

Who Pays for What Parts of Expert Depositions in Federal Courts? Decisions of Judges in the Northern District of Illinois

Kristine S. Slocum

Slocum Economics

Thomas R. Ireland

University of Missouri at St. Louis

This paper provides discussion of the specific language in what was Rule 26(b)(4)(C), and is now Rule 26(b)(4)(E) of the Federal Rules of Civil Procedure with regard to which party in a federal civil litigation matter is responsible for paying which portions of an expert's time and costs expended in the process of that expert's deposition. It reviews similarities and differences in reported opinions of several federal judges in the Northern District of Illinois regarding payment of expert witnesses in accordance with this and other related rules and statutes, and attempts to provide insight into what might at times appear to be inconsistencies in their rulings.

I. Introduction

Potentially, both sides in a federal litigation may pay an expert witness for time expended during the discovery process. An expert may spend time: (1) preparing an opinion and/or report; (2) preparing for deposition, including reviewing documents; (3) consulting with retaining counsel before the deposition; (4) complying with production requests made in conjunction with the deposition; (4) traveling to and from the deposition; (5) sitting for the deposition itself; and (7) reading, signing and having the deposition notarized. The majority of an expert's time is typically billed to retaining counsel. However, there are times and circumstances in which other costs may be shifted, or "taxed," to the opposing party.

This paper considers views about which side should pay for which portions of the deposition process as expressed in eight orders issued by six federal judges in the Northern District of Illinois between 1989 and 2017. Section II reviews Federal Rule of Civil Procedure 26(b)(4)(E), which was Rule 26(b)(4)(C), and which governs who should pay. Sections III-X consider controversies about payment that were resolved in the eight judicial orders, and highlight the evolving views expressed by each judge in arriving at his or her decision. In doing so, various other rules and Notes from the Advisory Committee on Rules are discussed. Relevant Notes from the Advisory Committee relate to amendments to the Rules that took place in 1993 and shed light on the judges' decisions regarding "who pays."

There are three different times during a federal litigation when a party might request that the opposing party pay for some portion of their expert's time and/or costs: (1) At the deposition of the expert, (2) in response to a motion requesting recovery from the other side, prior to settlement or conclusion of trial, or (3) at the conclusion of trial pursuant to Rule 54(d)(1), which allows a prevailing party to recover certain costs and fees. While it is not entirely clear why there are these three distinct times, at each juncture, the relevant rule cited is 26(b)(4)(C or E). It is this rule that imposes the duty to pay for the expert's time and costs on the party seeking to gain information via deposition. This paper ad-

dresses only requests made via mid-litigation motions and at the conclusion of trial, as it is in these situations that a formal ruling is required.

The primary focus of this paper is on which costs related to the deposition process may be recovered from the opposing party as indicated in the eight decisions reviewed. The decisions shed light not only on what costs might potentially be recovered, but also how much the judges determined to be reasonable and under what circumstances. In the final two sections, lessons practicing damage experts can take from these decisions are discussed (XI). The authors also offer opinions about why the issue of “who pays” does not come up more often during the course of a federal personal injury litigation (XII).

It is important to keep in mind that matters relating to payment of expert witnesses in cases tried in state courts are often handled differently from how payment of expert witnesses is handled in federal cases. In Illinois state cases, for example, each side is obligated to pay its own witnesses (the so-called “English Rule”) so that complications of the sort discussed in this paper do not arise. It is also important to understand that attorneys in any given case may have agreed to arrangements for payment of experts that differ from what a judge might rule in the event of a controversy between the parties.

II: Federal Rule of Civil Procedure 26(b)(4)(E)

Generally, determining what is “time spent responding to discovery” is left up to the parties in the litigation. If the parties do not agree, the determination falls to a federal judge to resolve. All six federal judges cited Federal Rule of Civil Procedure (F.R.C.P) 26(b)(4)(C) or (E) as providing the limited instruction that exists with respect to payment of expert witnesses. With recent changes in the Rules in 2010, the rule is now Rule 26(b)(4)(E), but the language has only been changed to accommodate new sections that have been added. Generally, Federal Rule 26 governs parties’ Duty to Disclose and General Provisions Governing Discovery in federal, civil litigation matters. Rule 26(b)(4)(E) reads as follows:

(E) *Payment*. Unless manifest injustice would result, the court must require that a party seeking discovery:

- (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and
- (ii) for discovery under (D), also pay the other party a fair proportion of the fees and expenses it reasonably incurred in obtaining the expert’s facts and opinions.

It is important to understand that Rule 26(b)(4)(A) referenced in subdivision (i) specifically addresses payments for *expert depositions*, and therefore potentially some of an expert’s time related to *preparing for that deposition*, and states:

(A) *Deposition of an Expert Who May Testify*. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

The paper defines and discusses Rule 26(a)(2)(B) and some of its important implications later in this paper. For now, in layman’s terms, subdivisions (A) and (E) of rule 26(b)(4) together demand that a “reasonable” fee be paid by the seeking party to the expert who is “responding to discovery” by making themselves available for deposition. The rule does not clearly specify for which portions of time necessitated by the deposition of an expert the “party seeking discovery” should pay. In addition, an expert’s billing descriptions are not likely to fall neatly into a category of time called “responding to discovery.” Judges are given a wide array of discretionary power in determining the answer to this inquire. However, clarity in the intended purpose of the Rule appears to have evolved over the past 25 years causing greater consistency in its application by the judges in the cases reviewed in this District.

Subsection (ii) of Rule 26(b)(4)(C) and (E) is addressed in only one of the orders considered in this paper (*Rhee v. Witco Chemical Corporation*, 1989), but has a meaning that is probably not familiar to most forensic experts. In some instances, a case may depend on having an expert opinion to establish

basic facts necessary for the case to proceed toward resolution. For example, a forensic economist might be required to determine the value of a pension that will be divided in a divorce action. Typically, this does not involve the kinds of damages opinions that economic, vocational and life care planning experts are retained to provide. The concern being addressed by subsection (ii) is avoidance of having one party bear all of the costs for obtaining a set of opinions needed by both sides in the litigation in order for the litigation to proceed. Put differently, this subsection is intended to avoid having one party seeking discovery from an expert for the other party that requires that other party to pay for having the expert develop their opinions purely at their own expense. The authors leave detailed discussion of the portions of rulings that address subsection (ii) to another time.

III. *Rhee v. Witco Chemical Corporation* (1989)

The decision in *Rhee v. Witco Chemical Corporation* (1989) was a decision of federal judge Charles R. Norgle. Sometime during the underlying litigation, after the plaintiff's expert had completed his report, the plaintiff, Young Rhee, moved to require that the defendant, Witco Chemical Corporation, pay one of plaintiff's testifying experts "a reasonable fee" for time spent preparing for and attending his deposition pursuant to what was then Rule 26(b)(4)(C). Specifically, plaintiff demanded that defendant pay for plaintiff's expert's preparation time, travel time to and from the deposition, and time spent sitting for the deposition. In addition, plaintiff demanded 50% of the reasonable fees and expenses incurred by the plaintiff in obtaining facts and opinions from plaintiff's expert pursuant to subdivision (ii).

It is important to note that at the time of this proceeding, the plaintiff's deposition had not yet taken place. In addition, the plaintiff had previously been ordered by the court to provide the defendant with all of their expert's records with respect to the plaintiff and to make the expert available for deposition. While the expert had completed his report, plaintiff had refused to provide the report or make his expert available for deposition unless the defendant agreed ahead of time to pay the expert his fee for time spent preparing for and attending the deposition.

The question about payment for time spent preparing for a deposition under subdivision (i) is a narrower question than whether cost sharing should be involved with preparation of the expert's opinions under subdivision (ii). On that narrower question, Judge Norgle said that:

There may be some cases where compensation of an expert for time spent preparing for a deposition is appropriate, such as in a complex case where the expert's deposition has been repeatedly postponed over long periods of time by the seeking party causing the expert to repeatedly review voluminous documents. Here, compensation of plaintiff's expert is inappropriate. The case is not complex, involving a single plaintiff and defendant, and the expert is testifying only to damages. Plaintiff's expert has produced a written report with which he may easily refresh any lapses in his memory arising in the intervening period between completion of his report and his deposition. Additionally, plaintiff himself must bear responsibility for the delay caused by his refusal to take the appropriate alternative of producing his expert, pursuant to the order, and seeking fees at a later date.

Judge Norgle went on to provide further support for his decision not to order that defendant pay for the plaintiff's expert's preparation time. It is important to note that while several of the judges in subsequent cases referred to Judge Norgle's decision in this matter, they were in virtually unanimous disagreement with his reasoning in this second regard:

Moreover, time spent "preparing" for a deposition entails not only the expert's review of his conclusions and their basis, but also consultation with the responding party's counsel and the expert to best support the responding party's case and to anticipate questions from seeking party's counsel. An expert's deposition is in part a dress rehearsal for his testimony at trial and thus his preparation is part of trial preparation. One party need not pay for the other's trial preparation. This court finds that a deposing party need not compensate the opposing party's expert for time spent "preparing" for the deposition, absent more compelling circumstances than exist here.

While it is true that a party need not pay for the other party's expert's trial preparation, most judges appear to view preparation for deposition as separate from preparation for trial, and the majority interpret Rule 26(b)(4)(C) and (E) to allow for recovery of some deposition preparation time in complex cases.

Rhee was ordered to make their expert available for deposition within 21 days, and defendant Witco was ordered to "compensate plaintiff's expert at his customary rate for actual time spent traveling to, from, and at his deposition." There was virtually no discussion regarding the appropriateness of compensating the plaintiff for their expert's time spent in these activities, suggesting recovery for this time may be fairly commonplace and straightforward.

IV. Collins v. Village of Woodridge (1999)

At issue in the *Collins* decision was payment for time expended by three expert witnesses retained by the plaintiff. All three experts had provided complete, lengthy reports, and despite a warning by the plaintiff that if the defendant chose to depose those experts they would seek recovery for preparation time, defendant had moved forward with each of their depositions. Plaintiff's counsel attempted to invoice the defendant directly for their experts' preparation and deposition time, but defendant did not pay. Therefore, Plaintiff moved the court to order payment.

Judge Kennelly reviewed a number of previous rulings from other federal judges regarding their interpretations of Rule 26(b)(4)(C) [now (E)] and its application to the question of whether expert preparation time should be paid by the opposing party. While the court had previously pointed out to both parties in this case that whether "time spent in responding to discovery" under F.R.C.P. 26(b)(4) included time spent preparing for a deposition was a debatable issue, the defendant had conceded that it did. Defendant's contention, however, was that given the circumstances in this case, it was unreasonable to award compensation for it because this was not, in their view, an "exceptional" or "complex" case.

Judge Kennelly argued that he did not find any of the prior decisions that failed to award compensation for deposition preparation, including *Rhee v. Witco*, to be particularly persuasive. He reasoned that:

Either the phrase "time spent responding to discovery" includes deposition preparation time, or it does not. If it does not, then there is no basis under Rule 26(b)(4)(C) or any other provision of the federal rules to shift such fees. In short, the Rule on its face does not permit a construction that says that such fees *may not* be awarded, but still somehow allows for them to be awarded in unusual or exceptional cases.

The Court believes that the better reading of Rule 26(b)(4)(C)(i) is that the expert's reasonable fees for preparation time are recoverable by the party who tendered the expert. [Citations omitted.] As noted, the Rule permits recovery for "time spent in responding to discovery" under this subdivision." Time spent preparing for a deposition is, literally speaking, time spent in responding to discovery (except where the deposition preparation time actually constitutes *trial* preparation, which we conclude is not the case here given the lengthy lapse of time between the depositions and the trial). And because depositions are the only type of "discovery under this subdivision" – i.e. under Rule 26(b)(4) – it would have been relatively easy for the Rules drafters to limit recovery to the time actually spent appearing for the deposition if that was what they had intended to do.

It is important at this juncture to highlight two major amendments to Rule 26 that took place in 1993 prior to this decision, and the reasoning behind them. First, one amendment to Rule 26(a)(2)(B) required the submission of detailed expert reports and supporting documentation as a matter of course, which the drafters of the rule hoped would reduce the need for some depositions, or at least reduce their length, thereby decreasing litigation costs. (See Federal Rule of Civil Procedure 26, 1993 Advisory Committee Notes.) Second, Rule 26(b)(4)(A) was amended to make it clear that an opposing party was entitled to depose a testifying expert, but only after receiving the expert's report. The Com-

mittee Notes state that “concerns regarding the expense of such depositions should be mitigated by the fact that the expert’s fees for the deposition will ordinarily be borne by the party taking the deposition.” Judge Kennelly opines that these same considerations apply to time spent preparing for the deposition:

In short, we think that it is entirely fair, and authorized by Rule 26(b)(4)(C)(i) – as defendants have conceded – to require a party who seeks to depose an expert from whom he has received a written report in conformity with Rule 26(a)(2) to pay the reasonable fees associated with the expert’s time reasonably spent preparing for the deposition. This is particularly so in a case such as this one, in which the expert’s reports were quite extensive and thus comported with Rule 26(a)(2)’s purpose of increasing the amount of information conveyed to the opposing party. See Fed. R. Civ. P. 26, 1993 Advisory Committee Notes (indicating that the report should essentially set forth “the testimony the witness is expected to present during direct examination, together with the reasons therefor.”)

The judge therefore ruled in this post-1993 case that preparation time as well as time spent in deposition should be paid for by the party seeking additional information via deposition.

Judge Kennelly then turned to evaluating the amount of time plaintiff should reasonably be compensated for his experts’ preparation. In doing so, he focused on the ratio of the amount of time spent by each expert relative to the time spent sitting for deposition. He indicated that while a 3:1 ratio might be considered reasonable in some cases, he did not feel it was reasonable in this case, and reasoned:

The amount of material the experts had reviewed in arriving at their opinions was unusually extensive, and it was entirely reasonable to expect that they would have to re-review significant portions of it in order to be able to answer questions intelligently at their depositions. Moreover, defendants knew in advance that plaintiff planned to seek recovery of the experts’ preparation time, but made no effort to limit the scope of the depositions, which might have limited the amount of “reasonable” preparation time. On the other hand, defendants requested the depositions promptly after receiving the experts’ reports and did not inordinately delay scheduling the depositions. Thus, the experts did not have to completely duplicate their earlier work in order to answer questions about their opinions.

The judge awarded Plaintiff recovery of deposition preparation time at a ratio of one and one-half times the length of each expert’s deposition. No mention is made of a request for travel or other deposition-related time in this case; therefore, none was awarded.

V. Nilssen v. Osram Sylvania, Inc. (2007)

Judge John Darrah made the ruling in this 2007 decision following a costs and fees proceeding. As noted earlier, one of the three times a party may request reimbursement for expert costs in federal cases is at the conclusion of a trial. In these instances, recovery is allowed pursuant to another rule, 54(d)(1), which provides that “costs – other than attorney’s fees – should be allowed to the prevailing party. While the determination of who the prevailing party was in this case required a separate decision by the judge due to the fact that there were claims by the plaintiff pertaining to two patents as well as multiple defendants and counterclaims, it was determined that Defendant Osram had won a “substantial” portion of the litigation as a whole.

In a cost and fees proceeding, the prevailing party must submit a formal document called a “bill of costs” which lists all of the costs for which they seek recovery. They must provide, documentation of those costs, and need to be prepared to submit evidence of their necessity in the litigation. The list of costs which can potentially be shifted, or “taxed” to the losing party is set forth in 28 U.S.C. Section 1920. This federal statute authorizes an award for costs, and includes items such as fees of the clerk, fees for transcripts, fees for copies, docket fees, and compensation of court-appointed experts and interpreters. Expert witness fees fall under Section 1920(3), which includes “fees and disbursements for printing and witnesses.” Accordingly, Osram sought reimbursement of expert fees totaling \$100,840.81, which included time spent by their experts responding to discovery, preparing for and

attending their depositions. One of their experts, Goffney, also charged Defendant for time spent attending the deposition of another of Osram's experts, and for assisting Osram in responding to discovery aimed at Osram.

In his decision, Judge Darrah confirmed that Rule 26(b)(4)(C)(i) was the operative rule that provided for compensation for reasonable time spent by an expert in preparing for his or her deposition, as well as for actual deposition time, citing several previous decisions by judges in this District, including *Collins*. However, after quoting the Rule, he reasoned,

As quoted above, the Rule provides for reasonable fees "spent in responding to discovery *under this subdivision*." (Emphasis added). The relevant subdivision is for discovery related to Osram's experts' opinions. (Citations omitted). Accordingly, the expert fees requested for assisting Osram in responding to unrelated discovery or attending another expert's deposition are not recoverable.

Judge Darrah held that Defendant be reimbursed for their experts' deposition preparation and actual deposition time, but deducted the charges by Goffney for time spent assisting counsel with discovery verses responding to discovery aimed at gaining this expert's opinions. In regard to the reasonableness of Goffney's time spent preparing for and attending his own deposition, without expressly noting the ratio of deposition preparation time to deposition time, Judge Darrah awarded Osram \$21,628.41 for a total of 46.5 hours of combined time spent in these two activities.

A second expert, Paveen Jain, billed defendant Osram for 5 hours of deposition time and 61 hours of "deposition preparation and other discovery matters." This expert did not break out time spent preparing for deposition from other time spent responding to other discovery. However, Judge Darrah ruled that "... based on the extensive document review required, the complexity of the issues, and the breadth of the expert's report, a ratio of three times the length of the deposition is reasonable." (Interestingly, he referenced the *Collins* decision here, which awarded deposition preparation time at only one-and one-half times the length of the deposition.)

In regard to another expert Carlile Stevens, Osram sought recovery for 13.25 hours of deposition time, 75.5 hours of deposition preparation, 74.5 hours of deposition preparation and discovery-related time, and 95 hours for other discovery related time. In this instance, Judge Darrah allowed Osram to recover all of Mr. Stevens' deposition preparation time at a resulting ratio of 5.7 to 1 (75.5/13.25). In light of the fact that the judge only awarded recovery for preparation time at a ratio of 3 to 1 for expert Paveen Jain, one wonders whether the fact that Mr. Stevens clearly delineated his preparation time may have been a critical factor in Osram's ability to recover for all of this expert's time in this activity.

The most interesting implication Judge Darrah made in his decision in this matter was that it is still possible for the losing party to recover the costs of "responding to discovery" under Rule 26(b)(4)(C) from the prevailing party. While Judge Darrah ultimately denied Nilssen's motion in which they sought recovery of their expert fees pursuant to Rule 26(b)(4)(C), he pointed out that, "The Rule is silent as to awarding such fees only to a prevailing party." As a result, he did not deny Nilssen's request because the fees were not recoverable. Rather, he denied them because he determined that awarding them would result in "manifest injustice," citing several reasons: 1) Nilssen had filed suit as to twenty-six patents and ultimately withdrew infringement claims for fifteen of those, but only after substantial funds had been expended by the defendant, and 2) The Court's Opinion and Order found Nilssen intentionally engaged in inequitable conduct before the Patent and Trademark Office in more than one regard.

This decision was appealed to the District of Columbia Federal Circuit and upheld in *Nilssen v. Osram Silvanica, Inc.*, 528 F.3d 1352 (D.C. Cir. 2008).

VI. *Waters v. City of Chicago* (2007)

The decision in *Waters v. City of Chicago* (2007) was set forth by Judge Milton I. Shadur at a mid-litigation cost and fees proceeding in response to a motion made by the plaintiff in that case. At issue was payment for the deposition preparation time of Dr. Gary R. Skoog, an economic expert retained by the

plaintiff. Dr. Skoog's bill for his deposition included 12.87 hours of "time spent in responding to discovery," and 4.32 hours of actual deposition time. It is implied that the 12.87 hours included 1.0 hour of time spent consulting with plaintiff's counsel, as well as travel time to and from his deposition. The defendant City of Chicago argued that it should only be required to pay for time spent in the deposition itself, which it had apparently already paid.

Judge Shadur noted that there had been mixed rulings regarding the interpretation of Rule 26(b)(4)(C) [now (E)]. However, he cited Wright, Miller & Marcus, *Federal Practice & Procedure: Civil* 2d sec. 2034 at 471 (2d ed. 1994), which he characterized as reflecting the majority view in cases decided around the country that preparation time is compensable. In addition, Judge Shadur described the decision of Judge Kennelly in *Collins v. Village of Woodridge* (1999) as "thoughtful," while describing at some length his disagreement with the logic of Judge Charles Norgle in his decision in *Rhee v. Witco Chemical Corporation* (1989). Specifically, Judge Shadur rejected Judge Norgle's characterization of the deposition of an opposing expert as constituting trial preparation for that expert:

This Court does not at all agree with the view of another of its respected colleagues, Honorable Charles Norgle, that an opinion witness' "deposition is in part a dress rehearsal for his testimony at trial and thus his preparation is part of trial preparation." (Citation omitted.) Instead the literal language of Rule 26(b)(4)(C), as interpreted and applied by the cases that reflect the prevailing view, is that a party that exercises its free choice to depose such a witness has created a need for that witness to prepare twice – once for the deposition and then again for his or her trial testimony – so that no unfairness is involved in that majority view.

Judge Shadur highlighted an important consequence of Rule 26(a)(2)(B): Namely that an expert's trial testimony is not only expected to be detailed in the required, written report, but is also limited by that report. Thus, there is great incentive for the expert to prepare a complete and comprehensive report, as the expert is only allowed to testify to what is included in that report. Like Judge Kennelly, Judge Shadur quoted the Advisory Committee Notes addressing this amendment to the rules:

Indeed, the Advisory Committee Note to the 1993 amendments that introduced the present form of that requirement, coupled with creating the potential for deposing such persons [Rule 26(b)(4)(A)], expressly states: "Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision(a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions."

Therefore, Judge Shadur ruled that the majority of Dr. Skoog's "time spent responding to discovery," which includes his preparation time, should be paid by the defendant. While he does not specifically address the ratio of preparation time to deposition time, we see that it is just under 3:1 (12.87:4.32). The judge did, however, reduce the plaintiff's recovery by one hour, which apparently constituted time spent in telephone conversations with plaintiff's counsel before the deposition. His specific reasoning is not indicated.

VII. Chicago United Industries v. City of Chicago (2011)

As was the case in *Nilssen*, the decision in *Chicago United Industries v. City of Chicago* came about at the conclusion of the underlying case pursuant to Rule 54(d)(1). As the prevailing party, Defendant City of Chicago asked the court to shift to the plaintiff the cost of defendant's expert witness' deposition preparation and deposition time totaling \$24,625. Again, while the types of costs generally that can be shifted to the opposing party are listed in 28 U.S.C. Section 1920, recovery of expert deposition and preparation time specifically is governed by Rule 26(b)(4)(C). Defendant City of Chicago requested reimbursement for other costs as well, including fees of the court reporter, exemplification costs, copies, and subpoenas. However, we ignore discussion pertaining to requests for these items for the purposes of this paper.

While Rule 54(d)(1) provides a presumption that the losing party will pay costs, the court is given the discretion to grant otherwise. The Judge in this case, Robert M. Dow, Jr., stated that the Seventh Circuit Court recognizes only two situations in which the denial of costs might be warranted: 1) misconduct by the prevailing party and 2) in the event that the losing party is indigent. Neither of these situations existed in this case. The plaintiff's objection, however, was that the work done by the defendant's accounting expert, Mark Hosfield, was excessive.

In evaluating whether the defendant should recover the cost for its expert's preparation time, Judge Dow clarified that "Taxing costs against the non-prevailing party requires two inquiries: (1) whether the cost is recoverable; and (2) whether the amount assessed is reasonable.

First, Judge Dow opined that expert preparation time is recoverable. In support of his opinion, he quoted Judge Shadur in *Waters v. City of Chicago* (2007) such that the "majority view in cases decided around the country is that preparation time is compensable" under Rule 26(b)(4)(C). He also quoted Judge Kennelly in *Collins* (1999): "The better reading of Rule 26(b)(4)(C) is that the expert's reasonable fees for preparation time are recoverable by the party who tendered the expert."

Judge Dow then turned to the question of whether the expert's preparation time was "reasonable," noting that "Courts that have applied that principle frequently have focused on the 'ratio of preparation time to deposition time.'" *Collins*, 197 F.R.D. at 358. He further stated, "In this district, judges have approved compensation at a 1.5:1 or even 3:1 ratio." He referenced two decisions that were reviewed above extensively: *Nilssen* (2007), (in which Judge John Darrah approved a 3:1 ratio due to "the extensive document review required, the complexity of the issues, and the breadth of the expert's report") and *Collins* (in which Judge Kennelly rejected a 3:1 ratio, but awarded a 1.5:1 ratio in light of the "unusually extensive" amount of material that experts reviewed in preparation). Judge Dow indicated that "The same considerations that justified a multiplier in *Nilssen* and *Collins* are present in this case." Based on this reasoning, he ruled that a 3:1 ratio was reasonable. Since the deposition of the City of Chicago's expert lasted five hours, the Court awarded a total of 20 hours at Mr. Hosfield's hourly rate of \$550 for a total of \$11,000. This was significantly less than the total charges by this expert for deposition preparation and deposition time (\$24,625), indicating the Court did not provide for recovery of all of his time in these activities.

One implication of Judge Dow's decision in this case seems especially noteworthy. While the 3:1 deposition preparation ratio recovery rate appears to have become somewhat of a standard for reasonableness in complex cases by the time this decision was handed down, Judge Dow implied that there was room for recovery at a higher ratio when he commented that, "... the Court does not think it likely that this case was more complicated than the patent infringement case [*Nilssen*] in which Judge Darrah approved a 3:1 preparation-to-deposition ratio, and thus the Court will apply that same ratio to Hosfield's efforts in this case."

VIII. LG Electronics v. Whirlpool Corp. (2011)

The opinion and order of Federal Judge Amy J. St. Eve awarded \$411,029.12 in costs, including \$70,593.05 in expert costs, to Whirlpool Corporation as the prevailing party in this commercial litigation case. Among the costs Whirlpool sought to recover was deposition preparation time, again pursuant to Rule 26(b)(4)(E). While LG Electronics did not object to Whirlpool's request for recovery of expert preparation time, it maintained that the amount of time spent by several of Whirlpool's experts was unreasonable. Judge St. Eve indicated that judges in the Federal Northern District of Illinois looked to the ratio of preparation time to deposition time, referencing *Chicago United Industries, Ltd v. City of Chicago* (2011). She also noted that courts in the Northern Illinois District had concluded that a reasonable ratio in complex cases was 3:1. *See id.*; *Nilssen v. Osram Sylvania, Inc.* (2007). Here again, the 3:1 ratio was indicated as the standard for reasonableness. The experts in question had spent 36.75 hours preparing for a 5.75 hour deposition (Dhar: ratio of 6.4 to 1), 30.75 hours preparing for a 6.25 hour deposition (Levi: ratio of 4.9 to 1), 28.5 hours preparing for a 6.75 hour deposition (Malladi: ratio of 4.6 to 1), 30.50 hours preparing for a 7 hour deposition (Nowlis: ratio of 4.2 to 1), and

38.50 hours preparing for a 6.5 hour deposition (Sims: ratio of 5.9 to 1). Judge Amy J. St. Eve reduced Whirlpool's recovery for each expert's deposition preparation time to reflect a 3 to 1 ratio.

Whirlpool also sought recovery for the time its experts spent reviewing their own deposition transcripts, and for time spent traveling to and from their depositions, requests seen infrequently in the cases reviewed for this paper. LG maintained that these costs were not recoverable. Addressing the time spent reviewing their deposition transcripts, the judge ruled that, "Courts in this district, however, have awarded such costs, and thus the Court will not deduct costs in this respect." She added, "This is especially true where, as here, the experts had to review their transcripts in preparation for the Daubert hearings and trial. Further, the time the deponents spent to and from the deposition location amounts to travel time and is thus recoverable."

Unique to this case was LG Electronics' argument that it should not have to pay for deposition costs related to one of Whirlpool's experts (Levi) that Whirlpool did not list as an expert in its Rule 26 disclosures, and which Whirlpool admitted it did not intend to call at trial. However, LG had chosen to depose the expert, an Associate Professor of Linguistics at Northern University. Judge Amy J. St. Eve reminded the plaintiff that Rule 26(b)(4)(E) was designed to "meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side had paid, often a substantial sum," citing her own decision in *Fairley v. Cook County*, 2008 U.S. Dist. LEXIS 28325, 2008 WL 961592. She also cited Wright, Miller and Marcus in support of the view that the discovering party has the obligation to pay expert costs if it takes a deposition. For these reasons, Judge Amy J. St. Eve held that work done by this expert had to be paid for by the LG Electronics, the losing party, regardless of the fact that he did not ultimately testify at the trial.

Finally, Whirlpool requested recovery for travel expenses for one or more of their experts for which they did not have documentation. The Court agreed with LG that undocumented costs are not recoverable and therefore did not allow them.

IX. *Artunduaga v. The University of Chicago Medical Center* (2017)

Also pursuant to Rule 54(d)(1) was the decision by Judge Amy St. Eve in the *Artunduaga* matter. Following the conclusion of the underlying trial, Defendant, The University of Chicago Medical Center (hereinafter "UCMC"), sought recovery of various costs as the prevailing party, including 5.2 hours spent by their economic expert, Malcom Cohen, in preparation for his 3.33-hour deposition as allowed by Rule 26(b)(4)(E).

Judge St. Eve summarized the case law addressing the recoverability of deposition preparation time as follows:

Courts in this District have concluded that costs associated with the time spent preparing for a deposition are recoverable. [Reference to *Waters*, and other decisions] In this district courts look to the preparation time in relation to the deposition time to determine whether the preparation time was reasonable. [Reference to *Chicago United Industries*.] These courts have concluded that a ratio of 3 to 1 preparation to deposition time is reasonable in complex cases [Reference to *LG Electronics*.]

Judge St. Eve also pointed out that "A party that takes advantage of the opportunity afforded by Rule 26(b) to prepare a more forceful cross-examination should pay the expert's charge for submitting to examination." 8 Wright, Miller and Marcus, Federal Practice & Procedure Section 2034. She therefore ruled that Cohen's charges for deposition preparation time should be paid by the plaintiff.

Without extensive discussion, Judge St. Eve noted that Dr. Cohen's preparation time was well within the 3 to 1 ratio. As a result, she shifted the full amount charged by Dr. Cohen to prepare for deposition to the defendant.

X. The Medicines Company v. Mylan Inc., et al. (2017)

This opinion and order, again by Federal Judge Amy J. St. Eve, involved a bill of costs presented by Mylan Inc., et al. (hereinafter “Defendants”) totaling \$276,193.89 in a patent infringement case. As was the case in all but the *Rhee* (1989), *Collins* (1999) and *Waters* (2007) decisions reviewed thus far, Defendants’ recovery of litigation costs generally was allowed as the prevailing party pursuant to Rule 54(d)(1), while Rule 26(b)(4)(E) was the governing rule considered by the judge when determining whether or not certain fees paid for or related to expert depositions could be recovered. Defendants sought recovery of \$46,966 in fees charged by four of their experts for time spent preparing for and attending their depositions and reviewing their own deposition transcripts.

Judge Amy St. Eve’s decision in this matter is consistent with her and other previous decisions. She reasoned that the Court can tax costs for expert deposition attendance as well as deposition preparation to the losing party, including transcript review under U.S. Code Section 1920(3), referencing her colleague’s decision in *Waters* (2007) and her own decision in *LG Electronics* (2011). Regarding the reasonableness of the expert’s time spent preparing for deposition, Judge St. Eve said:

In this District, courts look to the preparation time in relation to the deposition time to determine whether the preparation time was reasonable. *Chicago United Indus., Ltd. V. City of Chicago*, 2011 [full citation omitted]. “These courts have reasonably concluded that a ratio of 3 to 1 preparation to deposition time is reasonable in complex cases[.]” [Full citations of *LG Electronics*, 2011 and *Nilssen v. Osram Sylvania, Inc.*, 2007 omitted]

Without formal discussion, Judge St. Eve appeared to accept the premise that this was a complex case, and indicated that as a result, Mylan had reduced one of their expert’s (Auslander) preparation time to conform to the (3:1) ratio.

The plaintiff in this case argued it should not have to pay some expert fees for other reasons, including the fact that one witness was not called at trial, and that the testimony of the other three, in the plaintiff’s opinion, was irrelevant or questionable. Judge St. Eve refused to deny costs to defendants for either of these reasons, indicating that both sides retained experts in a good-faith preparation for trial.

Finally, the plaintiff argued that the amount of time spent by Dr. Auslander to review his deposition was high given the other experts’ review time. The Court agreed and considered the amount of time spent by the other experts. Ultimately, Plaintiff and Defendants agreed to significantly reduce Defendants’ recovery for Dr. Auslander’s review time from 9 hours to 2.5 hours. Thus, the judge awarded Defendants expert fees totaling \$44,333.50 after the adjustments to Dr. Auslander’s deposition preparation and review time.

XI. Lessons for Damages Experts

An expert witness can sometimes learn a lot by undertaking a careful analysis of what judges have had to say about matters that concern them. Prior to work on this paper, these authors had always assumed that the opposing party in federal cases is only responsible for paying for actual time spent in deposition, and that all other costs were billable to the expert’s retaining attorney. While this may still be the case, the Federal Rules of Civil Procedure allow for potential cost sharing, or shifting, of some of an expert’s time and costs necessitated by the expert’s deposition. In some cases, this may be left to the parties and their respective counsel to argue or debate. However, an understanding of how a court might be expected to handle disputes that arise can be of value. Specifically, judges in the Northern District of Illinois cite F.R.C.P. 26(b)(4)(E) and other related rules and statutes in determining whether or not certain costs related to the taking of an expert’s deposition might be recoverable from the party seeking to discover their opinions, and if so, what amounts are reasonable. They may look to other sources that shed light on the intended purpose of Rule 26(b)(4), including the Notes of the Advisory Committee on Rules, and must certainly consider previous rulings by other judges in their district addressing recovery of items in the categories claimed.

It seems clear from our review of the decisions set forth by the judges in this Court that in most cases, an opposing party is likely to be held responsible for paying for certain categories of time expended by an expert. Following is a summary from decisions made by judges in the Northern District of Illinois:

- 1) Time spent preparing for deposition is often recoverable, within reason. Some common considerations include:
 - a. The ratio of the amount of time spent to the length of the expert's deposition. This, in turn, is dependent upon the complexity of the case. Judges in this District considered the following in assessing complexity:
 - i. The number of plaintiffs and defendants. (*Rhee*)
 - ii. The type of case (e.g. patent infringement, commercial litigation, etc.) (*Nilssen, Chicago United Industries*)
 - iii. The issues in the case, or the breadth of the issues being addressed by the expert. (*Nilssen, Chicago United Industries*)
 - iv. The amount of materials received and required to be reviewed by the expert. (*Collins, Nilssen*)
 - v. The length of the litigation. (*The Medicines Company*)
 - b. A three to one ratio of preparation time to deposition time has often been considered to be reasonable in "complex" cases. (*Collins, Chicago United Industries, LG Electronics, Artunduaga, The Medicines Company*) However, judges have awarded more than this (*Nilssen: 5.7 to 1*) or less than this (*Rhee: none; Collins: 1.5:1*)
 - c. The amount of time that has passed between the time the expert's report was written and their deposition may be considered when determining a reasonable ratio of preparation time to deposition time. (*Rhee*)
 - d. The cause of a significant passage of time between production of the expert's report and their deposition (i.e. was one party at fault for the delay?) (*Rhee*)
- 2) Time spent preparing for trial is not recoverable. One criterion used to determine whether preparation time constitutes deposition prep or trial prep is the amount of time that has passed between the two. Rule 26(b)(4)(E) effectively seeks to protect a party from potentially having to pay for their experts' preparation time twice: once for deposition and once for trial.
- 3) Time spent reviewing one's own deposition transcript, especially if necessitated by an anticipated *Daubert* hearing, is recoverable. (*LG Electronics*)
- 4) The amount of time spent reviewing a deposition transcript must be reasonable. One test of reasonableness is how much time other experts in a case spent reviewing their transcripts. (*The Medicines Company*)
- 5) Time spent traveling to and from one's deposition is recoverable. (*Rhee, LG Electronics*)
- 6) Time spent consulting with retaining counsel in preparation for deposition may not be recoverable. (*Waters*)
- 7) Experts may be able to assist retaining counsel in their eventual recovery of certain costs by:
 - a. Clearly delineating "time spent preparing for their deposition" from "time spent responding to discovery," and omitting from "time spent responding to [the expert's] discovery" any time spent assisting counsel with responding to discovery or time spent attending another expert's deposition. (*Nilssen, Waters*)
 - b. Ensuring that all costs and fees expended by experts are documented. (*LG Electronics*).
- 8) The added requirement that a comprehensive and detailed written report be provided to the opposing party by experts who are expected to testify at trial (Rule 26(a)(2)) and the resulting expectation that this amendment to the Rules in 1993 would streamline the discovery process and reduce the need and expense of expert depositions (or at the very least, reduce the amount of time spent in deposition), appears to have added clarity regarding who should be held responsible for

paying for time and costs resulting from the decision of the opposing party to subsequently depose that expert. (*Collins*)

- 9) In addition to time and costs related to the taking of an expert's deposition, a party may be able to recover for some of an expert's time spent developing the expert's opinion, pursuant to subdivision (ii) of Rule 26(b)(4)(E). While not discussed in this paper, requests for recovery for this time were infrequent, possibly due to the fact that the requesting party would need to provide evidence that the opposing party's case benefitted from the opinions prepared and provided by an expert over and above the expert's preparation for an effective cross-examination. One judge indicated that this typically cannot be determined until the conclusion of the case. (*Rhee*)
- 10) While recovery of certain expert costs is often requested by and allowed by the prevailing party in a case pursuant to Rule 54(d)(1), Rule 26(b)(4)(E) allows either party to recover a reasonable fee for time spent by their expert "responding to discovery." (*Nilssen*)
- 11) A formal request for recovery or reimbursement of expert costs and fees is necessary in most cases in order to be allowed. (*Nilssen*)

One category of time noticeably absent from any of the decisions reviewed for this paper is time spent responding to interrogatories or other requests for information contained in a deposition subpoena. This may include time spent gathering, organizing and labeling source documents (i.e., preparing the expert's file); or time spent maintaining, preparing or updating an expert's testimony and publications lists and resume. Time spent by experts in these areas can be extensive, and would seem to clearly fall into the category of responding to discovery. The Notes of Advisory Committee on Rules - 1993 Amendments to Rule 26(a) provide potential insight into this discrepancy:

Through the addition of paragraphs (1)-(4), this subdivision [(a)] imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3) as the trial date approaches to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B).

A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives.

Addressing subdivision (2)(B) of Rule 26(a), the Notes state:

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony [] must prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor. The information disclosed under the former rule in answering interrogatories about the "substance" of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. Revised Rule 37(c)(1) provides an incentive for full disclosure; namely, that a party will not ordinarily be permitted to use on direct examination any expert testimony not so disclosed.

Review of the Notes, the application of the amended rules in the decisions by the judges' in the cases discussed herein, as well as the reasoning expressed by each for allowing or disallowing recovery for certain costs may all provide valuable insight as to why requests for recovery of time spent responding to this sort of discovery are rare or nonexistent.

Is Payment of Experts an Important Issue in Most Federal Personal Injury Cases?

Typically, experts bill retaining counsel for virtually all of the time they spend, as well as any out-of-pocket costs necessitated by their retention in a case. The one exception in many states and in federal litigation matters is for actual time spent sitting for deposition. The reason for this may be that the recoverability from the opposing party for deposition time is clearly appropriate in accordance with applicable state or federal rules of civil procedure, such as Federal Rule of Civil Procedure 26(b)(4)(E). In addition, determination of the “reasonable” amount of time spent in deposition is easy to determine and agree upon. In California, for instance, the seeking party is required to have a check ready at the beginning of an expert’s deposition for the estimated length of that deposition. (California Rule of Civil Procedure 2034) If the deposition exceeds the estimated length of time, any remaining amount due must be paid within five days. Somewhat more puzzling is why there is not a similar procedure in place in federal cases.

While rules of civil procedure may govern which party “should” or ultimately “will be” responsible for paying expert costs of any kind by allowing for cost shifting of some items in some or even most cases, in the event of a dispute, retaining counsel is typically responsible for insuring their experts are compensated for all of their time. Most experts’ retention agreements require that the party who retained them agree to be held responsible for the payment of any and all time expended as a result of that retention. This is true, and must be true, regardless of the outcome of the case, and despite any disagreements that might arise between the parties as to who should pay for work performed by the expert. In other words, who ultimately “pays” or is ordered to reimburse the other party, who may already have paid invoices submitted by an expert for their time and costs, is typically of no real consequence to the expert.

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Author Notes

Kristine S. Slocum is a forensic economic consultant and can be contacted at slocumeconomics@gmail.com. Thomas R. Ireland is Professor Emeritus at the University of Missouri at St. Louis and can be contacted at ireland@umsl.edu