unfair, but inefficient. Citing the Rock River case, the U.S. District Court for the Southern District of California, in Eastman v. Allstate Insurance Co., noted in 2016 that "separation of benefit and control from payment may encourage the retained expert to over prepare, thus increasing the overall cost of the deposition."[14]

Additionally, as stated in 2012 by the U.S. District Court for the District of New Jersey in Durkin v. Paccar Inc., because deposition preparation often overlaps with trial preparation, "requiring a party to reimburse a producing party for preparation time would in actuality compensate the producing party for what might effectively amount to trial preparation."[15]

No party should be forced to choose between forgoing a critical deposition or fronting the costs of preparation used by its opponent to ready itself and its expert for trial.

Fallbacks exist if preparation fees are shifted.

Even in cases where a court is likely — or certain — to award preparation fees, the party producing the expert should not be permitted to demand an exorbitant amount or to exploit the prospect of a fee award as leverage.

First, courts are often willing to split the baby, requiring a deposing party to pay for an expert's preparation time but reducing the demanded fees to a reasonable amount. The number of hours billed for preparation — not just the rate — must be reasonable,[16] and courts will often limit compensable preparation time to just a handful of hours.[17]

Second, a party should not be allowed to demand fees in advance as a condition precedent of making its own disclosed expert available to testify. Rule 26(b)(4)(E) speaks in the past tense: The deposing party must pay the expert for "time spent in responding to discovery." Thus, the rule does not obligate the deposing party to pay until after the deposition — that is, until after time has actually been spent responding.[18]

As a last option if a dispute arises over an expert's preparation fee, the deposing party should be able to conduct the deposition before settling the dispute. Parties are not entitled to refuse to produce an expert or seek a protective order on the grounds that the deposing party has refused to prepay an expert's fees — for preparation time or otherwise.

Gregory Ruehlmann is a partner and Nicholas Mecsas-Faxon is an associate at King & Spalding LLP.

[1] See Fed. R. Civ. P. 26(b)(4).

[2] Compare, e.g., Borel v. Chevron U.S.A. Inc., 265 F.R.D. 275, 277 (E.D. La. 2010) (concluding that a majority of district courts award preparation fees) with Brew v. Ferraro, No. CIV.95-615-JD, 1998 WL 34058048, at *2 (D.N.H. Sept. 1, 1998) (making the opposite observation a dozen years earlier).

[3] Wright & Miller, 8A Fed. Prac. & Proc. Civ. §2034 (3d ed.).

[4] See, e.g., N.Y. v. Solvent Chem., 210 F.R.D. 462, 471 (W.D.N.Y. 2002); Lamere v. N.Y. State Off. for the Aging, 223 F.R.D. 85, 93 (N.D.N.Y. 2004), aff'd, No. 03-CV-0356, 2004 WL 1592669 (N.D.N.Y. July 14, 2004); AP Links, LLC v. Russ, No. CV095437JSAKT, 2015 WL 9050298, at *1 (E.D.N.Y. Dec. 15, 2015); Constellation Power Source, Inc. v. Select Energy, Inc., No. 3:04cv983 (MRK), 2007 WL 188135, at *8 (D. Conn. Jan. 23, 2007).

[5] See, e.g., Rock River Commc'ns, Inc. v. Universal Music Grp., 276 F.R.D. 633 (C.D. Cal. 2011); Stevens v. CoreLogic, Inc., No. 14-CV-1158 BAS (JLB), 2016 WL 8729928, at *3 (S.D. Cal. May6, 2016); 3M Co. v. Kanbar, No. C06-01225=JWHRL, 2007 WL 2972921, at *3 (N.D. Cal. Oct. 10, 2007).

[6] Compare Giuliani v. Springfield Twp., No. CV 10-7518, 2017 WL 1382380 (E.D. Pa. Apr. 18, 2017) (awarding fees and recognizing split), and Ndubizu v. Drexel Univ., No. 07-3068, 2011 WL 6046816, (E.D. Pa. Nov. 16, 2011), report and recommendation adopted, 2011 WL 6058009 (E.D. Pa. Dec. 6, 2011) (awarding fees) with Durkin v. Paccar, Inc., No. CV 10-2013 (JHR/AMD), 2012WL 12887769, at *4 (D.N.J.

Dec. 28, 2012), aff'd sub nom. Durkin v. Wabash Nat., No.CIV.A. 10-2013, 2013 WL 5466930 (D.N.J. Sept. 30, 2013) ("The Court further finds that preparation time does not fall under Rule26(b)(4)(A) as 'responding to discovery under Rule 26(b)(4)(A),' and therefore, the deposing party is not required to compensate the producing party for the time the expert incurred preparing for the deposition.").

[7] Compare LK Nutrition, LLC v. Premier Research Labs, L.P., No. 12-7905, 2015 WL 4466632, at *2 (N.D. Ill. July 21, 2015) ("More recently, the tide has begun to turn toward a general acceptance in this district that an expert's preparation time counts as 'time spent in responding to discovery.'") with Fait v. Hummel, No. 01 C 2771, 2002 WL 31433424, at *4 (N.D. Ill. Oct. 30, 2002) (rejecting fee award), M.T. McBrian, Inc. v. Liebert Corp., 173F.R.D. 491, 493 (N.D. Ill. 1997) (same), and Rhee v. Witco Chem. Corp., 126 F.R.D. 45, 47–48 (N.D. Ill. 1989) (same).

[8] Compare Boos v. Prison Health Servs., 212 F.R.D. 578, 579 (D. Kan. 2002) ("In this District, the Court's general practice is to require defendants to pay for at least some of plaintiff's expert witnesses's [sic] time spent preparing for their deposition.") with Benjamin v. Gloz, 130 F.R.D. 455, 457 (D. Colo. 1990) (denying fees).

[9] Compare Barnes v. District of Columbia, 274 F.R.D. 314, 318 (D.D.C. 2011) (awarding fees) with U.S. ex rel. Fago v. M & T Mortg. Corp., 238 F.R.D. 3, 15 (D.D.C. 2006), abrogated on other grounds by Schmidt v. Solis, 272 F.R.D. 1 (D.D.C. 2010) ("I will not find that, as a general matter, preparation time is included within 'time spent responding to discovery' and find instead that the circumstances of the individual case must be examined.").

[10] Rock River, 276 F.R.D. at 636; see also Stevens, 2016 WL 8729928, at *3; Eastman, 2016 WL 795881, at *5.

[11] See Rock River, 276 F.R.D. at 636; Stevens, 2016 WL 8729928 at *3; Eastman, 2016WL 795881, at *5.

[12] Rock River, 276 F.R.D. at 636; see also Stevens, 2016 WL 8729928 at *3; Eastman, 2016 WL 795881, at *5.

[13] Rock River, 276 F.R.D. at 636.

[14] Eastman, 2016 WL 795881, at *5; see also Rock River, 276 F.R.D. at 636 ("Shifting expert fees for deposition preparation creates what economists call an externality.").

[15] Durkin, 2012 WL 12887769, at *4; Rhee, 126 F.R.D. at 47–48; Rock River, 276 F.R.D. at 636; see also Stevens, 2016 WL 8729928 at *3 ("[A]n expert's deposition preparation may encompass tasks undertaken strictly for the benefit of the retaining party."); Wright & Miller § 2034 (3d ed.) ("[T]he open-ended possibility that much ordinary trial preparation might be charged to the opponent by this device warrants caution.").

[16] See Fed. R. Civ. P.26(b)(4)(C).

[17] See, e.g., Script Sec. Sols., LLC v. Amazon.com, Inc., No. 2:15-CV-1030-WCB, 2016 WL 6649721, at *6 (E.D. Tex. Nov. 10, 2016) (collecting cases and noting "many courts have limited the recovery to preparation time that does not exceed the amount of deposition time, and most have declined to require payment for preparation time when the ratio of preparation time to deposition time exceeds

three to one"); Cabana v. Forcier, 200 F.R.D. 9, 16 (D. Mass. 2001) (awarding some fees for preparation time but reducing requested amount as unreasonable); Giuliani, 2017 WL 1382380, at *5 (same).

[18] See, e.g., Johnson v. Spirit Airlines, Inc., No. CV 07-1874FBJO, 2008 WL 1995117, at *1 (E.D.N.Y. May 6, 2008) (concluding an expert "may not insist on advance payment [or] set a flat fee before he knows what he will be called upon to do").