

A. Facts

The case at bar is not factually complex. It resolves around simple personal injury litigation, wherein a Plaintiff was hurt (this time at an amusement park) and sought treatment from a local physician for his injuries. "Routine" would be the word associated with this case, even when litigation became necessary to resolve the dispute between the parties. However, this "routine" piece of litigation has brought to the surface a most troublesome problem for personal injury litigators. The issue is what is a fair witness fee for a treating physician who gives a deposition in a personal injury case. Is the treating doctor entitled to an expert fee, even though he is an "actor/viewer/fact" witness, and, if so, what is reasonable compensation?

The problem in the instant case arose when defense counsel subpoenaed the Plaintiff's treating physician for deposition. The doctor responded to defense counsel by requesting a deposit of \$1,800.00 prior to the deposition. The good doctor estimated two hours of preparation time at \$450.00 per hour plus two hours of deposition time at \$450.00 per hour to reach the total given above. The doctor also indicated the deposit would be non-refundable if the deposition were canceled or postponed less than one week prior to the scheduled time. Finally, the doctor would charge an administrative fee of

\$100.00 if the deposition were canceled, no matter what the time frame. Defense counsel chose not to consider the doctor's demands, but instead offered to tender \$450.00 prior to the deposition and offered to allow the doctor to keep \$100.00 of the advance payment if the deposition were canceled on less than 48 hours notice.

The parties could not resolve the dispute; counsel for the Plaintiff made a Motion for Protective Order to prohibit the Defendant from taking the deposition of Plaintiff's expert medical witness without the advance payment of expert fees sought by the doctor.

B. The Treating Physician Is Entitled to an Expert Fee

Plaintiff's Motion for Protective Order cites Rule 26(b)(4)(C) and 30(h)(1) and 30(h)(2) as authority for the doctor to obtain a reasonable expert fee. However, Rule 26(b)(4) does not ordinarily apply to the treating physician in a personal injury case, as that rule deals primarily with trial preparation and discovery of facts known and opinions held by experts which were acquired or developed in anticipation of litigation or for trial. See e.g., Adkins v. Morton, 494 A.2d 652 (D.C.App. 1985); 4 Moore's Federal Practice, 26.22[2] (1984).

Rule 26(b)(4)(C)(ii) gives the court discretion to apportion the payment of fees and expenses of an expert between the party seeking discovery from that expert and the party who

had obtained the facts and opinions from the expert in the first instance. This rule provision allows the Court to remedy any unfairness in the expert discovery area, by requiring the party seeking discovery to share the cost of the expert information the other party has already paid for. Such is not the case with the Plaintiff's treating physician, most of whose information can be obtained through routine discovery processes. Insofar as a physician obtains and develops his information and opinions in the course of his treatment of a patient, he becomes an "actor or viewer" who should be treated as an ordinary witness rather than an expert covered under Rule 26(b)(4). Frantz v. Golebiewski, 407 So.2d 283 (Fla.App. 1981); Adkins v. Morton, *supra*.

In speaking of Rule 26(b)(4) the advisory committee for the Federal Rules said as follows:

It should be noted that the subdivision does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness. [Advisory Committee note to the 1970 amendments to the Federal Rules of Civil Procedure, 48 F.R.D. at 504; also see Harasimowicz v. McCallister, 78 F.R.D. 319 (D.Ct.

Penn. 1978); Congrove v. St. Louis S.F. Railroad Company, 77 F.R.D. 503 (D.Ct. Ms. 1978)].

In any event Rule 26(b)(4)(c) only addresses the apportionment of the expenses of the expert between the parties and does not address the reasonableness of the expert's fee.

The recent amendment to N.R.C.P. 30 does address the subject of expert witness fees for a deposition as set forth below:

(1) A party desiring to depose any expert who is to be asked to express an opinion, shall pay the reasonable and customary hourly or daily fee for the actual time consumed in the examination of that expert by the party noticing the deposition. If any other attending party desires to question the witness, that party shall be responsible for the expert's fee for the actual time consumed in that party's examination. If requested by the expert before the date of the deposition, the party taking the deposition of an expert shall tender the expert's fee based on the anticipated length of that party's examination of the witness. If the deposition of the expert takes longer than anticipated, any party responsible for any additional fee shall pay the balance of that expert's fee with 30 days of receipt of a statement from the expert. Any party identifying an expert whom that party expects to call at trial is responsible for any fee charges by the expert for preparing for the deposition and for traveling to the place of the deposition, as well as for any travel expenses of the expert.

This section makes clear where the responsibility is placed for any preparation time for which the expert may charge. Of course Plaintiff's counsel may choose to instruct the expert not to prepare for the deposition, but an unhappy expert may be detrimental to the Plaintiff's case. At the time of trial the

expert in many jurisdictions cannot refuse to testify and be qualified as an expert witness because he has not been compensated as an expert. He must obey a subpoena just as any other witness. Nevada has no statute, rule or case law on this point. However, if an expert is required to testify for \$25.00/day, you are likely to get about \$25.00 worth of testimony. Nationwide Mutual Ins. Co. v. Glaccum, 366 S.E.2d 772 (Ga.App. 1988); cf. the discussion in Byrd, "Without Reasonable Compensation, Must the Physician in Hawaii Consent to Serve as an Expert Witness," 39 Hawaii Med. Journal 84 (1980), and the cases cited therein.

Rule 30(h) concludes as follows:

(2) If a party desiring to take the deposition of an expert witness pursuant to this subdivision deems that the hourly or daily fee of that expert for providing deposition testimony is unreasonable, that party may move for an order setting the compensation of that expert. This motion shall be accompanied by an affidavit stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion. Notice of this motion shall be given to the expert. The court shall set the fee of the expert for providing deposition testimony if it determines that the fee demanded by that expert is unreasonable. The court may impose a sanction pursuant to Rule 37 against any party who does not prevail, and in favor of any party who does prevail, on a motion to set expert witness fee, providing the prevailing party has engaged in a reasonable and good faith attempt at an informal resolution of any issues presented by the motion.

As can be seen, the Rule has no limitation in regard to whether or not an expert has been retained to testify in anticipation of litigation, but rather the rule contemplates experts who are

asked "to express an opinion." [N.R.C.P. 30(h)(1)] This distinction would allow a doctor who acts in a capacity of a treating physician to receive a reasonable fee 99% of the time, while preventing the same doctor who would act as a witness to a contract transaction, for example, from seeking an expert fee simply because of mere professional status. In those few circumstances wherein a treating physician may not be called upon to "express an opinion," (perhaps by an attorney who seeks to avoid the fee) the Court can always enter a protective order pursuant to N.R.C.P. 26(c), allowing the discovery only on specific terms and conditions, including the payment of expenses to a deponent, when it would be economically unfair not to allow such expenses for the time needed for the deposition. It is clear that the combination of rules covers all possibilities for the compensation of the expert for time spent in deposition, including the retained expert, the actor/viewer expert or the expert who is only a lay witness under the circumstances of a particular case. **C. Reasonableness Of Fee**

Regardless of how the treating physician is characterized under the Rules, the Court considers the treating physician to be an expert witness and entitled to reasonable compensation for time spent on behalf of the Plaintiff/patient in deposition. The Commissioner finds that N.R.C.P. 30(h) constitutes a reasonable way to divide the expert's charges between or among the parties. The parties and the doctors involved are always

urged to resolve any dispute over the setting of the fee on their own, but the Commissioner's office is available to remove any and all obstacles to the smooth functioning of discovery in this area.

Initially, it should be recognized there must be an accommodation of all interests when depositions of health care professionals are scheduled and taken. The court, the patient, the parties involved and the two professions must work in harmony and neither profession may properly ignore the interests involved of the other. See e.g. Marshall and Ballantine, "Complaints About Fees and Costs for Medical Records and Depositions," 86 Journal of the Kentucky Medical Association 587 (1988); Norton, "Ethics in Medicine and Law - Standards and Conflicts," 26 Medical Trial Technique Quarterly 377 (1980). Lawyers must realize that doctors have better things to do than give depositions, and physicians who treat people who have lawsuits must recognize their duty to make themselves available for a deposition on reasonable terms.

Variables other than the fee also must be considered in the deposition procedure. The physician must realize that under the Nevada Rules of Civil Procedure the choice of the time for a deposition and the place for a deposition are normally up to the party who notices the deposition. The guaranty of appearance by the witness at the deposition is effected by the use of a subpoena issued by the Clerk under the seal of the court and

served upon the witness. The subpoena directs the witness to attend and give testimony at a time and place therein specified and it may also command the person to whom it is directed to produce books, records or other tangible things. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed to be a contempt of court. N.R.C.P. 45. A subpoena is not to be trifled with and the court takes a very dim view of any physician or other witness who ignores a properly served deposition subpoena. It is no joke that a failure to obey a subpoena may result in monetary sanctions and even the arrest of a disobedient witness. N.R.S. 22.010(4); 22.100. The physician must realize that one cannot simply ignore a subpoena, but must seek judicial relief to have the subpoena quashed or modified if it is unreasonable or oppressive. A motion for such relief must be made no later than the time set for compliance with the subpoena. N.R.C.P. 45(b).

Reasonableness is the hallmark of equity in arranging a deposition, especially where the taking of a deposition of an expert witness is concerned. Lawyers must follow certain rules of procedure in setting the depositions, whereby they must give notice to the opposing parties of intent to take a deposition. The Discovery Commissioner will also hold that fair and reasonable notice should be given to a deponent, but time frames for notice to the deponent will vary according to the circumstances of the case. The Commissioner finds that it is

very reasonable to schedule the deposition of a physician at the physician's office and at a time convenient to the physician, so long as the physician reciprocates by charging a reasonable fee and being as accommodating as possible to the likewise reasonable attorneys who are arranging the deposition. Doctors who are involved in litigation on more than an occasional basis should give thought to having a weekly time period set aside for giving deposition testimony, usually at a time most convenient to the physician, whether it be morning, afternoon or before or after normal business hours. The Commissioner finds that while some cases require special consideration regarding the scheduling of depositions, most lawyers are prepared to "wait their turn" and abide by reasonable restrictions on expert depositions. In fact, most lawyers will abide by even unreasonable restrictions, such as those practiced by doctors who only give depositions late at night or who set aside only an hour to deal with a complex case. However, the lawyer has the ultimate weapon, in the form of a subpoena, to deal with the recalcitrant expert. The subpoena, if reasonable, will be enforced by the court with all necessary emphasis by way of sanctions to convince the stubborn expert to comply with the law. When an expert demonstrates no reasonable cooperation, the setting of an expert deposition during business hours at the lawyer's office with timely notice would clearly be reasonable.

Suggestions from those physicians who have lived through

the process indicate that a weekly deposition allotment of three to four hours should satisfy the lawyers, without unduly infringing upon the rest of the doctor's professional life. Doctors who give depositions on a more infrequent basis may wish to set aside one afternoon per month for giving testimony. See Waldman, "Representing your Patients: the Deposition," 84 Texas Medicine 35 (1988).

Coupled with the Court's power to compel attendance at a deposition or in court is the ethical obligation of the doctor to provide testimony of behalf of a patient. For instance, as the director of the law department of the American Medical Association commented, in speaking to the annual convention in March of 1964, "We regard the presentation of medical testimony as a civic and professional responsibility even though physicians are called upon for testimony more often than all other professionals put together and more often than any other segment of the population."

See 31 Clinical Obstetrics and Gynecology, 201 (1988); also see "Duty of Physicians to Testify in Court," 42 San Diego Journal of Medicine 13 (1989). The opposite side of the coin allows the court to impose sanctions on an attorney for an abuse of the discovery process, which the Commissioner would find in the unreasonable noticing of a deposition of a physician, whether the abuse be in the scheduling of the deposition or in the payment of the expert. Nevada Rules of Civil Procedure 26, 30

and 37.

In addressing the question of what is a fair fee for a treating physician for giving a deposition in the Las Vegas area, the level of expertise of the physician should be taken into account, as a person who practices a specialty should be entitled to a higher fee than a general practitioner and physicians with a sub-specialty may charge even more. It is the Commissioner's opinion that a reasonable fee in August of 1990, in Las Vegas would be \$300.00 for a general practitioner or equivalent, \$400.00 for a person who practices a specialty and \$450.00 or more for a physician with even more specialized knowledge and training. A doctor of osteopathy would be considered on the same level as a general practitioner for reasonable fee purposes. The Commissioner finds that chiropractors generally do not have the same level of expertise or education that medical doctors are required to possess and finds that a \$225.00 per hour would be reasonable. Less skilled health care professionals, including therapists or nurses would be entitled to fees of \$25.00 to \$150.00 per hour, depending on levels of expertise, keeping in mind that these fees are only available if the witness is giving expert testimony, as opposed to factual observations. It should also be emphasized that the above guidelines have no application when the doctor is asked by a party to be an expert under conditions other than a treating physician. Such agreements between physicians and attorneys are

more contractual in nature and negotiated to the satisfaction of both sides. N.R.C.P. 30(h) easily handles disputes for the taking of depositions of such retained experts.

As additional guidelines for the payment of fees, the Commissioner feels that the treating physician is entitled to request payment prior to the deposition of the reasonable hourly fee for the time expected to be consumed in examination of the expert by the party noticing the deposition. The party will be required to submit a minimum 1 hour advance fee, if so requested by the expert, and said advance must be paid no later than 5 days prior to the deposition. The rule discussed in N.R.C.P. 30(h), wherein the balance of the expert's fee is to be paid within 30 days of receipt of a statement from the expert will be upheld. The deposition of an expert that has been canceled less than 48 hours prior to the time set for the start of the deposition shall entitle the expert to charge a cancellation fee for 1 hour's time. If the deposition is canceled less than 4 hours prior to its designated starting time or the doctor is not notified of the cancellation of the deposition, an additional charge of \$250.00 will be added to the customary 1 hour fee. Any problems which the physician encounters by failure of an attorney to pay the required fees for deposition may be brought upon motion before the Discovery Commissioner and the fee guidelines in this opinion or those agreed to in writing by the attorney and the party will be strictly enforced and additional

sanctions will be levied against any attorney who knowingly disregards these guidelines without cause.

Several final comments are to be made concerning the above guidelines. Counsel for the parties and the physician witness should be aware that expert witness fees may be recovered by the prevailing party in many actions pursuant to the guidelines of N.R.S. 18.020 and 18.005, portions of which are set forth below:

18.020 Costs must be allowed of course to the prevailing party against any adverse party against whom judgment is rendered in the following cases: . . .
. 3. in an action for the recovery of money or damages, where the Plaintiff seeks to recover more than \$2,500.00.

. . .

18.005 **"Costs" defined.** . . . "Costs" means: . . .
5. reasonable fees of not more than five expert witnesses in an amount of not more than \$1,500.00 for each witness, unless the court allows a larger fee after determining the circumstances surrounding the expert's testimony were of such

Prior to July of 1989, the maximum allowable for each expert was \$750.00. Guidelines for expert fees must be keep somewhat attuned to the limits set by the legislature for recovery of those fees in the litigation process; otherwise the legitimate redress of civil grievances may no longer be within reach of the average member of society.

The Commissioner finds in the case at bar that the demand for \$1,800.00 prior to the taking of his deposition is unreasonable and that a doctor is not entitled to request an advance of expenses for preparation for the deposition or for

more than the time estimated by defense counsel for his anticipated examination (1 hour minimum). If the doctor feels the preparation time for the deposition is necessary, that matter should be discussed with counsel for the patient; however, the deposition must go forward if reasonably scheduled by defense counsel and the anticipated examination time is tendered.

In conclusion it should also be made clear that any treating doctor or other health care professional may always submit financial records and affidavits to the Discovery Commissioner to support a higher hourly fee in any particular case. Otherwise, fees in excess of the suggested guidelines above which cannot be agreed upon by counsel and the physician may be regarded as unreasonable by the Commissioner's office.

II.

R E C O M M E N D A T I O N S

IT IS HEREBY RECOMMENDED that a reasonable hourly fee for the doctor at this time would be the sum of \$300.00 per hour for time actually consumed by any examiner at the time of the deposition;

IT IS FURTHER RECOMMENDED that sums advanced prior to the deposition and rules concerning the cancellation policies of a deposition be in accordance with the opinion set forth above.