

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**CRYSTAL BONAR,**

**Plaintiff,**

**v.**

**Case No. 2:08-CV-560  
MAGISTRATE JUDGE KING**

**JUDITH ROMANO, M.D., et al.,**

**Defendants.**

**OPINION AND ORDER**

This matter is before the Court for consideration of Plaintiff's *Motion for Protective Order*, Doc. No. 82. Plaintiff moves the Court to reduce the deposition fee of Defendants' expert witness, Lawson F. Bernstein, M.D.<sup>1</sup>

A forensic psychiatrist, Dr. Bernstein specializes in the assessment and treatment of neurological and neuropsychiatric conditions. He conducted a medical examination of Plaintiff, pursuant to Fed. R. Civ. P. 35, on June 4, 2010. *See Order*, Doc. No. 65; *Opinion and Order*, Doc. No. 80. Plaintiff has scheduled Dr. Bernstein's deposition to take place on October 26, 2010. *Notice of Deposition*, Doc. No. 83. Dr. Bernstein's deposition fee is three thousand dollars (\$3,000). Exhibit B, attached to *Defendants' Response to Plaintiff's Motion for Protective Order Concerning Expert Deposition Fee*, Doc. No. 84 [*"Defendants' Response"*]. Plaintiff seeks reduction of the fee, characterizing the fee as excessive and unreasonable.

Fed. R. Civ. P. 26(b)(4)(C) provides that "[u]nless manifest injustice would result," a party seeking discovery from an opponent's expert witness must pay the expert a reasonable fee.

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<sup>1</sup>Although plaintiff was afforded the opportunity to reply in support of her motion, *see Order*, Doc. No. 85, plaintiff has not filed a reply.

The reasonableness of the fee falls within the discretion of the Court. *See Weimer v. Honda of America, Mfg., Inc.*, No. 2:06-CV-844, 2008 WL 5142418 at \*1 (S.D. Ohio Dec. 5, 2008), citing *Fisher-Price, Inc. v. Safety 1<sup>st</sup>, Inc.*, 217 F.R.D. 329, 333 (D. Del. 2003); *Jochins v. Isuzu Motors, Ltd.*, 141 F.R.D. 493, 495 (S.D. Iowa 1992); *Hurst v. United States*, 123 F.R.D. 319, 321 (D. S.D. 1988). In determining the appropriate fee, the Court is to consider the education and experience of the expert, the prevailing rates for similar experts, as well as the complexity of the information sought. *Id.*, citing *Massosoit v. Carter*, 227 F.R.D. 264, 265 (M.D. N.C. 2005). “An expert’s regular hourly rate for professional services is presumptively a reasonable hourly rate for deposition.” *Barrett v. Nextel Communications, Inc.*, No. 04CV74556DT, 2006 WL 374757 at \*2 (E.D. Mich. Feb. 16, 2006), citing *Mathis v. NYNEX*, 165 F.R.D. 23 (E.D. N.Y. 1996).

Plaintiff’s motion is based primarily on her contention that Dr. Bernstein’s fee has not been either explained or justified. *Defendants’ Response* addresses both issues.

In this case, the fee of \$3,000 is a flat fee that Dr. Bernstein charges for discovery depositions.<sup>2</sup> Dr. Bernstein bases his fee “on the fact that I must leave the majority of my work day to allow for the exigencies and vagaries of this exercise.” Exhibit B, attached to *Defendants’ Response*. The fee does not include time spent by Dr. Bernstein in preparing for the deposition. *Id.*

Dr. Bernstein obtained his medical degree in 1987. Exhibit A, attached to *Defendants’ Response*. He is Board-certified and is broadly published. *Id.* He has provided consulting services to a wide variety of organizations. *Id.* He has maintained a private practice since 1994 and has held academic positions since 1991. *Id.*

In support of their position that the fee is reasonable, Defendants offer the *curriculum vitae* and expert fees of five other physicians. Two of the experts practice, like Dr. Bernstein, in

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<sup>2</sup>The Court notes that Defendants’ counsel characterizes the \$3,000 fee as compensation for the first four hours of deposition (*see Defendants’ Response*, at 5) while Dr. Bernstein characterizes the fee as a flat fee. The Court will rely on the characterization of Dr. Bernstein rather than that of counsel.

Pittsburgh, Pennsylvania; one expert practices in Greensburg, Pennsylvania; and the remaining two experts practice in Martins Ferry and Zanesville, Ohio. *See Exhibits C-G, attached to Defendants' Response.* Dr. Bernstein's fee is lower than that charged by the Pittsburgh physicians: Drs. Bookwalter and Cosgrove charge almost \$3000 for a two-hour deposition and \$250 per 1/4 hour thereafter. Exhibits C, D, attached to *Defendants' Response.* Dr. Hennessey, who practices in Greensburg, Pennsylvania, charges \$1800 per hour for an oral deposition and \$2100 per hour for a video deposition. Exhibit E, attached to *Defendants' Response.* Dr. Bernstein's fee is comparable to the physicians who practice in Martins Ferry and Zanesville, Ohio: Thomas Romano, M.D., Ph.D., charges the greater of \$500.00 per hour or a total of \$1250.00, Exhibit F, attached to *Defendants' Response;* Robert J. Thompson, M.D., charges \$900 for the first hour of deposition and either \$500 per hour thereafter or \$125 per 15 minutes thereafter, Exhibit G, attached to *Defendants' Response.*

The Court is unable to find that the remaining claim in this case presents issues of unusual complexity. However, in view of the education and experience of Dr. Bernstein, and of the rates of similar professionals for similar services, the Court concludes that Dr. Bernstein's deposition fee of \$3,000 is reasonable. The Court does not find that any manifest injustice would result from Dr. Bernstein being compensated accordingly.

The Plaintiff's *Motion for Protective Order, Doc. No. 82*, is therefore **DENIED**.

**October 25, 2010**  
**DATE**

*S/ Norah McCann King*  
**NORAH McCANN KING**  
**UNITED STATES MAGISTRATE JUDGE**

