SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOSEPH R. SLIGHTS, III
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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December 3, 2009

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Re: ***Reid v. Johnston***
C.A. No. 08C-01-025-JRS
Upon Plaintiff's Motion to Determine Expert Fees.

Dear Counsel:

As you know, this case arises out of a rear-end automobile collision which allegedly caused personal injury to the plaintiff, Shari Reid. The defendant, Michael Z. Johnston, has engaged Dr. Richard H. Bennett, a neurologist, to examine Ms. Reid and to offer opinions at trial regarding the extent to which the automobile accident proximately caused her injuries. Dr. Bennett examined Ms. Reid on February 6, 2009, and prepared an extensive report in which he detailed the information he reviewed

prior to the examination, his clinical findings on examination, the medical literature upon which he relied, and his opinions regarding Ms. Reid's injuries and prognosis.

Plaintiff's counsel noticed Dr. Bennett's deposition for October 6, 2009. Upon receipt of the notice, Dr. Bennett issued a fee schedule in which he set forth his fee for the deposition and, particularly relevant here, his fee to prepare for the deposition. Plaintiff has filed a motion in which she seeks an order of this Court (1) setting the maximum fee Dr. Bennett may charge to sit for his deposition; and (2) relieving her of any obligation to compensate Dr. Bennett for the time he might spend preparing for his deposition. The Court already has given its ruling regarding Dr. Bennett's deposition fee. To follow is the Court's decision regarding the extent to which Dr. Bennett may pass his deposition preparation fee on to the Plaintiff. Remarkably, as best as the Court can discern, this is an issue of first impression, at least within the written jurisprudence of this Court.[1]

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[1] Among the Courts that have addressed this issue, there is a split of authority that mirrors the divergent positions taken by the parties in this case. *Compare Fisher-Price, Inc. v. Safety 1st, Inc.*, 217 F.R.D. 329, 331 (D. Del. 2003) (preparation time is included in the reasonable fee to be charged the noticing party under Rule 26(b)(4)(C)), *Fleming v. United States*, 205 F.R.D. 188, 190 (W.D. Va. 2000) (ordering party noticing expert deposition to pay for expert's deposition preparation), *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 154 F.R.D. 212, 213 (E.D. Wis. 1994) (same), *and EEOC v. Sears, Roebuck & Co.*, 138 F.R.D. 523, 526 (N.D. Ill. 1991) (same), with *TV58 Ltd. P'ship v. Weigel Broad. Co.*, 1993 WL 125523, at *2 (Del. Ch. 1993) (preparation time is not included in the reasonable fee absent compelling circumstances), *United States v. M&T Mortgage Corp.*, 238 F.R.D. 3, 14 (D.D.C. 2006) (disallowing reimbursement for preparation time), *M.T. McBrian, Inc. v. Liebert Corp.*, 173 F.R.D. 491, 493 (N.D. Ill. 1997) (same), *Benjamin v. Gloz*, 130 F.R.D. 455, 456 (D. Col. 1990) (same), *and Rhee v. Witco Chem. Corp.*, 126 F.R.D. 45, 47 (N.D. Ill. 1989) (same).

Before turning to the specifics of the Plaintiff's motion, it is useful first to identify certain overarching considerations that have guided the Court's analysis of the issue *sub judice*. First, under our rules of civil procedure, a party seeking discovery from an expert witness proffered by another party is responsible for the reasonable costs incurred by the expert in responding to that discovery.[2] In this regard, the Court draws a distinction between the cost of disclosing the expert's testimony under Rule 26(b)(4)(A)(i),[3] which cost must be borne by the party proffering the expert as a predicate to presenting that expert at trial, and the cost of responding to further discovery regarding the expert's opinion after the expert and his opinion have been disclosed, which cost, if reasonable, must be borne by the party seeking that discovery.[4] The distinction, of course, makes perfect sense. A party may not present expert testimony at trial unless and until that party discloses the substance of the expert's testimony to the other parties in the litigation.[5] It is reasonable to expect the proffering party to pay the expert for the time it takes to develop his opinions and then disclose them in a manner that will allow others (including the

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[2] Del. Super. Ct. Civ. R. 26(b)(4)(C)(i) ("the Court *shall* require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery.")(emphasis added)).
[3] *Compare* Del. Super. Ct. Civ. R. 26(b)(4)(A)(i) ("A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.") with Del. Super. Ct. Civ. R. 26(b)(4)(C)(i).
[4] Del. Super. Ct. Civ. R. 26(b)(4)(C)(i).
[5] *See Cloroben Chem. Corp. v. Comegys*, 464 A.2d 887 (Del. 1983).

proffering party) to understand what the expert will say at trial. On the other hand, the proffering party gains little, if anything, from a pretrial discovery deposition of his expert when noticed by another party. It is not surprising, then, that our rules require that the party "seeking [such] discovery pay the expert a reasonable fee for time spent in responding to [such] discovery."[6]

The second consideration that has guided the Court's analysis of this motion is the notion that the Court, whenever possible, should foster efficient discovery processes in order to "secure the just, speedy and inexpensive determination of every proceeding."[7] In this regard, the Court takes the liberty of stating the obvious - - an expert's deposition will be more efficient and productive if the expert is prepared for the deposition. And, to be most efficient and productive, the preparation should occur before the deposition begins. Otherwise, the deposition would be interrupted frequently (and unnecessarily) whilst the expert "prepares" in the midst of the deposition itself.[8]

Next, the Court has considered the practical implications of deposition preparation - - exactly what is the expert being asked to do? In order to prepare for

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[6] Del. Super. Ct. Civ. R. 26(b)(4)(C)(i).
[7] Del. Super. Ct. Civ. R. 1 ("[These rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding.").
[8] *See Magee v. The Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 647 (E.D.N.Y. 1997)(recognizing the benefits of the expert's pre-deposition preparation); *Hose v. Chicago and N.W. Transp. Co.*, 154 F.R.D. 222, 228 (S.D. Iowa 1994)(same).

a deposition, an expert must refresh his memory of the facts of the case, the documents or other matters he reviewed to reach his opinions, the process he employed to reach his opinions, and the opinions themselves. Assuming the proffering party properly complied with Rule 26(b)(4)(A)(i), the expert may well need only review the written disclosure and summary of his opinion (either by expert report or detailed interrogatory response) to restore his memory. If the case is more complex, the expert may need to review the actual records, research and other data that form the bases of his opinion(s) to prepare for the deposition. In either event, absent extraordinary circumstances, he will *not* be researching new matter or developing his opinions in the case anew. Preparation for deposition connotes reviewing what has already been reviewed, and becoming re-familiar with opinions already given in order to facilitate the deposition process - - a process that has been initiated by the party who noticed the deposition.

Finally, the Court considered the fact that Delaware courts regularly have recognized that experts are entitled to be compensated (albeit reasonably) for their time. They are not "involuntary servants."[9] It is simply not reasonable to expect an expert to perform substantive work in a case without being compensated.[10] When the expert is responding to discovery, our rules direct that the expert's compensation

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[9] *See generally Pinkett v. Brittingham*, 567 A.2d 858 (Del. 1989).
[10] *Fisher-Price, Inc.*, 217 F.R.D. at 331(citing *Fleming*, 205 F.R.D. at 190).

should be paid by the party who propounds the discovery.

In light of the considerations just reviewed, and after considering the issue as it relates to this case, the Court is satisfied that the Plaintiff, as the party noticing the expert deposition, should be required to reimburse Dr. Bennett for the reasonable time he spends reviewing materials in preparation for the deposition. In preparing for his discovery deposition (noticed by another party), Dr. Bennett is "responding to discovery" and should be reimbursed "a reasonable fee" for that time by "the party seeking the discovery."[11] The time Dr. Bennett might spend conferring and preparing with retaining counsel regarding deposition testimony, however, is not reimbursable, as this time will be spent not to refresh Dr. Bennett's recollection of the facts and bases for his opinion (for which counsel's involvement is not required), but rather to address tactical and trial preparation issues, for which Dr. Bennett is not entitled to reimbursement from the Plaintiff.[12]

The rule adopted here comports with the underlying purpose of Rule 26(b)(4)(C) and the Court's interest in managing litigation burden and costs by making the time spent in deposing experts more efficient. The Court declines to extend this rule only to "complex cases," as the determination of what is and what is not a complex case would itself provoke litigation and undermine the very purpose of

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[11] Del. Super. Ct. Civ. R. 26(b)(4)(C)(i).
[12] *Rhee*, 126 F.R.D. at 47.

the rule the Court adopts today - efficient, cost effective litigation practices. Moreover, efficiency in litigation is desirable in all civil cases, whether complex or not.

The Court next must decide how best to ascertain a "reasonable fee" for preparation time under Rule 26(b)(4)(C). Because each case is different, the Court's first inclination is to adopt a rule that would encourage the reviewing court to address the reasonableness question on a case-by-case basis. The difficulty with this approach, of course, is that it also would encourage the very sort of litigation that the Court is seeking to discourage by this decision. A "bright line" must be drawn, within reason of course. In this regard, the approach taken by the United States District Court for the District of Connecticut, in *Packer v. SN Servicing Corp.*,[13] is appealing. In *Packer*, the court adopted a rule that an expert's preparation time cannot exceed the length of the deposition itself, and his preparation fee cannot exceed his hourly deposition fee.[14] While any rule, by necessity, would involve some measure of

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[13] 243 F.R.D. 39 (D. Conn. 2007). The Court notes that some courts have declined to place any limits on the amount of reimbursable preparation time. *See, e.g.*, *Underhill Inv. Corp. v. Fixed Income Disc. Advisory Co.*, 540 F. Supp. 2d 528, 539 (D. Del. 2008). Other courts have adopted adjusted ratios of preparation time to deposition time. *See, e.g.*, *Fee v. Great Bear Lodge of Wis. Dells, LLC*, 2005 WL 1323162, at *3 (D. Minn. 2005) (allowing a ratio of two hours of preparation time to one hour of deposition time); *Boos v. Prison Health Servs.*, 212 F.R.D. 578, 580 (D. Kan. 2002) (granting reimbursement for three-and-one-half hours of preparation time for a one-and-one-half-hour deposition). For the reasons stated, the Court has declined to adopt either of these approaches in favor of the approach taken in *Packer*.

[14] *Packer*, 243 F.R.D. at 43-44.

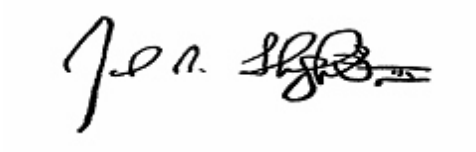
arbitrariness, the rule adopted in *Packer* promotes certainty, predictability, and assurance of compensation for the expert, while at the same time placing reasonable limits on the expert's reimbursable preparation time and hourly fee. Absent extraordinary circumstances, therefore, the Court adopts a rule that the expert shall be reimbursed by the noticing party for time spent actually preparing for a deposition at the expert's hourly rate in an amount up to and including the amount of time spent in the deposition itself.

To summarize, the Court holds that the Plaintiff must reimburse Dr. Bennett for his actual deposition preparation time at his deposition rate up to the time taken to conduct the deposition itself. Accordingly, Plaintiff's Motion to Determine Expert Fees, as it pertains to this issue, is **DENIED.** If called upon to review Dr. Bennett's (or any other expert's) reimbursement request, the Court should (and will in this case) be mindful that preparation for deposition involves refreshing the expert's recollection of facts already reviewed and opinions already expressed. To reiterate, the deposition preparation session is not the time to conduct new research or to review new facts, at least not to the extent that the expert will seek reimbursement for that time from the opposing party. Nor may the expert seek reimbursement for the time spent meeting with the attorney(s) who retained him, even if such meetings ostensibly are meant to help prepare the expert for deposition. As stated, such meetings serve the tactical

interests of the party who engaged the expert and are more accurately characterized as trial preparation expenses. Finally, the Court notes that any request for reimbursement for an expert's deposition preparation time should be in writing and should provide sufficient detail to allow opposing counsel to see what she is paying for.[15]

IT IS SO ORDERED.

Very truly yours,



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[15] Counsel may, of course, stipulate to a different arrangement including, but not limited to, an agreement that each side will pay its own expert preparation costs.