

## Discovery of Expert Witnesses: Amending Rule 26(b)(4)(E) to Limit Expert Fee Shifting and Reduce Litigation Abuses

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*The federal expert witness discovery rule makes sense in theory: it provides for robust discovery of a testifying expert's opinions while requiring the opposing party to pay for the expenses related to its discovery of those opinions, namely payment for the expert's deposition. In practice, though, the rule was not well-drafted and is fraught with problems that make it unfair and inefficient.*

*First, the expert discovery rule strikes the wrong balance, which results in the opposing party being forced to pay excessive amounts for the expert's work. Second, the expert discovery rule is vague and its contours are unclear. This is particularly troubling because fee shifting of any kind is almost unheard of in the federal courts, and in the rare occasions in which it is mandated, such as for e-discovery, there exist clear procedures and safeguards.‡ Not so, however, in the context of fee shifting for expert discovery expenses. The rule is unclear and district courts disagree about basic questions arising under the rule: Are an expert's fees for traveling to*

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\* Many of the most useful law review articles are spawned by their authors' own experiences, and this Article is no exception. For that, I thank opposing counsel who have advocated positions—both reasonable and unreasonable—regarding Rule 26 and, in doing so, brought to light many of the rule's shortcomings. In addition, I thank Melissa Weresh and Thomas Mayes for reviewing earlier versions of this Article and providing valuable feedback. I thank Drake University Law School, in particular Dean Jerry Anderson and Associate Dean Andrew Jurs, for supporting this work.

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‡ Even with such safeguards, the high costs of e-discovery, combined with the shifting of such costs to the opposing party, can be daunting and discourage litigants from litigating in federal court. See David J. Cook, *Mutiny on the Fee Bounty: Redrafting Fee Clauses in the Age of Trump*, 17 U.C. DAVIS BUS. L.J. 57, 88 n.67 (2016) (“[D]iscovery costs, particularly related to ESI discovery, are partly responsible for making federal litigation ‘procedurally more complex, risky to prosecute, and very expensive,’ causing litigants to avoid litigating in federal court.”) (citing Gregory P. Joseph, *Trial Balloon: Federal Litigation-Where Did It Go Off Track?*, 34 LITIG. 5, 62 (2008)).

*and from a deposition included in the rule? Can an expert charge a higher hourly rate for his deposition time than he charged the retaining attorney? Can the expert make the other party pay in advance or refuse to sit for his deposition? What is the court’s role in ensuring that only reasonable fees are shifted despite the rule’s automatic nature? And because these issues play out almost exclusively at the federal district court level and never reach the appellate courts, these questions have no consistent or uniform answers, despite having been litigated in district courts for almost twenty-five years.*

*None of this makes sense given the enduring and increasing role that experts play in federal litigation. The expert fee shifting rule must be fixed so that the opposing party only has to pay fees for work that it controls and from which it benefits, and then only at a rate that is justified. Further, the rule must be amended to provide clarity about the categories of fees that are shifted as well as the process for shifting fees. Expert discovery is far too common and too costly to have an automatic fee shifting rule that is unfair and inefficient.*

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I. INTRODUCTION

While expert witnesses have long been a staple of federal litigation, their use and related expenses are increasing.<sup>1</sup> One such expense arises in the area of expert discovery.<sup>2</sup> Federal Rule of Civil Procedure 26(b)(4)(E),

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<sup>1</sup> See Lance L. Shea, Ronn B. Kreps & Olufemi O. Solade, *An Indispensable Force of Persuasion: Navigating Expert Discovery*, 2010 FOR THE DEFENSE 14, 15 (“Expert witnesses play an increasingly common and crucial role in litigation today.”).

<sup>2</sup> Over fifteen years ago, one commentator critiqued the high fees charged by experts and the impact such fees have on the legal system:

The sky has really become the limit. For example, in some cases medical experts are now demanding hourly rates of \$700, \$800, or even \$1,000 or more per hour for deposition testimony. Although such fees are usually

which addresses discovery of expert opinions, provides that “[u]nless manifest injustice would result, the court must require that the party seeking discovery . . . pay the expert a reasonable fee for time spent in responding to discovery.”<sup>3</sup> In other words, if a party wants to depose the opposing expert, it has to pay to do so. While this sort of fee shifting is seemingly straightforward, the rule is fraught with problems.

Many of these problems arise from the rule’s lack of clarity—what, for example, does “time spent responding to discovery” mean and what differentiates “reasonable fees” from unreasonable fees? Other problems arise from the rule’s failure to address key questions that arise under it, including when fees are due and the logistics of fee shifting. Finally, some problems with the rule arise from its overbreadth, which results in experts’ fees shifting to an opponent without justification.

These shortcomings of the expert discovery rule have real consequences for litigants and courts. Not only is the use of experts a mainstay of federal litigation,<sup>4</sup> discovery—and, in particular, depositions—of such experts is likewise routine.<sup>5</sup> Unlike lay witnesses who are paid only a nominal witness fee per day for their depositions regardless of their profession,<sup>6</sup> experts are expensive and are paid professional rates. With typical rates that often exceed \$500 per hour and reach upwards of \$1000

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excessive, sometimes these rates are paid, thereby perpetuating the notion that it is the expert, and not the judicial system, that controls such fees.

Mark Canepa, *Drawing the Line on Excessive Expert Witness Fees*, MONDAQ, <http://www.mondaq.com/unitedstates/x/10024/Drawing+The+Line+On+Excessive+Expert+Witness+Fees> (last updated Jan. 31, 2001).

<sup>3</sup> FED. R. CIV. P. 26(b)(4)(E).

<sup>4</sup> See Andrew W. Jurs, *Expert Prevalence, Persuasion, and Price: What Trial Participants Really Think About Experts*, 91 IND. L.J. 353, 359 (2016) (“To recap, studies have found that experts appear in between 63% and 86% of cases, with studies in the 1990s showing between 4.1 and 4.8 experts per case and the newest study in 2005 finding 3.6 experts per case.”).

<sup>5</sup> See Amendments to the Fed. Rules of Civil Procedure, 146 F.R.D. 401, 639 (1993) (addressing the right to take the opposing expert’s deposition and stating that the report disclosure requirement “may . . . eliminate the need for some such depositions or at least reduce the length of the depositions”).

<sup>6</sup> See *Hillmann v. City of Chicago*, No. 04 C 6671, 2017 WL 3521098, at \*10 (N.D. Ill. Aug. 16, 2017) (“‘The witness fee specified in § 1920(3) is defined in 28 U.S.C. § 1821,’ which provides that witnesses who travel to testify at trial or sit for a deposition must be paid an ‘attendance fee’ of \$40 per day and must be reimbursed for their travel and related expenses.”) (first citing 28 U.S.C. § 1821(a)(1), (b)–(c)(1), (c)(3)–(d)(1) (2012); and then citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987)).

per hour<sup>7</sup>—or even “\$12,000 per day”<sup>8</sup> for experts that charge a flat fee—the stakes are high for the opposing party to whom expert discovery fees are shifted.<sup>9</sup> The already high-stakes of expert fee shifting is made even more costly, and even unfair, by the rule’s shortcomings. And because these problems play out exclusively at the district court level, these shortcomings have not been resolved at the appellate level.

This Article explores the myriad ways in which the expert discovery rule falls short of its purpose and the ways in which it should be improved. Part II discusses the existing rule, focusing on its key provisions, scope, and purposes, and the larger procedural framework in which it operates. Part III addresses the various and conflicting ways in which courts have interpreted and applied the rule’s key provisions. Part IV addresses the negative implications of the current rule that arise from its ambiguity and the balance it strikes in favor of excessive fee shifting. Part V proposes amendments to the rule that would minimize these problems and result in a rule that better serves the purposes behind expert fee shifting. Many of these problems can be solved by adding clarity and content to the rule, with the remaining problems lessened by adding certain guidelines and presumptions into the rule.

## II. THE BASICS OF THE EXPERT FEE SHIFTING RULE

### A. *Rule 26: Expert Discovery Obligations in General*

The expert fee shifting provision is contained within Rule 26. Not only does Rule 26 broadly address litigants’ discovery disclosures in general, it includes several provisions relating exclusively to discovery-related obligations for expert witnesses.<sup>10</sup> That the expert fee shifting rule arises in

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<sup>7</sup> See Victoria Negron, *Expert Witness Fee Report: Facts, Figures & Trends in 2017*, EXPERT INST. (Mar. 20, 2018), <https://www.theexpertinstitute.com/expert-witness-fee-report-facts-figures-trends-in-2017/> (surveying expert witnesses nationwide “across all industries and areas of practice” and finding average deposition fees of \$444.31 (Northeast), \$407.51 (South), \$415.20 (Midwest), and \$380.05 (West)).

<sup>8</sup> *EEOC v. Johnson & Higgins, Inc.*, No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at \*3 (S.D.N.Y. Jan. 21, 1999) (retaining party demanded payment of \$12,000 for one day of deposition testimony by its expert).

<sup>9</sup> It is not uncommon for the deposing party to have to pay six figures for the privilege of deposing the other side’s expert. See, e.g., *Neutral Tandem, Inc. v. Peerless Network, Inc.*, No. 08 C 3402, 2011 WL 13199213, at \*5 (N.D. Ill. Sept. 1, 2011) (awarding “a total of \$48,020.00, pursuant to Rule 26(b)(4)(E)” for two experts’ depositions).

<sup>10</sup> Federal Rule of Civil Procedure 26, entitled “Duty to Disclose; General Provisions Governing Discovery,” is divided into two parts: (a) “Required Disclosures” and (b) “Discovery Scope and Limits.” Expert testimony is addressed in both parts. Part (a) addresses, among other things, the “Disclosure of Expert Testimony,” and covers the timing and content of disclosure of experts’ opinions. FED. R. CIV. P. 26(a)(2). That section differentiates between the disclosure requirements for experts retained specifically for

the context of Rule 26 is no coincidence; the various parts of Rule 26 are designed to work in tandem.

Most notably, the shifting of discovery expert fees to the opposing party<sup>11</sup> is justified by the robust automatic disclosure rule that applies to most experts.<sup>12</sup> The broad expert disclosure rule requires that most experts provide a complete and accurate disclosure of their opinions, the basis for those opinions, and all information reviewed in forming that opinion.<sup>13</sup> The disclosure rule also requires most experts to disclose information about, among other things, their background, experience, expertise, and rates.<sup>14</sup> Because of the broad disclosure requirements, Rule 26 anticipates that it will be unnecessary for the expert to be deposed or, even if deposed, for the deposition to be significantly shorter than it would be without the disclosures.<sup>15</sup> In addition, the right to depose an opposing expert<sup>16</sup> is balanced by the obligation to pay the expert for her deposition time.<sup>17</sup> By making the opposing party pay for the deposition, the rule assures that the party that retained the expert will not have to pay the expert for work that the party did not request nor benefit from, such as the expert's deposition. Yet, at the same time, the rule permits the free and liberal discovery of information, which is a cornerstone of the Federal Rules of Civil Procedure.<sup>18</sup>

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purposes of litigation and other experts, and only requires the former to provide reports. Part (b) addresses, among other matters, "Trial Preparation: Experts." Namely, Rule 26(b)(4) provides that:

- "A party may depose any person who has been identified as an expert whose opinions may be presented at trial." FED. R. CIV. P. 26(b)(4)(A);
- "[D]rafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded[,] is protected work product, as are many "communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications . . . ." FED. R. CIV. P. 26(b)(4)(B)–(C);
- A "party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial" absent certain exceptions. FED. R. CIV. P. 26(b)(4)(D);
- "Unless manifest injustice would result, the court must require that the party seeking discovery . . . pay the expert a reasonable fee for time spent in responding to discovery . . . ." FED. R. CIV. P. 26(b)(4)(E).

<sup>11</sup> FED. R. CIV. P. 26(b)(4)(E).

<sup>12</sup> FED. R. CIV. P. 26(a)(2).

<sup>13</sup> *See id.*

<sup>14</sup> FED. R. CIV. P. 26(a)(2)(B).

<sup>15</sup> *See* 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2034 (3d ed. 1998), Westlaw (database updated Nov. 2018).

<sup>16</sup> *See* FED. R. CIV. P. 26(b)(4)(A).

<sup>17</sup> FED. R. CIV. P. 26(b)(4)(E).

<sup>18</sup> *See Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the

B. *The Rationale for the Expert Fee Shifting Rule*

The “basic proposition” of the expert fee shifting rule “is relatively straightforward—a party that takes advantage of the opportunity afforded by Rule 26(b)(4)(A) to prepare a more forceful cross-examination should pay the expert’s charges for submitting to this examination.”<sup>19</sup> In other words, while a party is permitted to depose the opposing party’s expert, the deposing party should be the one who pays the expert’s deposition fees.

While this basic rationale behind expert fee shifting may appear logical, fee shifting—even when seemingly warranted—is an anomaly within the American legal system.<sup>20</sup> Fees are rarely shifted, let alone shifted automatically.<sup>21</sup> On the rare occasion in which attorneys’ fees are shifted, the shifting is not automatic, but rather happens only after a detailed fee application is made. The opposing party has the opportunity to challenge the application and the court ultimately arrives at a reasonable amount.<sup>22</sup> Thus, the question arises: what warrants the unique and automatic rule for shifting experts’ fees? The answer comes down to experts’ voluntary involvement in the legal system and the fact that someone has to pay them; the tradeoff between mandatory disclosures and the perceived need for depositions; and the fact that the deposing party controls the deposition by determining the location, length, etc., and thus the related costs.

First, expert witnesses are themselves anomalies. Most witnesses in litigation have not willingly injected themselves into the legal process; they are there, generally, because they have first-hand knowledge of some fact at issue in a trial. If necessary, they can be subpoenaed and forced to provide testimony. They are paid a nominal per diem amount for their testimony,

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facts underlying his opponent’s case.”); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 739 (1998) (discussing liberalization of discovery rules).

<sup>19</sup> WRIGHT ET AL., *supra* note 15, § 2034; *see also* Eastman v. Allstate Ins. Co., No. 14-cv-00703-WQH (WVG), 2016 WL 795881, at \*4 (S.D. Cal. Feb. 29, 2016).

<sup>20</sup> *See, e.g.*, Globe Distributors, Inc. v. Adolph Coors Co. (*In re* Globe Distributors, Inc.), 145 B.R. 728, 733 (Bankr. D.N.H. 1992) (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 245 (1975)) (noting that a fee shifting statute was “contrary to the general ‘American rule’ that each party to a lawsuit bears its own costs (and fees)”).

<sup>21</sup> *See id.* at 733 (“Where, as here, an exception to the general rule is allowed, such [fee shifting] should be implemented in a conservative fashion.”).

<sup>22</sup> *See* DiNicola v. Serv. Emps. Int’l Union Local 503, No. 6:08-cv-6317-TC, 2013 WL 5781220, at \*1–2 (D. Or. Oct. 25, 2013), for an example of the rigorous and detailed procedures involved in shifting attorney’s fees under a federal statute. *See also* Matthew D. Klaiber, Comment, *A Uniform Fee-Setting System for Calculating Court-Awarded Attorneys’ Fees: Combining Ex Ante Rates with a Multifactor Lodestar Method and a Performance-Based Mathematical Model*, 66 MD. L. REV. 228, 235 (2006) (noting development of “certain fee-calculation methodologies aimed at guiding the process of awarding attorneys’ fees[,]” including “the percentage-of-recovery method, the lodestar method, and the pure factor-based method”).

regardless of the hardship or costs imposed on them or their work as a result of providing such testimony.<sup>23</sup> Expert witnesses, though, are retained by one of the parties. The expert witness serves by choice and, like most people, chooses not to work for free.

As it turns out, the fact that experts are hired—and not required—to be part of the litigation process makes all the difference as to why discovery fees for experts are shifted. Rather than expert discovery being viewed as a right, like other forms of discovery, it is viewed more as a privilege with strings attached.<sup>24</sup> The party that hires the expert must pay the expert for time spent forming expert opinions in the case, which includes reviewing documents, talking to persons with first-hand knowledge, reviewing relevant literature in the expert's field, formulating opinions, and drafting a report. That can be costly, and it is a cost that is paid for solely by the party that retains the expert.<sup>25</sup> Expert discovery of those opinions is thus viewed as potentially “unfair” because it “let[s] one party have for free what the other party has paid for.”<sup>26</sup> Therefore, historically, courts have restricted discovery of an adversary's expert, particularly as to the expert's opinions, based on “the fear that one side will benefit unduly from the other's better preparation.”<sup>27</sup> Rule 26(b)(4)(E) shifting of expert discovery fees represents an attempt to find a middle ground that avoids this potential unfairness by allocating “expert expenses between the retaining party and the one seeking discovery.”<sup>28</sup> The result is that discovery of experts' testimony is allowed, but the deposing party must pay for it.

Second, unlike lay witnesses, experts have to disclose their opinions. In theory, such disclosures obviate, or at least drastically reduce, the need for any, let alone lengthy, deposition testimony. This is because all of the experts' opinions, and the bases for such opinions, have already been disclosed.<sup>29</sup> Indeed, when Rule 26 was amended to require disclosure of

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<sup>23</sup> See 28 U.S.C.A. § 1821(b) (West 2018) (“A witness shall be paid an attendance fee of \$40 per day for each day's attendance.”).

<sup>24</sup> See WRIGHT ET AL., *supra* note 15, § 2034.

<sup>25</sup> See *Mann v. Taser Int'l, Inc.*, No. 4:05-CV-0273-HLM, 2007 WL 9712069, at \*6 (N.D. Ga. July 24, 2007) (quoting *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 645 (E.D.N.Y. 1997)) (“Rule 26(b)(4)(C)'s mandatory compensation requirement is intended ‘to avoid the unfairness of requiring one party to provide expensive discovery for another party's benefit without reimbursement.’”).

<sup>26</sup> WRIGHT ET AL., *supra* note 15, § 2034.

<sup>27</sup> FED. R. CIV. P. 26 advisory committee's note to 1970 amendment.

<sup>28</sup> WRIGHT ET AL., *supra* note 15, § 2034.

<sup>29</sup> See *Schmidt v. Solis*, 272 F.R.D.1, 2 (D.D.C. 2010); *Waters v. City of Chicago*, 526 F. Supp. 2d 899, 900 (N.D. Ill. 2007) (“This Court frequently reminds counsel in cases before it that an important consequence of the Rule 26(a)(2)(B) and (C) requirement of a comprehensive report from every opinion witness who is expected to testify is that the witness' trial testimony is circumscribed by that report.”); cf. WRIGHT ET AL., *supra* note 15, § 2034 (“If, as was hoped, these disclosures serve to avoid the need for some experts'



expert reports, one primary reason cited for the amendment was that it would and should discourage parties from taking experts' depositions. The Rule 26 Advisory Committee reasoned that the expert's report would "eliminate the need to take a useless deposition in which the expert simply repeats what [the expert] had said in his report." By extension, the Advisory Committee believed that "forc[ing] the party taking the deposition to pay the expert's fee" would hopefully "eliminate[e] such depositions because the expert will have produced a report that clearly indicates the opinions the expert holds and will testify about at trial."<sup>30</sup> Put differently, the deposing party could have chosen a less expensive discovery method, such as written interrogatories, but it did not.<sup>31</sup> Thus, the need for an expert deposition is viewed with some skepticism, such that a party that insists on deposing the opposing expert, despite having a "complete and accurate" report, must pay for that luxury.

Finally, the third rationale is that the deposing party controls not only whether the expert is deposed, but also the length and location of the deposition. So, not only is the deposing party viewed as the beneficiary of the deposition, but it is also viewed as the party that controls the costs associated with the deposition. Put simply, if the deposing party elects to take an eight-hour deposition at a location that is remote for the expert, it should have to incur all related costs—not the party that retained the expert.

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depositions, or at least to shorten the depositions, that may mean that there will be fewer occasions for payment of expert fees pursuant to Rule 26(b)(4)(C)."). For a thorough history of the expert discovery rule from its inception to its most recent amendments in 2010, see generally Brett Lawrence, Note, *What Do I Have to Do to Get Paid Around Here?: Rule 26(b)(4)(E)(i) and the Qualms Regarding Expert Deposition Preparation Time*, 74 WASH. & LEE L. REV. 2231 (2017).

<sup>30</sup> FED. R. CIV. P. 26 advisory committee's note to 1993 amendment.

[P]aragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. 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. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.

*Id.*

<sup>31</sup> *Lancaster v. Lord*, No. 90 Civ. 5843 (RLC), 1993 WL 97258, at \*2 (S.D.N.Y. Mar. 31, 1993) ("Since the defendants chose to depose [the opposing expert] rather than to seek discovery through written interrogatories, Rule 26(b)(4)(C) applies, and plaintiff is entitled to reimbursement for [the expert's] time spent preparing for and attending the deposition[.]" (citation omitted)).

*C. The Mechanics of the Expert Fee Shifting Rule*

The expert fee shifting rule is seemingly straightforward. It provides, in pertinent part, that “[u]nless manifest injustice would result . . . the court must require that the party seeking discovery . . . pay [the adverse party’s] expert a reasonable fee for time spent in responding to discovery under [this subdivision] . . . .”<sup>32</sup> Thus, the rule, at its clearest and most basic level, provides that the party who seeks expert discovery must pay for it. It is well-settled that deposition time is compensable under Rule 26(b)(4)(E) as “time spent in responding to discovery.”<sup>33</sup> Accordingly, the rule does not by its express terms include trial testimony, responding to a *Daubert* motion, or any non-discovery matter.<sup>34</sup> Further, the rule covers discovery relating to all types of experts, whether the expert is one that is specifically retained for litigation or not.<sup>35</sup> Thus, fees are shifted even for experts that are the adversary’s employees or for experts that have opinions due to their pre-suit involvement in the subject of the litigation, such as in treating physicians.<sup>36</sup> And finally, because the rule “provides an independent basis for recovery of expert fees as part of discovery,” it “applies to both parties, not just to the prevailing party.”<sup>37</sup>

For expert discovery covered by the rule, the fee-shifting provision contains two operative parts: (1) the party seeking discovery must “pay the expert a reasonable fee,” and (2) the fee payment is only “for time spent in responding to discovery.” While this language seems straightforward at first blush, the devil (and litigation) is in the details. Various and recurring questions arise in the context of fee shifting. What is “time spent responding to discovery?” The usual way in which experts respond to discovery is by providing deposition testimony. Still, what time relating to depositions is covered? While the actual time spent in being deposed is clearly

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<sup>32</sup> FED. R. CIV. P. 26(b)(4)(E). Prior to the 2010 amendment to Rule 26, the expert fee shifting rule was located at 26(b)(4)(C). Thus, in cases that predate that amendment, a reference to Rule 26(b)(4)(C) is a reference to the fee shifting rule now housed at 26(b)(4)(E). See Lawrence, *supra* note 29, at 2253 (“[F]ormer subdivision (b)(4)(C) became (b)(4)(E).”).

<sup>33</sup> Fisher v. Accor Hotels, Inc., No. Civ.A. 02-CV-8576, 2004 WL 73727, at \*1 (E.D. Pa. Jan. 12, 2004) (citation omitted).

<sup>34</sup> See Nester v. Textron, Inc., No. 1:13-CV-920 RP, 2016 WL 6537991, at \*3 (W.D. Tex. Nov. 3, 2016).

<sup>35</sup> See FED. R. CIV. P. 26(b)(4)(E).

<sup>36</sup> See Maxwell S. Kennerly, *Treating Physicians & Non-Retained Expert Witnesses: What Do Parties Have to Disclose Before Trial?*, LITIG. & TRIAL (Mar. 7, 2017) <https://www.litigationandtrial.com/2017/03/articles/attorney/non-retained-expert-witnesses/> (“Non-retained’ expert witnesses are more common in federal court than many people realize: think of the doctors who treated an injured plaintiff, the government employees who investigated an accident, the engineers who worked on a defective product, or the competing inventors of a design in a patent infringement case.”).

<sup>37</sup> La. Power & Light Co. v. Kellstrom, 50 F.3d 319, 332–33 (5th Cir. 1995).

compensable, what about the time peripheral to a deposition, such as travel time? What about the time that an expert spends preparing (e.g., reviewing the file) for the deposition?

Similarly, what constitutes a “reasonable fee?” Is a flat-fee rate of \$3000 for a deposition that lasts only two hours “reasonable?” Is an hourly rate of \$500 for deposition testimony “reasonable?” What if that same expert only charged \$200 an hour for other work in the case? In addition, interpretative problems arise not only from what the rule says, but from what the rule does not say. The rule fails to state when fees are due or who bears the burden of proving the reasonableness of fees. Further, the rule does not address the procedures when disagreements about fees arise—a gap made all the worse by the rule’s blanket pronouncement that fees must be paid unless “manifest injustice” would result. These problems associated with the rule are addressed in Part III, and the overall implications associated with those problems are discussed in Part IV.

### III. PROBLEMS WITH THE FEE SHIFTING RULE

The problems with the expert fee-shifting rule arise from not only what it does say, but also from what it does not say. First and foremost, the rule is plagued by interpretive issues regarding its scope that arise from ambiguities within its four corners; key operational terms are left vague and undefined. Second, the rule makes no provisions for the logistical issues that routinely arise under it. It leaves litigants and courts alike to make educated guesses about, for example, when payments are due. Finally, even for matters in which it is clear, the rule strikes the wrong balance by shifting fees without justification. The result is that the deposing party ends up paying experts’ fees that it did not request, does not control, and gains no benefits from.

#### A. *Interpretative Problems: What Constitutes “Reasonable Fees” for “Time Spent Responding to Discovery”*

While the rule’s “basic proposition is relatively straightforward,” the implementation is not.<sup>38</sup> Instead, “potential difficulties and unfairness lurk below the surface.”<sup>39</sup> Most notably, the two main prongs of the rule—that the deposing party must “pay the expert a reasonable fee” and that fee must pay for “time spent in responding to discovery”—raise numerous interpretative questions.

For example, is an expert’s flat fee that charges the opposing party for setting aside a full day “reasonable” regardless of the length of the

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<sup>38</sup> WRIGHT ET AL., *supra* note 15, § 2034.

<sup>39</sup> *Id.*

deposition? Is an expert's fee "reasonable" if the expert charges a higher hourly rate for his deposition than he did for the time spent preparing his report? Is time that an expert spends travelling to and from the deposition part of "time spent in responding to discovery," such that the deposing party must pay the expert's fees for that time? What about the time an expert spends preparing for her deposition—must the opposing party pay for such time as part of "time spent responding to discovery?"

In addition, some interpretative problems arise from what the rule fails to address. Most notably absent from the four corners of the rule is any mention of when fees are due and what process should be employed when disputes arise over fees. And despite an endless stream of district court litigation, these interpretative problems continue to mire the fee-shifting rule. Ambiguities in a rule frequently are resolved at the appellate court level. Once the appellate courts conclusively interpret a rule, its meaning becomes settled, there is uniformity, and there is no need (or ability) for district courts to continue to re-examine the issue. That has not, however, been the case for the expert fee shifting rule.<sup>40</sup> Rather, the same questions of law have been repeatedly litigated in federal courtrooms across the country.<sup>41</sup> What makes this rule different, such that the typical process for resolving its meaning has not happened despite its promulgation over twenty-five years ago?

The problem lies in the fact that almost all litigation over the rule occurs at the district court level and never reaches the appellate courts.<sup>42</sup> It is well-known that "the [r]ule lacks discussion at the federal appellate level."<sup>43</sup> The dearth of appellate discussion stems from two dynamics. First, most cases settle rather than go trial and thus there is no appeal. Second, even for those cases for which there is an appeal, the issue of which fees should have shifted would not be an issue raised on appeal because it is not an outcome-determinative issue. So while understandable, the lack of authority at the appellate level means the rule "cannot be applied consistently in a region, let

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<sup>40</sup> *Id.* ("The courts have deplored the paucity of authority on the subject . . .") (footnote omitted).

<sup>41</sup> The absence of appellate authority, and thus consistency, has been noted by district courts. *See, e.g.,* *Veasey v. Abbott*, No. 2:13-CV-193, 2017 WL 1092307, at \*1 (S.D. Tex. Mar. 23, 2017) ("The Fifth Circuit has not addressed whether Rule 26(b)(4)(E) covers fees for time spent preparing for a deposition. Other courts are split on whether the rule allows for such compensation with a slim majority allowing recovery as long as the fees are reasonable." (citing *Borel v. Chevron U.S.A. Inc.*, 265 F.R.D. 275, 277 (E.D. La. 2010))).

<sup>42</sup> Namely, it is highly unusual for a party to raise an issue regarding expert fees on appeal. Such an issue surely would not warrant an interlocutory appeal; not only because it is not likely to irreparably alter the status quo if it goes to final judgment, but also because the likelihood of success is low given the deferential abuse of discretion standard. And for those few cases that do not settle and go to final judgment, at that point there are more consequential issues to appeal.

<sup>43</sup> *Lawrence, supra* note 29, at 2277.

alone across the United States.”<sup>44</sup>

1. Disputes Regarding What Constitutes “Time Spent Responding to Discovery”

The largest interpretative problem from the fee shifting rule arises from the phrase “time responding to discovery.” Courts must decide “what is encompassed by the phrase,” ranging from “expert fees for the actual deposition only, or fees for deposition preparation and other expenses, including travel time and expense.”<sup>45</sup> Not surprisingly, there is no consensus among courts or litigants as to what this cryptic phrase entails. Further, the Advisory Committee Note “provides only the most limited guidance.”<sup>46</sup> It “states, without further elaboration, that ‘the expert’s fees for the deposition will ordinarily be borne by the party taking the deposition.’”<sup>47</sup> So although it is clear that an expert’s fees for time spent in a deposition are covered, it is unclear and disputed whether other fees related to a deposition, such as preparation for the deposition and travel to the deposition, must be paid by the deposing party. Courts are split, such that “[t]here has . . . ‘been considerable disagreement among courts regarding what activities qualify as ‘time spent in responding to discovery.’”<sup>48</sup>

Some courts have observed that “[t]he Advisory Committee Note’s use of the phrase ‘for the deposition’ suggests that the shifting of expert fees is limited to the fees attributable to the deposition itself.”<sup>49</sup> As one court correctly conceded, however, “the Advisory Committee Note ‘could be construed differently,’ and is not dispositive.”<sup>50</sup> And, indeed, many courts do construe that phrase differently. The various interpretations of this phrase are discussed below with regard to two primary areas of dispute: whether depositions preparation time is covered, and whether time spent traveling to and from a deposition is covered.<sup>51</sup>

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<sup>44</sup> *Id.* (footnote omitted).

<sup>45</sup> *Durkin v. Paccar, Inc.*, No. 10-2013 (JHR/AMD), 2012 WL 12887769, at \*3 (D.N.J. Dec. 28, 2012).

<sup>46</sup> *Eastman v. Allstate Ins. Co.*, No. 14-cv-00703-WQH (WVG), 2016 WL 795881, at \*5 n.1 (S.D. Cal. Feb. 29, 2016).

<sup>47</sup> *Id.* (citing FED. R. CIV. P. 26 advisory committee’s note to 1993 amendment).

<sup>48</sup> *Id.* at \*4 (quoting *Fulks v. Allstate Prop. & Cas., Ins. Co.*, No. 3:14-cv-29473, 2016 WL 447628, at \*2 (S.D. W. Va. Feb. 4, 2016)).

<sup>49</sup> *Rock River Commc’ns, Inc. v. Universal Music Grp.*, 276 F.R.D. 633, 635 (C.D. Cal. 2011).

<sup>50</sup> *Allstate Ins. Co.*, 2016 WL 795881, at \*5 n.1 (citation omitted).

<sup>51</sup> Other areas of dispute arise, but with less frequency and fewer consequences. For example, courts have addressed whether “time spent reviewing a deposition [transcript] falls within the scope of Rule 26(b)(4)(E)(i).” *Nester v. Textron, Inc.*, No. 1:13-CV-920 RP, 2016 WL 6537991, at \*4 (W.D. Tex. Nov. 3, 2016) (“However, like deposition preparation time, the Court finds that although the time an expert spends reviewing his or her deposition is

i. Whether Fees for Time Spent Preparing for the Deposition Are Shifted

Whether preparation time is included under the fee shifting rule has divided the federal courts.<sup>52</sup> The inquiry boils down to how courts interpret the phrase “time spent responding to discovery.” At one extreme, some courts hold that preparation time is always covered: “Fees awarded under this rule include time spent in preparing for the deposition, in traveling to the deposition, and in the deposition.”<sup>53</sup> At the other end of the spectrum, some courts hold that absent extenuating circumstances, an expert’s time outside of the deposition room is not covered: “[I]n the absence of extenuating circumstances, the deposing party is not required to compensate the expert for his or her preparation time.”<sup>54</sup> These courts reason, among other things, that “the language of the rule is too vague to directly dispose of the issue at hand.”<sup>55</sup> Other courts have attempted to carve out middle grounds, such as including preparation time in general, but not time spent consulting with the retaining party’s counsel.<sup>56</sup>

Without a clear standard in the rule itself, courts tend to resort to policy rationales in support of their interpretations—e.g., “even in exceptional, complex, or unusual circumstances expert deposition preparation and expert

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compensable, it should be limited to the extent it is unreasonable.” (citation omitted)). Interpretation issues arise because, while a deposing party may reasonably expect that an expert will read her deposition for “obvious errors or typos,” an expert may bill for time spent reviewing her deposition when her review is, in essence, to help prepare for cross-examination at trial. *Id.* Thus, review time is another category of fees that warrants clarification. *See id.*

<sup>52</sup> *See, e.g., Allstate Ins. Co.*, 2016 WL 795881, at \*1.

<sup>53</sup> *Auto. Rentals, Inc. v. Keith Huber, Inc.*, No. 1:10CV385-LG-RHW, 2012 WL 12854841, at \*1 (S.D. Miss. Jan. 10, 2012). This is, in fact, the most common approach. *See, e.g., Nester*, 2016 WL 6537991, at \*3 (citing *Halasa v. ITT Educ. Servs., Inc.*, 609 F.3d 844 (7th Cir. 2012)); *Ushijima v. Samsung Elecs. Co.*, No. A-12-CV-318-LY, 2015 WL 11251558, at \*6 (W.D. Tex. July 30, 2015) (ordering reimbursement of one hour of preparation time for every hour spent in deposition); *Se-Kure Controls, Inc. v. Vanguard Prods. Grp., Inc.*, 873 F. Supp. 2d 939, 956 (N.D. Ill. 2012) (“In general, courts in this District have concluded that, under Rule 26(b)(4)(E), it is reasonable for a party to recover expert witness fees from the opposing party for the time an expert spent both preparing for and attending a deposition conducted by the opposing party.”); *Tavarez-Guerrero v. Toledo-Dávila*, 271 F.R.D. 426, 428 (D.P.R. 2010) (“Courts have generally found that the party taking the deposition is required by Rule 26(b)(4)(E)(i) to pay for preparation time.”).

<sup>54</sup> *Allstate Ins. Co.*, 2016 WL 795881, at \*1 (“The second question is whether Allstate, as the party seeking discovery, is required to compensate the experts not only for their testimony—which Allstate has agreed to do—but also for their time spent preparing for and attending depositions.” (citing FED. R. CIV. P. 26(b)(4)(E)(i) (“Unless manifest injustice would result, the court must require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D).”))).

<sup>55</sup> *Id.* at \*5 (“[The rule] does not specifically address whether fees can be recovered for time spent preparing for a deposition . . .”).

<sup>56</sup> *See Allstate Ins. Co.*, 2016 WL 795881, at \*4.

trial preparation are inextricably intertwined.”<sup>57</sup> Some courts hold that an expert’s preparation time benefits the deposing party because “preparation is often necessary to enable the witness to be fully responsive during the deposition, and that preparation ‘facilitates the deposition process by avoiding repeated interruptions to enable the witness to refresh his recollection by consulting.’”<sup>58</sup> Other courts reach the opposite policy conclusion and hold that the beneficiary of an expert’s preparation is the party that hired him, even noting that the deposing attorney might prefer the expert be unprepared: “There are doubtless some attorneys who will send an expert into a deposition unprepared, but there are surely very few inquiring attorneys who complain.”<sup>59</sup> Because the rule does not provide clarity, and courts do not agree, widespread variation exists surrounding whether and when preparation time is covered.<sup>60</sup>

In light of the myriad interpretations, one court attempted to summarize the various positions taken by courts, positing four approaches:

As relevant here, courts within the Ninth Circuit and beyond have divided on the question of whether Rule 26(b)(4)(E)(i) requires the inquiring party to reimburse the expert for his or her preparation time. A number of courts have held that reasonable preparation time is reimbursable.<sup>61</sup> Other courts have reached the same conclusion on reimbursement for preparation time but have specifically excluded any time that the expert spends in consultation with the retaining party’s attorney.<sup>62</sup> Other courts

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<sup>57</sup> *Durkin v. Paccar, Inc.*, No. 10-2013 (JHR/AMD), 2012 WL 12887769, at \*4 (D.N.J. Dec. 28, 2012), *aff’d sub nom.*, *Durkin v. Wabash Nat’l*, No. 10-2013, 2013 WL 5466930 (D.N.J. Sept. 30, 2013).

<sup>58</sup> *Script Sec. Sols., LLC v. Amazon.com, Inc.*, No. 2:15-CV-1030-WCB, 2016 WL 6649721, at \*4 (E.D. Tex. Nov. 10, 2016) (citations omitted).

<sup>59</sup> *Allstate Ins. Co.*, 2016 WL 795881, at \*5.

<sup>60</sup> The variation exists not only across the courts of appeals, but also among the district courts in a given circuit. *See, e.g., id.* at \*4 (“There is no Ninth Circuit authority on point and no consensus among district courts within this circuit.”).

<sup>61</sup> *Id.* (first citing *United States ex rel. Liotine v. CDW–Gov’t, Inc.*, No. 3:05-cv-33-DRH-DGW, 2012 WL 1252982, at \*2 (S.D. Ill. Apr. 13, 2012); then citing *Borel v. Chevron U.S.A. Inc.*, 265 F.R.D. 275, 277 (E.D. La. 2010); then citing *Packer v. SN Servicing Corp.*, 243 F.R.D. 39, 42 (D. Conn. 2007); then citing *Lent v. Fashion Mall Partners, L.P.*, 223 F.R.D. 317, 318 (S.D.N.Y. 2004); then citing *Mannarino v. United States*, 218 F.R.D. 372, 376 (E.D.N.Y. 2003); then citing *Profile Prods., LLC v. Soil Mgmt. Techs., Inc.*, 155 F. Supp. 2d 880, 886 (N.D. Ill. 2001); and then citing *Collins v. Vill. of Woodridge*, 197 F.R.D. 354, 355 (N.D. Ill. 1999)).

<sup>62</sup> *Id.* (first citing *Ndubizu v. Drexel Univ.*, No. 07-3068, 2011 WL 6046816, at \*3 (E.D. Pa. Nov. 16, 2011); then citing *All Cities Realty, Inc. v. CF Real Estate Loans, Inc.*, No. SA CV 05-615 AHS (MLGx), 2008 WL 10594412, at \*6 (C.D. Cal. Mar. 14, 2008); then citing *Waters v. City of Chicago*, 526 F. Supp. 2d 899, 901 (N.D. Ill. 2007); then citing *Mock v. Johnson*, 218 F.R.D. 680, 683 (D. Haw. 2003); then citing *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 647 (E.D.N.Y. 1997); and then citing *Hose v. Chi. & N.W. Transp. Co.*, 154 F.R.D. 222, 228 (S.D. Iowa 1994)); *see, e.g., All Cities Realty, Inc.*, 2008 WL 10594412,

(and this appears to be a minority view) have held that preparation time is not “time spent in responding to discovery” reimbursable under Rule 26(b)(4)(E)(i).<sup>63</sup> A final line of decisions holds that preparation time is only reimbursable in complex cases, or in extenuating circumstances.<sup>64</sup>

Not only do different courts interpret the rule differently, whether preparation time is covered is sufficiently ambiguous that at least one judge has reversed his position, initially taking a “middle ground” approach and later adopting a *per se* rule:

In the *Fago* case, I attempted to find a middle ground for the fee provision in Fed. R. Civ. P. 26(b)(4)(C)(i) to deal with the ambiguities raised in preparing for deposition, where it may be unclear whether an expert is “responding to discovery” or engaging in trial preparation, the latter of which should not be charged to the deposing party. [A]fter careful consideration, I have come to the conclusion that my prior position was misguided. Instead, I believe that reasonable fees for the time spent by an expert for a deposition should always be paid by the party taking the deposition.<sup>65</sup>

In addition, some courts ignore this issue entirely and do not address whether

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at \*6 (“[T]he Court must avoid charging the opponent for the deposing party’s ordinary trial preparation . . . [and it] will not reimburse fees for the experts’ time spent in conference with counsel prior to the depositions.”).

<sup>63</sup> *Allstate Ins. Co.*, 2016 WL 795881, at \*4 (citing *Rock River Commc’ns, Inc. v. Universal Music Grp.*, 276 F.R.D. 633, 637 (C.D. Cal. 2011)).

<sup>64</sup> *Id.* (first citing *Fiber Optic Designs, Inc. v. New Eng. Pottery, LLC*, 262 F.R.D. 586, 592 (D. Colo. 2009); then citing *3M Co. v. Kanbar*, No. C06-01225 JW (HRL), 2007 WL 2972921, at \*3 (N.D. Cal. Oct. 10, 2007); then citing *M. T. McBrien, Inc. v. Liebert Corp.*, 173 F.R.D. 491, 493 (N.D. Ill. 1997); then citing *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 154 F.R.D. 212, 214 (E.D. Wis. 1994); and then citing *Rhee v. Witco Chem. Corp.*, 126 F.R.D. 45, 47 (N.D. Ill. 1989)).

The Court therefore holds that fee-shifting for expert preparation is the exception, not the rule, and is only required in extenuating circumstances. The Court must next decide whether such circumstances are present in this case. In so doing, the Court does not write on a blank slate, but is guided by other courts that have similarly construed Rule 26(b)(4)(E)(i). The *Rhee* court, for instance, noted that reimbursement of expert preparation time may be appropriate “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.” In *S.A. Healy*, the court similarly recognized an “exception to the general rule [against reimbursement] in complex cases where there has been a considerable lapse of time between an expert’s work on a case and the date of his actual deposition.” Another court allowed reimbursement for expert preparation fees where the case was ‘extremely complex’ and required the expert to review “voluminous documents.”

*Id.* at \*6.

<sup>65</sup> *Schmidt v. Solis*, 272 F.R.D. 1, 1 (D.D.C. 2010).



deposition preparation time is included in Rule 26(b)(4)(E)(i).<sup>66</sup> Instead, these courts assume, without providing any “rationalization,” that preparation time is covered.<sup>67</sup>

Finally, the rule’s ambiguity regarding fee shifting for preparation time also results in variation among experts. Some experts include this time in their invoices, while others do not.<sup>68</sup> This, too, creates a lack of uniformity, insofar as experts, without any guidance from the rule, will err on different sides—some will take the lack of clarity as an opportunity to charge opposing counsel for such expenses, whereas others will note the express lack of coverage as a basis not to include such fees.

Because neither the plain language of the rule nor its advisory notes shed sufficient light on what is meant by “time spent preparing for the deposition,” a few courts have resorted to issuing standing orders to clear up ambiguities in the rule.<sup>69</sup> For example, in a multidistrict litigation case, the court issued a two-page order with eleven protocols regarding the rule.<sup>70</sup> The order contains a paragraph defining what is included as “time spent responding to discovery”:

Pursuant to Rule 26(b)(4)(E), the Court shall require the party or parties seeking to depose an expert witness to pay the expert a reasonable fee for time spent by the expert in connection with his/her participation in the deposition. This shall include time spent preparing for the deposition (not including time spent conferring with counsel), actual time spent in the deposition, and travel time to and from the place where the deposition is conducted.<sup>71</sup>

While room exists for disagreement regarding the interpretation of the rule reflected in the standing order, the existence of a standing order at least serves to alleviate the interpretative problems and disputes in that particular court.

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<sup>66</sup> Lawrence, *supra* note 29, at 2263.

<sup>67</sup> *Id.*

<sup>68</sup> The author’s spouse has served as an expert in more than 100 cases in state and federal courts for approximately twenty years and has never billed the opposing party for time spent preparing for a deposition. When asked about his practice, he explained that an expert already has done the work and issued a report, and thus should already have done the “preparation” needed for a deposition. To the extent preparation time is needed, it likely is for the benefit of the party that engaged the expert, not the party taking the deposition.

<sup>69</sup> See, e.g., DEPOSITION PROTOCOL REGARDING TENDER & PAYMENT OF EXPERT WITNESSES IN CVLO MDL 875 CASES (2012), <https://www.paed.uscourts.gov/documents/MDL/MDL875/15expert%20deposition%20protocol.pdf> [hereinafter MDL PROTOCOL].

<sup>70</sup> While the protocol represents a single court’s response to the lack of clarity and guidance in the rule, the fact that such a protocol was deemed necessary—and that eleven different protocols all tied to Rule 26(b)(4)(E) were included—is telling and instructive.

<sup>71</sup> MDL PROTOCOL, *supra* note 69, ¶ 2.

In the vast majority of cases, there is no case precedent nor a standing order that clarifies what is included in “time spent responding to discovery.” As a result, litigants and courts frequently resort to policy considerations in their interpretations.<sup>72</sup> The considerations range from who controls the experts’ particular fees and for whose benefit such fees are truly incurred,<sup>73</sup> to the difficulty of gauging what preparation time is reasonable.<sup>74</sup> Thus, courts spend considerable time analyzing the pros and cons of including preparation time as part of “time spent responding to discovery.” Not surprisingly, courts weigh the competing policies differently, resulting in varied interpretations. The result is not only inconsistency among interpretations, but also the litigation costs of having various courts decide this issue anew because there is no settled law.

ii. Whether Fees and Expenses for Traveling to and from the Deposition Are Shifted

Like deposition preparation time, no consistency exists regarding whether the deposing party must pay for time and expenses spent traveling to and from the deposition. Just as it is unresolved whether preparation time is “time spent responding to discovery,” it also is unsettled whether time and expenses spent traveling to and from a deposition fall within that language. While many courts hold that time and expenses spent traveling is covered,<sup>75</sup>

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<sup>72</sup> See, e.g., *Durkin v. Paccar, Inc.*, No. 10-2013 (JHR/AMD), 2012 WL 12887769, at \*1 (D.N.J. Dec. 28, 2012), *aff’d sub nom.*, *Durkin v. Wabash Nat’l*, No. 10-2013, 2013 WL 5466930 (D.N.J. Sept. 30, 2013) (“Defendant has not cited any binding authority on the matter, but relies upon the policy behind Rule 26(b)(4) and asserts that the majority of the courts to have addressed this question permit reimbursement.” (citations omitted)).

<sup>73</sup> See, e.g., *Rock River Commc’ns, Inc. v. Universal Music Grp.*, 276 F.R.D. 633, 636 (C.D. Cal. 2011) (“[A]n expert’s deposition preparation may encompass a variety of tasks that contribute little or nothing to the efficiency of the deposition, are largely unrelated to the deposition, or are undertaken for an entirely partisan purpose . . .”).

<sup>74</sup> See generally *Eastman v. Allstate Ins. Co.*, No. 14-cv-00703-WQH (WVG), 2016 WL 795881, at \*5–6 (S.D. Cal. Feb. 29, 2016) (describing various concerns with holding that fees should be shifted for time spent preparing for a deposition).

<sup>75</sup> See, e.g., *Nnodimele v. City of New York*, No. 13-CV-3461 (ARR), 2015 WL 4461008, at \*2 (E.D.N.Y. July 21, 2015) (“Ordinarily, hours that an expert spends on preparation and travel in connection with the expert’s deposition are compensable under Rule 26(b)(4)(E).”); *Reit v. Post Props., Inc.*, No. 09 Civ. 5455(RMB)(KNF), 2010 WL 4537044, at \*2 (S.D.N.Y. Nov. 4, 2010) (“The district courts in the Second Circuit have consistently held that time spent by an expert preparing for a deposition is compensable under Rule 26(b)(4)(C),’ and that ‘time spent traveling to and from the deposition, and the expenses incurred during travel, so long as they are reasonable, are compensable under Rule 26(b)(4)(C).” (quoting *New York v. Solvent Chem. Co.*, 210 F.R.D. 462, 471–72 (W.D.N.Y. 2002)); *EEOC v. Johnson & Higgins, Inc.*, No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at \*3 (S.D.N.Y. Jan. 21, 1999) (“The EEOC therefore implicitly concedes that properly documented and reasonable travel expenses are reimbursable, and at least on the facts of this case, the Court agrees.” (citing *Ohuche v. British Airways*, No. 97 Civ. 1853 (JSM) RLE, 1998 WL 240481, at \*1 (S.D.N.Y. May 11, 1998) (granting recovery of expert’s travel

others hold that it is not contemplated by the rule.<sup>76</sup>

Without clear language in the rule, policy considerations—often inconsistent—abound. These policy considerations are weighed anew, and differently, by each trial court. Some courts that interpret the rule as not encompassing travel fees and expenses note the potential for the retaining party to impose increased costs on the deposing party by hiring an expert in a remote location.<sup>77</sup> Although recognizing that a party “should be free to select the expert of his choice[,]” the opposing party “should not be forced to pay the increased costs associated with [a party’s] decision to engage an expert from another part of the country.”<sup>78</sup> Other courts appear indifferent to the potential for one party to impose excessive costs on the opposing party, and do not take into account the reason for the retaining party’s choice of the remote expert.<sup>79</sup>

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expenses)); *Bonner v. Am. Airlines, Inc.*, No. 96CIV.4762(KMW)(HBP), 1997 WL 802894, at \*1 (S.D.N.Y. Dec. 31, 1997) (“[T]he weight of authority appears to hold that Rule 26(b)(4)(C) permits recovery of fees for an expert’s travel time . . . in connection with a deposition, along with the expert’s out-of-pocket expenses.”); *Harbor Software, Inc. v. Applied Sys., Inc.*, No. 92 Civ. 8097(HB), 1997 WL 187350, at \*3 (S.D.N.Y. Apr. 15, 1997) (granting recovery of expert’s travel expenses); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 646 (E.D.N.Y. 1997) (“[T]wo issues remain, namely whether [the expert] is entitled to compensation for travel time and for time spent preparing for the deposition. The short answers are yes and yes. Travel time has been held compensable.”); *DeFelice v. Am. Int’l Life Assurance Co. of N.Y.*, No. 94Civ.8165(AGS)(RLE), 1995 WL 753892, at \*1 (S.D.N.Y. Dec. 19, 1995) (granting recovery for expert’s travel expenses); *In re “Agent Orange” Prod. Liab. Litig.*, 105 F.R.D. 577, 582 (E.D.N.Y. 1985).

<sup>76</sup> *Bonner*, 1997 WL 802894, at \*1 (“Although there are conflicting decisions, the weight of authority appears to hold that Rule 26(b)(4)(C) permits recovery of fees for an expert’s travel time and preparation time in connection with a deposition, along with the expert’s out-of-pocket expenses.” (first citing *Magee*, 172 F.R.D. at 646; then citing *McHale v. Westcott*, 893 F. Supp. 143, 151 (N.D.N.Y. 1995); then citing *David Tunick, Inc. v. Kornfeld*, 151 F.R.D. 534, 536–37 (S.D.N.Y. 1993); then citing “*Agent Orange*” *Prod. Liab. Litig.*, 105 F.R.D. at 582; and then citing *Carter-Wallace, Inc. v. Hartz Mountain Indus.*, 553 F. Supp. 45, 53 (S.D.N.Y. 1982)).

<sup>77</sup> Clearly such gamesmanship would not be the sole reason—or even a reason—that a party selects a particular expert. The retaining party’s lack of regard for the fees and expenses associated with the expert’s location does nonetheless impose increased expenses on the opposing party, and the opposing party neither controls those increased expenses nor benefits from them.

<sup>78</sup> *Durkin v. Paccar, Inc.*, No. 10-2013 (JHR/AMD), 2012 WL 12887769, at \*4 (D.N.J. Dec. 28, 2012), *aff’d sub nom.*, *Durkin v. Wabash Nat’l*, No. 10-2013, 2013 WL 5466930 (D.N.J. Sept. 30, 2013) (quoting *Lent v. Fashion Mall Partners, L.P.*, 223 F.R.D. 317, 318 (S.D.N.Y. 2004)).

<sup>79</sup> *See, e.g.*, *Rock River Commc’ns, Inc. v. Universal Music Grp.*, 276 F.R.D. 633, 637 (C.D. Cal. 2011) (focusing on the deposing party’s ability to “control the amount of time the expert spends traveling by selecting a location for an expert’s deposition that minimizes an expert’s travel time, potentially including opting to take the deposition by telephone or video conference[,]” without acknowledging the travel expenses that would be imposed on the deposing party to take a remote deposition).

Closely related to the question of compensation for travel time is the interpretive question of whether travel expenses (cost of a hotel, airfare, etc.) are included in the fee shifting. Most courts treat the question as merely an extension of the travel time.<sup>80</sup> Such courts reason that because “travel time [is] time spent ‘responding’ to discovery[.]” so too must the related “expenses incurred during travel” be deemed as “time spent responding to discovery.”<sup>81</sup> Other courts rationalize shifting expert travel expenses on grounds that lay witnesses may be compensated for “their travel expenses post-trial as part of ‘costs.’”<sup>82</sup>

Some courts, however, have focused on the plain words of the rule, such as payment for “time spent in responding to discovery[.]” and have concluded that expenses are not compensable. For example, in rejecting the claim to shift deposition travel expenses to the opposing party, one court held:

Like with review time, neither party directly addresses whether the costs of travel to and from a deposition, such as the

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<sup>80</sup> See, e.g., *Durkin*, 2012 WL 12887769, at \*4 (equating travel time and expenses and allowing recovery, despite not permitting recovery for deposition preparation time); *Ndubizu v. Drexel Univ.*, No. 07-3068, 2011 WL 6046816, at \*3 (E.D. Pa. Nov. 16, 2011) (“Travel expenses are also reimbursable under Rule 26(b)(4)(E).” (citing *Feliciano v. Cty. of Suffolk*, 246 F.R.D. 134, 137 (E.D.N.Y. 2007) (“[A] number of courts in the Second Circuit have held that [Rule 26(b)(4)(E)] ‘permits recovery of fees for an expert’s travel time along with the expert’s out-of-pocket expenses.’”)); *Dwyer v. Deutsche Lufthansa, AG*, No. CV 04-3184(TCP)(AKT), 2007 WL 526606, at \*4 (E.D.N.Y. Feb. 13, 2007) (“A number of courts in the Second Circuit have held that Rule 26(b)(4)(C) ‘permits recovery of fees for an expert’s travel time along with the expert’s out-of-pocket expenses.’” (quoting *Bonner*, 1997 WL 802894, at \*1)).

<sup>81</sup> *Handi-Craft Co. v. Action Trading, S.A.*, No. 4:02 CV 1731 LMB, 2003 WL 26098543, at \*16 (E.D. Mo. Nov. 25, 2003).

<sup>82</sup> See, e.g., *Hillmann v. City of Chicago*, No. 04 C 6671, 2017 WL 3521098, at \*10 (N.D. Ill. Aug. 16, 2017) (“The Court finds Plaintiff’s arguments for denying [the expert’s] travel expenses unpersuasive. Section 1920 authorizes awarding costs for ‘[f]ees and disbursements for . . . witnesses.’” (quoting 28 U.S.C. § 1920(3))). “‘The witness fee specified in § 1920(3) is defined in 28 U.S.C. § 1821,’ which provides that witnesses who travel to testify at trial or sit for a deposition must be paid an ‘attendance fee’ of \$40 per day and must be reimbursed for their travel and related expenses.” *Id.* (quoting *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 440 (1987)); see 28 U.S.C. § 1821(a)(1), (b)–(c)(1), (c)(3)–(d)(1) (2018). “Collectively, 28 U.S.C. §§ 1821 and 1920(3) authorize the award of costs to reimburse witnesses for their reasonable travel and lodging expenses.” *Hillmann*, 2017 WL 3521098, at \*10 (quoting *Majeske v. City of Chicago*, 218 F.3d 816, 825–26 (7th Cir. 2000). “Accordingly, courts in this District have routinely awarded costs for expert witnesses’ travel expenses.” *Id.* (citing *Nilssen v. Osram Sylvania, Inc.*, No. 01 C 3585, 2007 WL 25771, at \*4 (N.D. Ill. Jan. 23, 2007) (“awarding expenses for expert witness to travel to testify at trial even though trial was belatedly rescheduled”)); *Vardon Golf Co. v. Karsten Mfg. Corp.*, No. 99 C 2785, 2003 WL 1720066, at \*9 (N.D. Ill. Mar. 31, 2003) (“awarding costs for expert witness’s travel expenses”). This logic, however, is limited by the fact that “costs” are only awarded to the prevailing party, and only after a judgment. See *infra* Part II.C.

cost of a plane ticket or hotel room, fall within the scope of Rule 26(b)(4)(E)(i). However, the rule only requires that a deposing party pay for an expert's *time*, not other costs or expenses. Thus, the Court will exclude such costs from its award of any expert's fees pursuant to Rule 26(b)(4)(E)(i).<sup>83</sup>

There is no reason that a rule of procedure, which should facilitate civil litigation, instead consumes so much time and so many resources on the part of litigants and courts, particularly for a recurring issue like travel time and expenses. First, federal rules exist so that there is uniformity. That uniformity gives parties notice of what is covered by the rule, and avoids the costs and uncertainty that arise when no clarity exists, and thus, parties can and do reasonably dispute what is covered. A federal rule that fails to provide for such clarity results in excessive time and money spent litigating its meaning. Second, even when a rule is clear—for example, assume that the rule unambiguously provided that reasonable travel fees and expenses must be paid by the opposing party—one must still question if analyzing a hotel's rate in a given market is a good use of judicial resources.<sup>84</sup>

This variation regarding whether fees should shift for an expert's travel time, like similar variation regarding preparation time, results in inconsistency among courts. Depending on where the case is pending, such fees may or may not be shifted. The fact that courts can and do reach diametrically opposed positions despite interpreting identical language in the rule is troubling in a federal court system premised on uniformity. It is also costly, both in terms of money and time. There is no reason in a federal system to have nearly identical issues being litigated in successive courts over and over again.

## 2. Disputes Regarding What Constitutes “Reasonable Fees”

For fees that are deemed included in “time spent responding to discovery[,]” the dispute quickly shifts as to what amount of fees are “reasonable.” The rule does not provide any definitions, presumptions, factors, or guidelines as to what constitutes “reasonable fees.” Individual courts, rather, are left to develop their own tests, with many lamenting the lack of guidance.<sup>85</sup> Not surprisingly, wide variation exists across

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<sup>83</sup> *Nester v. Textron, Inc.*, No. 1:13-CV-920 RP, 2016 WL 6537991, at \*4 (W.D. Tex. Nov. 3, 2016) (citing FED. R. CIV. P. 26(b)(4)(E)(i)).

<sup>84</sup> *See EEOC v. Johnson & Higgins, Inc.*, No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at \*3 (S.D.N.Y. Jan. 21, 1999) (“J & H’s reply papers cured the specificity and documentation problem of which the EEOC complains. However, the Court finds the \$970 for 2 nights in a hotel for Dr. Maister to be excessive—despite the high cost of New York hotel rooms—and reduces that amount to \$400 (*i.e.*, a \$570 reduction). In all other respects, the Court rejects the EEOC’s objections to J & H’s experts’ travel expenses.”).

<sup>85</sup> *See WRIGHT ET AL.*, *supra* note 15, § 2034.

jurisdictions, and good faith disputes among attorneys abound as to what constitutes “reasonable fees.”<sup>86</sup> These disputes tend to fall into three categories: (1) the “reasonableness” of the expert’s billed hourly rate and expenses; (2) the reasonableness of a “flat fee” rate; and (3) the “reasonableness” of the number of hours charged by the expert.

i. Reasonableness of Experts’ Billed Hourly Rate and Expenses

First, unnecessary disputes arise regarding the “reasonableness” of experts’ hourly rates. Because each expert and their work is different, there obviously will be variation in what constitutes a “reasonable fee.” But the rule provides no guidance to courts about what to consider when determining what is reasonable, whether through definitions, presumptions, or factors. Thus, rather than a uniform test that all courts must apply to determine what constitutes a “reasonable fee,” courts instead are left to carve out their own tests, a reality that several courts have lamented.<sup>87</sup> Over time, many courts have adopted the *Borel* test, which provides:

To determine whether a fee request pursuant to Rule 26(b)(4)(E) is reasonable, courts consider seven criteria: (1) the witness’s area of expertise; (2) the education and training required to provide the expert insight that is sought; (3) the prevailing rates of other comparably respected available experts; (4) the nature, quality, and complexity of the discovery responses provided; (5) the fee actually charged to the party who retained the expert; (6) fees traditionally charged by the expert on related matters; and (7) any other factor likely to assist the court in balancing the interest implicated by Rule 26.<sup>88</sup>

While the *Borel* test is more helpful than not, it is highly discretionary by nature. While some discretion is necessarily part of a “reasonableness” determination, unnecessary discretion leads to unnecessary disputes.<sup>89</sup>

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<sup>86</sup> What constitutes “reasonable fees” will never be subject to black and white rules and necessarily will involve some discretion. That does not, however, mean that the rule cannot provide clarity about what factors and/or presumptions the court must apply in making the determination of whether a certain fee application is “reasonable.”

<sup>87</sup> See, e.g., *Hose v. Chi. & N.W. Transp. Co.*, 154 F.R.D. 222, 224 (S.D. Iowa 1994) (“There is very little authority as to what is meant by the term ‘a reasonable fee’ in Rule 26(b)(4)(C).” (alteration in original omitted) (quoting *Goldwater v. Postmaster Gen. of the U.S.*, 136 F.R.D. 337, 339 (D. Conn. 1991))).

<sup>88</sup> *Ovella v. B&C Constr. & Equip., LLC*, No. 1:10CV285-LG-RHW, 2012 WL 12883213, at \*3 (S.D. Miss. Apr. 18, 2012) (citing *Borel v. Chevron U.S.A. Inc.*, 265 F.R.D. 275, 276 (E.D. La. 2010)).

<sup>89</sup> Indeed, “the time-consuming and expensive judicial process of litigating the fee question itself” is one of the primary rationales for “the American Rule against fee shifting.” Risa L. Lieberwitz, *Attorneys’ Fees, the NLRB, and the Equal Access to Justice Act: From Bad to Worse*, 2 HOFSTRA LAB. L.J. 1, 4, 10 (1984).

In particular, for recurring areas of disputes—i.e., ones that predominately involve a legal, rather than a fact-based, question—litigants and courts alike would benefit from a clearer test. One such question of law that arises is whether it is reasonable for an expert to charge a different—and higher—hourly rate for time spent in a deposition versus time spent preparing the expert’s report.<sup>90</sup> Without any guidance from the rule (or the *Borel* test, if that test has been adopted by the court), parties are left to argue in good faith how the court should interpret what constitutes a “reasonable fee.”<sup>91</sup>

Another area in which recurring disputes occur regarding the same question of law is whether an expert’s hourly rate for travel time can be the same as the expert’s rate for performing work. Because the rule is silent, courts vary greatly in their interpretations of the rule, with some treating this as a case-by-case inquiry and others establishing a bright-line rule. The most common of these rules is that an expert’s “reasonable” hourly rate is half of the expert’s regular rate.<sup>92</sup> Still, other courts hold that the travel rate and

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<sup>90</sup> For example, in *Walker v. Spike’s Tactical, LLC*, the expert sought to charge defendant’s counsel \$2,500 per hour for an in-person deposition as compared to the \$600 per hour he had charged the plaintiff’s counsel to review records and issue his report. No. 2:13-cv-01923-RFB-PAL, 2015 U.S. Dist. LEXIS 1125, at \*4 (D. Nev. Jan. 2, 2015); *see also* *EEOC v. Johnson & Higgins, Inc.*, No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at \*4 (S.D.N.Y. Jan. 21, 1999) (“Indeed, courts most often reduce expert fee requests when the expert seeks to charge the opposing party a higher rate than the expert charges the retaining party. (first citing *Sublette v. Glidden Co.*, No. Civ.A. 97-CV-5047, 1998 WL 398156, at \*4 (E.D. Pa. June 25, 1998) (“reducing expert fee from \$600 per hour to the \$200 the expert charged the retaining party”); then citing *Ohuche v. British Airways*, No. 97CIV. 1853(JSM)RLE, 1998 WL 240481, at \*1 (S.D.N.Y. May 11, 1998) (“reducing expert fee where expert charged retaining party less than opposing counsel”); then citing *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 646 (“reducing expert’s fee from \$350 per hour to the \$250 the expert charged retaining party”); then citing *Jochims v. Isuzu Motors, Ltd.*, 141 F.R.D. 493, 496–97 (S.D. Iowa 1992) (“expert’s fee reduced from \$500 to \$250, because, *inter alia*, [i]t is double the highest hourly rate he is charging the Plaintiff who retained him”); then citing *Draper v. Red Devil, Inc.*, 114 F.R.D. 46, 48 (E.D. Ark. 1987) (“In the absence of proof as to the reason(s) why the expert charged counsel for the Plaintiff \$110.00 and counsel for the defense \$120.00 hourly, the fee will be determined at the rate of \$110.00 per hour.”); then citing *Anthony v. Abbott Labs.*, 106 F.R.D. 461, 464–65 (D.R.I. 1985) (“expert fee reduced from \$420 hourly to \$250 hourly, the charge the expert ‘was content to charge a (friendly) litigant . . . for his time’”); and then citing *Mathis v. NYNEX*, 165 F.R.D. 23, 26 (E.D.N.Y. 1996) (“The court is especially persuaded [that the expert’s fee is reasonable] by the fact that [the expert] regularly charges the same rate for his consultative services and is charging plaintiff that rate for his expert services in this case.”))).

<sup>91</sup> In a case in which the parties disputed that very issue, the court began its analysis by remarking on the lack of authority: “Both sides cite Fed. R. Civ. P. 26(b)(4) to support their respective positions. Both sides acknowledge that there are very few cases deciding the issue before the court.” *Walker*, 2015 U.S. Dist. LEXIS 1125, at \*4.

<sup>92</sup> *See, e.g.*, *Ndubizu v. Drexel Univ.*, No. 07-3068, 2011 WL 6046816, at \*3 (E.D. Pa. Nov. 16, 2011) (“For example, the Eastern District of New York created a rule that compensation for travel time should be half the normal rate.” (citing *Mannarino v. United States*, 218 F.R.D. 372, 377 (E.D.N.Y. 2003) (“The general rule, which this court follows, is

work rate can be the same.<sup>93</sup> Like many issues that arise under the fee-shifting rule, there is a lack of uniformity among the courts.

Likewise, as to what travel expenses are reasonable, courts that shift such expenses end up engaging in a highly-factual analysis of the expenses billed.<sup>94</sup> Courts have, for example, declined to shift expenses for “first class travel or first class accommodations.”<sup>95</sup> It is not uncommon for courts to play the role of a human resources officer, analyzing and policing what daily hotel rate is reasonable, for example: “the Court finds the \$970 for 2 nights in a hotel for Dr. Maister to be excessive—despite the high cost of New York hotel rooms—and reduces that amount to \$400 (i.e., a \$570 reduction).”<sup>96</sup>

Finally, in determining reasonableness, some courts look behind the scenes to which party caused the travel time and expenses.<sup>97</sup> For example, if the retaining party could have but did not hire an expert closer, the court

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that compensation for travel time should be half the regular hourly amount charged.”)); *Reit v. Post Props., Inc.*, No. 09 Civ. 5455(RMB)(KNF), 2010 WL 4537044, at \*2 (S.D.N.Y. Nov. 4, 2010) (quoting *Mannarino*, 218 F.R.D. at 377); *Dwyer v. Deutsche Lufthansa, AG*, No. CV 04-3184(TCP)(AKT), 2007 WL 526606, at \*4 (E.D.N.Y. Feb. 13, 2007) (“[The expert’s] compensation should not be at the full hourly rate charged for rendering professional services. Accordingly, it is hereby ordered that Defendants shall pay Plaintiff’s expert for his travel time at half of his normal rate, or \$ 175, and reasonable travel expenses.” (citation omitted)).

<sup>93</sup> See, e.g., *Handi-Craft Co. v. Action Trading, S.A.*, No. 4:02 CV 1731 LMB, 2003 WL 26098543, at \*17 (E.D. Mo. Nov. 25, 2003).

The hourly fee charged by an expert for deposition time has also been held reasonable for a measure of compensation for travel time. Mr. Martin claims the same rate for travel time as that claimed for deposition time. Therefore, the court will order plaintiff to pay Mr. Martin his deposition rate for the time spent traveling from his home in the United Kingdom to St. Louis for his deposition.

*Id.* (first citing *Magee*, 172 F.R.D. at 647; and then citing *David Tunick, Inc. v. Kornfeld*, 151 F.R.D. 534, 536 (S.D.N.Y. 1993)).

<sup>94</sup> There is no uniformity about what travel expenses are reasonable for experts, even in arms-length transactions. See Todd Hatcher, *How to Manage an Expert Witness’ Travel Fees*, EXPERT INST. (Feb. 21, 2017), <https://www.theexpertinstitute.com/how-to-manage-an-expert-witness-travel-fees/>.

While experts usually charge set hourly fees for relevant tasks such as court testimony, depositions and file reviews, the proper compensation for an expert’s travel expenses can be a more uncertain, nebulous area. It doesn’t help that there are no set standards which dictate how to handle experts’ travel costs.

*Id.*

<sup>95</sup> *Frederick v. Columbia Univ.*, 212 F.R.D. 176, 178 (S.D.N.Y. 2003); see also 28 U.S.C. § 1821(c)(1) (2012) (“Such a witness shall utilize a common carrier at the most economical rate reasonably available.”).

<sup>96</sup> *EEOC v. Johnson & Higgins, Inc.*, No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at \*3 (S.D.N.Y. Jan. 21, 1999).

<sup>97</sup> See WRIGHT ET AL., *supra* note 15, § 2034 (“Perhaps no overarching rule is appropriate, but judicial sensitivity to the underlying considerations surely is.”).



might hold that it is unreasonable to reimburse the expert for such expenses.<sup>98</sup> On the other hand, if the deposing party insisted on the expert traveling to the jurisdiction to be deposed, rather than going to the expert or conducting a phone deposition, the court might use that to justify the “reasonableness” of shifting the travel fees and expenses.<sup>99</sup> Inquiries into which party “caused” travel time to be incurred are not, however, universal. Many courts do not consider this factor as part of the “reasonable fees” prong. Thus, this variation in the interpretation of what constitutes “reasonable” ends up being litigated. Without clear language in the rule or a uniform interpretation, litigants understandably disagree about what the deposing party is required to pay. Whether the disputes end up in court or not, they are expensive and time-consuming, and could be circumvented by adding presumptions to the rule.

A final issue that arises under the “reasonableness” prong, and that reveals a limitation of the *Borel* test, concerns the fifth factor: “(5) the fee actually charged to the party who retained the expert.” Experts sometimes will charge a flat fee to the party that retained them, and then charge an hourly rate to the deposing party.<sup>100</sup> While *Borel* directs a court to compare

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<sup>98</sup> See Don Zupanec, *Reimbursing Expert’s Travel Expenses*, 19 FED. LITIGATOR 16 (2004).

[D]istrict court said the plaintiff was free to select an expert of his choice, regardless of where the person was located. But the defendants would not be compelled to pay the additional costs resulting from the decision to retain someone from Georgia. This was especially true since the plaintiff made no showing, or even claimed, that no acceptable security experts were available in the New York area. . . . A party retaining a “distant” expert who doesn’t show that no similarly qualified “local” expert is available should not be surprised if the court is reluctant to require the deposing party to pay the expert’s entire travel expenses to and from a deposition.

*Id.* (citing *Lent v. Fashion Mall Partners, L.P.*, 223 F.R.D. 317, 318 (S.D.N.Y. 2004)).

<sup>99</sup> See, e.g., *Hillmann v. City of Chicago*, No. 04 C 6671, 2017 WL 3521098, at \*10 (N.D. Ill. Aug. 16, 2017).

Although Plaintiff did at one point raise the prospect of a telephonic deposition of White, in the same correspondence Plaintiff requested dates of availability for his deposition “here in Chicago.” And Plaintiff ultimately confirmed that the deposition would take place in Chicago. Given the parties’ agreement that White’s deposition would take place in Chicago, Plaintiff’s retrospective objection that the deposition could have been telephonic is not a basis to deny costs.

*Id.* (citing *BASF Corp. v. Old World Trading Co.*, No. 86 C 5602, 1992 WL 229473, at \*3 (N.D. Ill. Sept. 11, 1992) (“A joint decision on where to hold a deposition does not constitute any logical basis for refusing to grant witness travel costs which are actually incurred.”)); *Handi-Craft Co. v. Action Trading, S.A.*, No. 4:02 CV 1731 LMB, 2003 WL 26098543, at \*16 (E.D. Mo. Nov. 25, 2003) (“The court first notes that it is plaintiff who is demanding that Mr. Martin’s deposition continue in St. Louis, and not via telephone. Thus, it is clear that plaintiff should be responsible for Mr. Martin’s travel costs to St. Louis.”).

<sup>100</sup> See, e.g., *Walker v. Spike’s Tactical, LLC*, No. 2:13-cv-01923-RFB-PAL, 2015 U.S.

those rates, an apples-to-apples comparison is not possible. Many courts then simply disregard this factor, notwithstanding the fact that it is arguably the most important way to gauge reasonableness—what the market has freely paid for the expert.<sup>101</sup>

The great variation in how courts interpret what constitutes “reasonable fees” has real consequences for litigants and experts. First, it means that the rate that is deemed “reasonable” for identical work may vary simply because of the location of the court in which the case is pending. An expert testifying in two different federal courts may be reimbursed in one court for time spent traveling at the expert’s full rate, but may be reimbursed at half of that rate in the other court. Likewise, one court may conclude that it is per se unreasonable to charge different rates for deposition time and writing the report, while another may conclude that it is presumptively reasonable to do so. That lack of uniformity is the opposite of what is expected from a federal rule of procedure.<sup>102</sup> It also is unfair, insofar as the relative dollar amounts at stake are high.<sup>103</sup>

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Dist. LEXIS 1125, at \*4 (D. Nev. Jan. 2, 2015) (highlighting that expert billed deposing attorney \$2,500 per hour for an in-person deposition as compared to the \$600 per hour he had charged the plaintiff’s counsel to review records and issue his report).

<sup>101</sup> For example, in *Mathis v. NYNEX*, the court was “especially persuaded [that the expert’s fee was reasonable] by the fact that [the expert] regularly charge[d] the same rate for his consultative services and [wa]s charging plaintiff that rate for his expert services in this case.” 165 F.R.D. 23, 26 (E.D.N.Y. 1996). Even so, in cases in which courts are critical of the fact that an expert cannot arrive at an hourly rate for the work he or she did for the retaining party, courts nevertheless throw out that factor rather than taking its absence as a strike against the reasonableness of the fees requested. *See, e.g., Garnier v. Ill. Tool Works, Inc., No. 04CV1825(NGG)(KAM)*, 2006 WL 1085080, at \*3 (E.D.N.Y. Apr. 24, 2006).

With respect to the fee actually being charged to the retaining party, defendants’ counsel, in response to this Court’s order, has represented that Dr. Glass cannot in good faith estimate the time he expended examining plaintiff and preparing a report of that examination. The Court is troubled by this position, given that Dr. Glass has testified as an expert in over 500 cases, and claims to have examined “thousands of plaintiffs and defendants in civil law suits.” Dr. Glass should be able to estimate the amount of time he expended in this case, but has not done so. In any event, this factor is not dispositive; instead, the Court must balance the defendants’ need for competent experts with the need to protect the opposing party with being “unfairly burdened by excessive ransoms which produce windfalls for the defendants’ expert.”

*Id.* (alterations in original omitted) (quoting *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 645 (E.D.N.Y. 1997)).

<sup>102</sup> *See Federal Rules of Civil Procedure Establish Uniformity*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/timeline/federal-rules-civil-procedure-establish-uniformity> (last visited Aug. 10, 2018) (“The rules, which went into effect on September 16, 1938, after gaining congressional approval, ensured that the procedure followed in federal courts throughout the nation would be consistent and uniform.”).

<sup>103</sup> *See, e.g., Neutral Tandem, Inc. v. Peerless Network, Inc., No. 08 C 3402*, 2011 WL 13199213, at \*1 (N.D. Ill. Sept. 1, 2011) (demonstrating a case where one side sought

In addition, the lack of guidance concerning what standard courts should apply as to what is “reasonable” means that litigants and experts alike lack notice of what a given court will deem reasonable. If everything is discretionary, then litigants can be expected as advocates to engage in disputes about what is reasonable. Such disputes, even if they never go before a court, waste time and resources when the rule could provide guidance that would limit the range of what is reasonable. Litigants may pay “unreasonable” rates because the expense of litigating the issue in court outweighs any upside from litigating.

ii. Reasonableness of Flat Fees

In addition to disputes about the “reasonableness” of the expert’s billed hourly rate and expenses, other “reasonableness” disputes arise when experts charge a “flat fee” for their deposition, rather than billing by the hour. The rule does not address the practice of flat fee billing. Experts who charge a flat fee justify it on the ground that they are “forced” to set aside a full day for the deposition, regardless of whether it finishes early. Although many courts have opined that “flat fees are generally disfavored,”<sup>104</sup> the practice continues.

Indeed the case law is replete with instances in which the parties dispute whether flat fees are reasonable. Notably, these are not cases in which the amount of the flat fee—for example, \$750 per day versus \$3000 per day—is disputed. Rather, these cases address the basic interpretative question of whether flat fees are “reasonable” and thus permitted. Further, these disputes involve significant sums.<sup>105</sup> It is not uncommon for experts to charge more than \$2500 for a deposition, regardless of its length.

Courts that address this issue note that “[f]lat fees for experts are generally considered to be unreasonable.”<sup>106</sup> Courts rightfully “expect some

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\$38,759.13 in fees under Rule 26(b)(4)(E) and the other side sought \$72,426.74).

<sup>104</sup> *Garnier*, 2006 WL 1085080, at \*2 (first citing *Carafino v. Forester*, No. 03 Civ. 6258PKLDF, 2005 WL 1020892, at \*1 (S.D.N.Y. Apr. 29, 2005); and then citing *Ramirez v. Marriott Corp.*, No. 98 Civ. 7007, 2005 U.S. Dist. LEXIS 23390 (S.D.N.Y. Oct. 12, 2005)).

<sup>105</sup> See *Ndubizu v. Drexel Univ.*, No. 07-3068, 2011 WL 6046816, at \*8 (E.D. Pa. Nov. 16, 2011) (expert charged “a flat fee of \$2,500 for his deposition testimony”); *Garnier*, 2006 WL 1085080, at \*1 (detailing a dispute regarding “a flat rate of \$4,000 for a full day deposition, \$2,500 for four hours, . . . \$1,500 for two hours[,]” or “a flat fee of \$4,500 . . . should it take place at” a more distant location, or “a rate of \$450 per hour for the deposition, applying the same rate for time spent preparing for and traveling to the deposition”); *EEOC v. Johnson & Higgins, Inc.*, No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at \*3 (S.D.N.Y. Jan. 21, 1999) (flat fee of \$12,000 per day billed).

<sup>106</sup> *Nnodimele v. City of New York*, No. 13-CV-3461 (ARR), 2015 WL 4461008, at \*2 (E.D.N.Y. July 21, 2015); see also *Kreyn v. Gateway Target*, No. CV-05-3175 (ERK)(VVP), 2008 WL 2946061, at \*1 (E.D.N.Y. July 31, 2008) (“A flat fee for an expert’s appearance . . . is generally unreasonable.”); *Garnier*, 2006 WL 1085080, at \*2 (noting that “flat fees are generally disfavored” and denying the expert’s request for a flat fee).

reasonable relationship between the services rendered and the remuneration to which an expert is entitled.”<sup>107</sup> “By its nature, a flat fee runs counter to this principle because it is simply not reasonable to require parties in every case to pay the same amount regardless of the actual ‘services rendered’ or ‘time spent complying with the requested discovery.’”<sup>108</sup> Even when the flat fee charge would, as a practical matter, yield a “reasonable” hourly rate, courts typically still hold the flat fee unreasonable: “[T]he fact that the agreed-upon hourly rate multiplied by the number of hours actually incurred in this particular instance happens to approximate the requested flat-rate fee does not render the use of a flat fee more reasonable.”<sup>109</sup>

Still, without a settled rule, experts continue to frequently bill for depositions at a flat-fee rate, leading to costly disputes in which courts address the relative merits of flat-fee billing. An expert typically will contend that it is “reasonable . . . to charge a flat fee for deposition testimony because [the expert] is unavailable to do other work on the day of the deposition.”<sup>110</sup> Because depositions have a start time but no end time, experts often end up setting aside more time than ultimately needed. On the other hand, the fact that depositions last for varying lengths of time is, according to some courts, a reason not to charge a flat fee.<sup>111</sup>

### iii. Reasonableness of Number of Hours Billed

Finally, disputes regarding the “reasonableness” of experts’ fees arise in the context of the number of hours billed by the expert. This issue arises for time billed for preparation time, travel time, or other time that, unlike the time spent in the deposition, is not objectively computable. Thus, in those cases where a court holds that fees for preparation and travel time are recoverable under the rule, the debate then shifts to how many hours are reasonable.<sup>112</sup> While what constitutes a “reasonable” number of hours billed—like an expert’s hourly rate—will vary in cases, courts can and do

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<sup>107</sup> *Nnodimele*, 2015 WL 4461008, at \*2 (citing *Mannarino v. United States*, 218 F.R.D. 372, 375 (E.D.N.Y. 2003)).

<sup>108</sup> *Id.* (alterations in original omitted).

<sup>109</sup> *Id.* (“That the bottom line of the [expert’s] bill approximates the amount sought here is purely coincidental, and does not make [the expert’s] flat fee any more reasonable.” (citing *Mannarino*, 218 F.R.D. at 375)); *cf.* *Marin v. United States*, No. 06 Civ. 552(SHS), 2008 WL 5351935, at \*1 (S.D.N.Y. Dec. 22, 2008) (“In general, it is not reasonable to request a flat fee for deposition testimony regardless of the number of hours actually spent.”).

<sup>110</sup> *Id.* at \*3.

<sup>111</sup> *See id.* (“In any event, plaintiff conveniently ignores that [the expert] charges this flat fee regardless of the length of the deposition, which necessarily would have an effect on whether he was available to do other work on the day of a deposition.”).

<sup>112</sup> *See* *Auto. Rentals, Inc. v. Keith Huber, Inc.*, No. 1:10CV385-LG-RHW, 2012 WL 12854841, at \*1 (S.D. Miss. Jan. 10, 2012) (“Rather, [the defendant] disputes the number of hours claimed for preparation and review of documents in anticipation of the deposition.”).

employ presumptions and rules of thumb about ratios and other formulas that provide clarity and uniformity, at least within the employing court. The rule itself contains no guidance.

While no uniform approach exists, many federal courts across the country have adopted a “reasonableness” ratio ranging from 1:1 to 3:1 between time spent preparing for a deposition and time spent actually being deposed.<sup>113</sup> Some district courts that handle a high volume of fee disputes, such as the Northern District of Illinois, have arrived at a formula that further makes the ratio dependent on the complexity of the case, namely:

To determine whether an expert’s preparation time was reasonable, courts in this district have looked “to the preparation time in relation to the deposition time, and the nature or complexity of the case, to establish a reasonable ratio of preparation time to actual deposition time for the case.” Courts have approved of a 1:1 ratio up to a 3:1 ratio depending on the nature of the required document review, breadth of the expert’s involvement, and difficulty of the issues. Also relevant is how the expert spent his time and the specificity with which the expert describes that time in the invoice.<sup>114</sup>

Courts’ use of ratios limits the magnitude of hours that can be shifted for preparation time, and thus lessens concerns about the deposing party having to pay for preparation time over which it has no control.<sup>115</sup>

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<sup>113</sup> See, e.g., *Rote v. Zel Custom Mfg. LLC*, No. 2:13-cv-1189, 2018 WL 2093619, at \*4 (S.D. Ohio May 7, 2018) (“The Court acknowledges that such preparation-to-deposition ratios . . . have generally been found to be reasonable.” (citing *Script Sec. Sols., LLC v. Amazon.com, Inc.*, No. 2:15-CV-1030-WCB, 2016 WL 6649721, at \*6 (E.D. Tex. Nov. 10, 2016) (reviewing a vast sampling of cases addressing ratios and concluding that “many courts have limited the recovery to preparation time that does not exceed the amount of deposition time, and most have declined to require payment . . . when the ratio of preparation time to deposition time exceeds three to one”)); *Keith Huber, Inc.*, 2012 WL 12854841, at \*1; *Neutral Tandem, Inc. v. Peerless Network, Inc.*, No. 08 C 3402, 2011 WL 13199213, at \*5 (N.D. Ill. Sept. 1, 2011) (“Therefore, the formula employed by in *Nilssen* to determine a reasonable number of hours for deposition-preparation time is appropriate, which is a ratio of three times the length of the deposition.” (citing *Nilssen v. Osram Sylvania, Inc.*, No. 01 C 3585, 2007 WL 25771, at \*5 (N.D. Ill. Jan. 23, 2007))).

<sup>114</sup> *LK Nutrition, LLC v. Premier Research Labs, LP*, No. 12 CV 7905, 2015 WL 4466632, at \*3 (N.D. Ill. July 21, 2015) (citations omitted).

<sup>115</sup> See *Nester v. Textron, Inc.*, No. 1:13-CV-920 RP, 2016 WL 6537991, at \*4 (W.D. Tex. Nov. 3, 2016).

While Defendant is correct that some courts have chosen not to reimburse any preparation time, the concerns of these courts—that the deposing party has no control over how much time an expert prepares, and that an expert’s preparation may largely consist of trial preparation—can be addressed by limiting, rather than excluding, reimbursement for deposition for preparation time.

*Id.* (citing *Rock River Commc’ns, Inc. v. Universal Music Grp.*, 276 F.R.D. 633, 636 (C.D. Cal. 2011)).

Courts vary in terms of how much detail the expert is required to provide about the preparation work she performed, often due to the perception that this is an area in which “misuse” could occur. One court, for example, stated:

Although this court recognizes that the experts’ preparation time falls within the ratios of preparation to deposition time that in some cases have warranted reimbursement, it agrees [that the retaining party] (or its experts) has not done enough to demonstrate how that time was spent to satisfy the court that it was reasonably spent in responding to discovery within the meaning of Rule 26(b)(4)(E)(i).<sup>116</sup>

The court noted that “to simply take the adverse party’s unsupported word for the amount of preparation time involved is to hand it a tool of oppression to misuse.”<sup>117</sup> This court’s concern is more than theoretical; in numerous cases, experts have billed for double-digit hours of preparation time—for example, twenty-three hours of preparation for a thirteen-hour deposition<sup>118</sup> and fourteen hours of preparation for an eight-hour deposition.<sup>119</sup>

Other courts, while allowing recovery for some preparation time, exclude from fee shifting any hours billed for time spent preparing with the retaining counsel. Other courts scrutinize what level of review is reasonable in order to prepare for a deposition and reach differing conclusions. For example, in a case where the court made a modest adjustment to the expert’s hours spent for deposition preparation (fourteen hours billed reduced to ten hours recoverable), it took the expert’s hours as a presumptive starting point, and reduced those hours only where clearly excessive:

Nevertheless, while the Court declines to impose a categorical limit on the type of record review that warrants reimbursement under Rule 26(b)(4)(E), that is not to say that the record review in this case was therefore reasonable. In preparation for drafting his expert report, Pollini spent an estimated 12 to 17 hours reviewing the record. Two months later, Pollini spent 14 hours reviewing nearly the exact same materials to prepare for his deposition. While Pollini need not merely review his report and

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<sup>116</sup> *LK Nutrition, LLC*, 2015 WL 4466632, at \*3 (“Even courts that have viewed payment for deposition preparation as mandatory under Rule 26(b)(4)(E)(i) have excluded fees where the experts do too little to justify the amount of time spent preparing.”).

<sup>117</sup> *Id.* at \*3 (alterations in original omitted) (citing *Profile Prods., LLC v. Soil Mgmt. Techs., Inc.*, 155 F. Supp. 2d 880, 887 (N.D. Ill. 2001)).

<sup>118</sup> *See EEOC v. Johnson & Higgins, Inc.*, No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at \*2 (S.D.N.Y. Jan. 21, 1999) (“The Court nevertheless is troubled by the preparation time billed by J & H expert Dr. Becker, who charged for 23 hours of deposition preparation time. No other J & H expert billed for more than 9 hours of preparation time.”).

<sup>119</sup> *See Nnodimele v. City of New York*, No. 13-CV-3461 (ARR), 2015 WL 4461008, at \*5–6 (E.D.N.Y. July 21, 2015).

contemporaneous notes as defendants suggest, the latter, duplicative record review appears to be excessive, especially in light of Pollini's decades of experience with police practices, his prior experience testifying as an expert, and the fact that the issues in the case are not especially technical or complex.<sup>120</sup>

In contrast, other courts have emphasized that, with respect to deposition preparation time, Rule 26(b)(4)(E) should be applied with caution "since that time usually includes much of what ultimately is trial preparation work for the party retaining the expert."<sup>121</sup>

Regardless of whether a court takes a presumptively reasonable or presumptively unreasonable approach, the cases in this area tend, as in the above excerpt, to be fairly detailed with respect to the facts of the given cases and the policy considerations at issue. These same policy discussions arise in case after case, with each court determining anew its test for "reasonableness."<sup>122</sup> Like what is included in "time spent responding to discovery," what fees are "reasonable" need not be so ill-defined. As described below, the rule could and should have presumptions that guide reasonableness.<sup>123</sup>

#### B. *Logistical Problems: Disputes Arising from the Rule's Failure to Address When and How Fees Shift*

In addition to interpretative problems regarding what fees are "reasonable," logistical problems also arise under the rule. Even so, nothing in the rule addresses these logistical questions. It leaves litigants and courts alike to make educated guesses about, for example, when fee payments are due, what consequences arise from an expert's failure to make mandatory disclosures, and what the process is for enforcing the rule when disputes arise.

##### 1. Disputes Regarding Timing of When Fees Must Be Billed and Paid

The rule contains no provision regarding when the experts' fees should be billed and when payment for fees is due. Without any guidance from the rule, the topic of when fees must be billed and, even more so, paid has been highly litigated. Most of the disputes about the timing of fees fall under two categories: (1) whether fees must be prepaid if the expert so demands; and

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<sup>120</sup> *Id.* at \*5 (citing *Mannarino v. United States*, 218 F.R.D. 372, 376 (E.D.N.Y. 2003)).

<sup>121</sup> *Constellation Power Source, Inc. v. Select Energy, Inc.*, No. 3:04cv983 (MRK), 2007 WL 188135, at \*8 (D. Conn. Jan. 23, 2007) (citing *WRIGHT ET AL.*, *supra* note 15, § 2034).

<sup>122</sup> *See WRIGHT ET AL.*, *supra* note 15, § 2034 ("Compensation for time spent preparing for the deposition has proved a divisive issue.").

<sup>123</sup> *See infra* Part V.B.2.

(2) whether fees must be billed within a certain time frame in order to shift.

i. Timing for Payment of Fees

Although the rule is intended to be self-executing and to require minimal, if any, involvement by the court, the gap regarding when fees are due has spawned extensive and costly motions practice. Without a clear rule as to when fees must be paid, lawyers—being lawyers—may end up litigating that issue, often at great expense to their clients, the opposing parties, and the court.

Because the rule does not expressly require that fees be determined and paid before the deposition, some lawyers contend that payment before the discovery occurs is not required. This, however, is not a universally accepted interpretation of the rule. In fact, many courts have ordered parties to pay the opposing expert's deposition fees before the deposition occurs. Other courts have held that there is no basis in the rule for fees to be prepaid—and have pointed out the logistical challenges of prepayment given the uncertain length of most depositions—and thus have denied motions for fees to be prepaid. These courts have made clear that it is the retaining party's "responsibility" to pay the expert, and that "Rule 26 entitles Defendants' counsel [only] to *reimbursement* for 'reasonable fees' in connection with [the] deposition."<sup>124</sup>

The problem does not lie primarily in the substantive question of whether litigants should have to advance payment or simply provide reimbursement; while the reimbursement approach is more sensible for the practical reasons identified by courts, an advance payment approach could arguably be workable if certain safeguards were put in place.<sup>125</sup> Instead, the problem lies with the fact that the rule provides no clear guidance. That lack of guidance means that experts and litigants alike do not know what is required or permitted by the rule, so they end up spending time and money disputing the issue of when fees are due.

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<sup>124</sup> AP Links, LLC v. Russ, No. CV 09-5437 (JS) (AKT), 2015 WL 9050298, at \*3 (E.D.N.Y. Dec. 15, 2015) (emphasis in original) (quoting *Conte v. Newsday, Inc.*, No. CV 06-4859 (JFB) (ETB), 2011 U.S. Dist. LEXIS 88546, at \*3 (E.D.N.Y. Aug. 10, 2011)).

<sup>125</sup> For example, in the MDL Protocol, the court issued multiple directives regarding how fees must be billed and when fees must be paid. Among other items, the court ordered that expert's fees would be "due and owing within a period of thirty (30) days from the date of receipt by counsel responsible for payment" and provided a "fifteen (15) day grace-period for payment after the initial thirty (30) days expires." MDL PROTOCOL, *supra* note 69, ¶ 4. The protocol goes on to note that once a fee is "due and owing, interest shall accrue at a rate of 3.5% per month for the length of time the invoice remains unpaid" and that a party who has failed to pay expert fees due and owing may not "utilize the transcript of that deposition in any motion." *Id.* ¶ 6. The protocol does not address, however, when fees can be billed, and leaves open the question of whether an expert can demand advance payment.



Take, for example, the all-too-common scenario of an expert, whether on his own accord or at the behest of the retaining attorney, who threatens not to appear for his deposition unless he is paid for his time in advance.<sup>126</sup> What happens in this situation? As it turns out, any number of things may happen, all of which waste time and resources. First, the lawyers engage in a back-and-forth exchange of emails and likely phone calls about the reasonableness or unreasonableness of the request for prepayment, each pointing to some supporting but unauthoritative authorities. This back-and-forth results in one of three things: (1) the expert may relent and agree to be paid after the deposition, typically as long as the deposing lawyer agrees to indeed pay the expert; (2) the deposing lawyer may relent and agree to pay the expert in advance; or (3) neither side budes, much like the Zaxes in the Dr. Seuss classic.<sup>127</sup> If neither side budes, no agreement is reached.

The deposing lawyer may elect to file a motion with the court, asking the court to order the expert to appear for the deposition without the advance fee payment or with a reasonable fee advanced. The retaining lawyer may elect to file a motion with the court,<sup>128</sup> asking the court to order the deposing party to advance the expert's fees. Or the retaining lawyer instead may send a letter informing opposing counsel that the expert will not attend the deposition without payment in advance, thus attempting to shift the burden to the deposing party. That lawyer may either: (1) ignore the letter and move forward with the deposition; or (2) bring a motion to compel the expert's

<sup>126</sup> For example, the expert in *Santella* apparently threatened that "he might refuse to attend his deposition should the matter of his fee not be resolved in his favor." *Santella v. Grizzly Indus., Inc.*, No. A-11-CA-181 LY, 2012 WL 12882000, at \*1 n.1 (W.D. Tex. Nov. 14, 2012). While not directly addressing that threat, the court stated that its "ruling is not intended to address the propriety of exclusion of [the expert's] testimony in that circumstance." *Id.*

<sup>127</sup> After much back-and-forth with the equally stubborn North-Going Zax, the South-Going Zax threw down the gauntlet and the zero-sum game played out:

"And I'll prove to YOU," yelled the South-Going Zax,  
 "That I can stand here in the prairie of Prax  
 For fifty-nine years! For I live by a rule  
 That I learned as a boy back in South-Going School.  
 Never budge! That's my rule. Never budge in the least!  
 Not an inch to the west! Not an inch to the east!  
 I'll stay here, not budging! I can and I will  
 If it makes you and me and the whole world stand still!"

DR. SEUSS, *The Zax*, in *THE SNEETCHES AND OTHER STORIES* 27, 27 (1961).

<sup>128</sup> Lawyers have styled such motions in various ways. See, e.g., *Rote v. Zel Custom Mfg. LLC*, No. 2:13-cv-1189, 2018 WL 2093619, at \*1 (S.D. Ohio May 7, 2018) (motion to compel); *AP Links, LLC*, 2015 WL 9050298, at \*1 (motion to preclude or, alternatively, to order expert to appear for deposition); *Handi-Craft Co. v. Action Trading, S.A.*, No. 4:02 CV 1731 LMB, 2003 WL 26098543, at \*13-14 (E.D. Mo. Nov. 25, 2003) ("Motion for Protective Order and Other Relief[] requesting that the court enter a protective order requiring, *inter alia*, that plaintiff adequately compensate two of defendant's expert witnesses.").

attendance at the deposition.<sup>129</sup> Not surprisingly, the deposition often does not occur even when the deposing lawyer elects to “move forward” with it. Instead, the deposing lawyer appears, makes a record, and then brings a motion to compel the expert to appear at the deposition at a later date, as well as to recover costs for fees and costs of the aborted deposition.

Courts, like lawyers, handle this matter in various ways. Some courts, if requested, will order the deposing party to pay some or all of the expert’s fees in advance.<sup>130</sup> Others will order the expert to appear with the condition that the deposing party agrees to pay the fees within a fixed number of days post-deposition.<sup>131</sup> Other courts will simply compel the expert to appear.<sup>132</sup> In refusing to require advance payment, these courts sometimes note the inability of the court or deposing party to foresee how long the deposition may take and thus what payment is required.<sup>133</sup> Finally, when the expert has

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<sup>129</sup> One party, when faced with an opposing expert who refused to appear for his deposition because of a dispute about advance payment of his flat fee, brought a motion to exclude the expert from testifying at trial or, in the alternative, to appear for a deposition. *AP Links, LLC*, 2015 WL 9050298, at \*1 (noting that “the parties’ dispute arose when they were unable to agree whether Plaintiffs’ counsel was required to pay the flat fee sought by [the expert] in advance of his deposition”).

<sup>130</sup> *E.g.*, *Garnier v. Ill. Tool Works, Inc.*, No. 04CV1825(NGG)(KAM), 2006 WL 1085080, at \*1 (E.D.N.Y. Apr. 24, 2006) (“[The expert] shall receive a 50% down payment on his fee seven days in advance of his deposition, with the balance to be remitted within two business days following his deposition.”).

<sup>131</sup> *See, e.g.*, *Dwyer v. Deutsche Lufthansa, AG*, No. CV 04-3184(TCP)(AKT), 2007 WL 526606, at \*4 (E.D.N.Y. Feb. 13, 2007). Some courts take a hybrid approach, such as requiring some prepayment of expert fees with the balance due post-deposition. Not surprising, some of these orders are rather intricate for a seemingly straightforward matter.

With respect to Dr. Glass’s requirement that he be paid for his services in advance of his deposition, the Court orders that Dr. Glass be paid a 50% down payment on the estimated fee seven days in advance of his deposition, assuming that he will be deposed for seven hours, with the balance to be remitted within two business days following his deposition. The payment of the balance may be stayed in the event that plaintiff’s counsel seeks modification of the hourly rate for the reasons set forth [previously]. The Court notes that plaintiff’s counsel has represented that his “firm is guaranteeing payment” of Dr. Glass’s fee.

*Garnier*, 2006 WL 1085080, at \*4.

<sup>132</sup> *See, e.g.*, *Santella v. Grizzly Indus., Inc.*, No. A-11-CA-181 LY, 2012 WL 12882000, at \*2–3 (W.D. Tex. Nov. 14, 2012) (stating that “neither party nor the Court has discovered any legal authority requiring the reasonableness of an expert’s hourly fee be determined prior to the taking of the deposition and that the fee be tendered prior to the deposition[,]” and ordering appearance without prepayment); *Burdette v. Steadfast Commons II, LLC*, No. 2:11-980-RSM, 2012 WL 3762515 (W.D. Wash. Aug. 29, 2012) (ordering appearance without prepayment).

<sup>133</sup> *See, e.g.*, *AP Links, LLC*, 2015 WL 9050298, at \*3 (“[A]n expert ‘may not insist on advance payment, and may not set a flat fee before he knows what he will be called upon to do; he may instead charge only a reasonable hourly fee.’” (quoting *Johnson v. Spirit Airlines, Inc.*, No. CV 07-1874 (FB)(JO), 2008 WL 1995117, at \*1 (E.D.N.Y. May 6, 2008))). The issues are not whether the expert will be paid in advance if she so requires. It is who will pay

failed to appear on the day for which the deposition was noticed, some courts will require the retaining party to pay the deposing party for all fees and expenses incurred because of the expert's no-show.<sup>134</sup>

Importantly, the Advisory Committee's notes to the rule state that the court may "order payment . . . either as a condition of providing discovery or after the discovery has been completed," thus expressing no presumption either way and, instead, leaving the decision to individual courts on a case-by-case basis.<sup>135</sup> Not surprisingly, this perceived discretion invites lawyers to take opposing positions.<sup>136</sup> The result is time and money spent litigating

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the expert in advance: the party that retained her or the opposing party. *See AP Links*, 2015 WL 9050298, at \*3 ("The Court will not direct advance payment." (quoting *Almonte v. Averna Vision & Robotics Inc.*, No. 11-CV-1088S(Sr), 2014 WL 287586, at \*3 (W.D.N.Y. Jan. 24, 2014)). "As the court explained in *Conte*, Defendants' counsel retained [the expert] and therefore it is 'his responsibility to pay [the expert].'" *Id.* at \*1 (quoting *Conte v. Newsday, Inc.*, No. CV 06-4859 (JFB) (ETB), 2011 WL 3511071, at \*3 (E.D.N.Y. Aug. 10, 2011)). "While Rule 26 entitles Defendants' counsel to *reimbursement* for 'reasonable fees' in connection with [the expert's] deposition, Plaintiffs' counsel is under no obligation to pay [the expert] a flat fee in advance of his deposition." *Id.* (emphasis in original) (quoting *Conte*, 2011 WL 3511071, at \*3) (citing *Johnson*, 2008 WL 1995117, at \*1).

<sup>134</sup> *See, e.g.*, *Harris v. Costco Wholesale Corp.*, 226 F.R.D. 675 (S.D. Cal. 2005) (expert cancelled deposition because not paid in advance; court said that if no agreement to pay fees in advance, no obligation to do so; so result there was that the party who was put out by the expert's last-minute fit was entitled to attorney's fees and costs incurred in conjunction with the cancelled deposition).

<sup>135</sup> FED. R. CIV. P. 26 advisory committee's note to 1970 amendment.

Under subdivision (b)(4)(C), the court is directed or authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery, and that the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert. The court may issue the latter order as a condition of discovery, or it may delay the order until after discovery is completed. These provisions for fees and expenses 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 has paid, often a substantial sum.

*Id.* (first citing *Walsh v. Reynolds Metal Co.*, 15 F.R.D. 376 (D.N.J. 1954); and then citing *Lewis v. United Air Lines Transp. Corp.*, 32 F. Supp. 21, 23 (W.D. Pa. 1940)); *see also* *WRIGHT ET AL.*, *supra* note 15, § 2034. On the other hand, a party may not obtain discovery simply by offering to pay fees and expenses. *Cf. Boynton v. R. J. Reynolds Tobacco Co.*, 36 F. Supp. 593 (D. Mass. 1941). Notwithstanding the Advisory Committee note, some courts have refused to award expert fees in advance on grounds that the rule does not allow it. *See, e.g.*, *Conte*, 2011 WL 3511071, at \*3 (stating that the rule does not entitle the plaintiff "to payment in advance" for his expert deposition (first citing FED. R. CIV. P. 26(b)(4)(E); and then citing *Johnson*, 2008 WL 1995117, at \*1)).

<sup>136</sup> The fact that courts have such discretion does not, of course, necessarily mean that they will use that discretion to order advance payment. *See AP Links, LLC*, 2015 WL 9050298, at \*2.

Defendants' counsel asserts that "the Court has discretion to order advance compensation of an expert" and cites two cases to support this proposition. However, the Court finds that the circumstances set forth in

over the simple matter of when fees must be paid.

Further, it is not only the litigants that pay the price for the rule's lack of clarity, courts do as well. When faced with disputes about the timing of fees, courts must not only look into the interpretation of a rule that gives little guidance, but also into the factual intricacies of the dispute and related policy arguments.<sup>137</sup> While courts may lament the fact that the parties do not just "work it out on their own," the rule's lack of guidance, the inconsistency among courts' interpretations, and the "splitting-of-the-baby" that often occurs in such disputes provides litigants with more reasons to litigate than not.

## ii. Timing of Request for Fees

Other disputes regarding timing concern when the retaining party must request fees from the deposing party. Because the only hint in how the rule should be read comes from an advisory note (and one that many courts do not mention), courts differ greatly in their interpretation of the rule's

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these two cases are distinct from the instant matter. Defendants' counsel has not otherwise shown that, under the facts here, the Court should exercise its discretion to require Plaintiffs to pay [the expert] in advance of his deposition.

*Id.* (alterations in original omitted) (first citing *Garnier*, 2006 WL 1085080, at \*2–4 (plaintiff disputed the amount of the fee charged by the defendants' expert, holding that the expert was entitled to, *inter alia*, a \$350 hourly rate and ordering that the expert "be paid a 50% down payment on the estimated fee seven days in advance of his deposition"); and then citing *In re "Agent Orange" Prod. Liab. Litig.*, 105 F.R.D. 577, 582 (E.D.N.Y. 1985) (ordering that the plaintiffs' depositions of four of the defendants' experts in "complex 'Agent Orange' multidistrict litigation" was "conditioned on plaintiffs' payment of reasonable experts' fees and expenses incurred in discovery")).

<sup>137</sup> For a painstaking example of these dynamics, see *Mann v. Taser Int'l, Inc.*, No. 4:05-CV-0273-HLM, 2007 WL 9712069, at \*2–3 (N.D. Ga. July 24, 2007). In that case, the court described dozens of back-and-forth communications among counsel, including letters and emails to and from the expert:

The total amount I will therefore need in advice [sic] to forward to her is \$2,890.00 total or \$963.33 per defendant. The above is based upon the assumption the 8 hours of deposition time can be completed within one day if we begin at 9:00 a.m.? . . .

"I need to once again try to clarify Charly Miller's fees. IN ADDITION TO THE COST OF AIRFARE [sic], HOTEL, TAXI, FOOD AND HER DEPOSITION TIME, [s]he charges \$50.00 per hour portal to portal which means she will be traveling away from home about 48 hours. It takes about 12 hours to get here. She lives about 3 hours from the airport. Even if we met in Atlanta for the deposition, she would still need 2 nights because YOU ALMOST CANNOT GET HERE FROM THERE. ALL SAID, I NEED CONFIRMATION THAT THIS IS ACCEPTABLE AND SHE WILL BE PAID OR WE NEED TO FLY TO NEBRASKA.

*Id.* (third and fourth alternations in original). The final dollar amount awarded to plaintiff's expert was \$4011.55, approximately \$660.00 more than the deposing counsel offered and \$890.00 less than the retaining party demanded. *Id.* at \*8.

requirements regarding timing of fees. At the other end of the spectrum from cases in which fees are requested before the deposition lie those cases in which no mention is made of payment for expert's fees until the conclusion of the litigation. Thus, rather than requesting payment at or around the time of the expert's deposition, the retaining lawyer requests such a payment at the conclusion of the case.<sup>138</sup>

Courts have handled disputes about the timing of the fee request with mixed results. Many courts enforce the rule's fee shifting language regardless of when the request for fees is made.<sup>139</sup> These courts frequently note the Advisory Committee's statement that the court may issue an order to pay fees as a condition of discovery "or may delay the order until after discovery[.]" as indicative of the propriety of a fee request at any point in the litigation.<sup>140</sup> These courts also note that, whether expressly requested by counsel at the time or not, "the Federal Rules plainly provide that notice."<sup>141</sup>

Some courts, however, decline to award fees if the retaining party waits too long to request them. In such situations, the court may decide that fee shifting is not permitted due to the parties' failure to discuss it around the time of the deposition, which created an implied agreement between the parties not to shift fees.<sup>142</sup> At least one court, in refusing to shift expert

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<sup>138</sup> Sometimes parties request such fees under Rule 26. Other times, parties request reimbursement for the experts' fees under Rule 54, which allows the prevailing party in a case to recover certain costs. FED. R. CIV. P. 54. Notably, Rule 54's utility is constrained in two ways: first, it only applies to the prevailing party and second, it only applies to cases in which there is a final judgment entered. *Id.*

<sup>139</sup> See, e.g., *Ndubizu v. Drexel Univ.*, No. 07-3068, 2011 WL 6046816, at \*4 (E.D. Pa. Nov. 16, 2011) ("The fact that Defendants requested payment of expert fees for the first time after judgment was entered . . . does not preclude us from granting the motion." (citing *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1011 (10th Cir. 1996))). "In *Ellis*, the court emphasized that 'Rule 26(b)(4)(C) itself does not specify whether or when a party must demand payment of fees to its expert.'" *Id.* (first citing *Ellis*, 73 F.3d at 1011; then citing *Rogers v. Penland*, 232 F.R.D. 581, 582 (E.D. Tex. 2005); and then citing *Fisher-Price, Inc. v. Safety 1st, Inc.*, 217 F.R.D. 329, 330 (D. Del. 2003)).

<sup>140</sup> See, e.g., *Neutral Tandem, Inc. v. Peerless Network, Inc.*, No. 08 C 3402, 2011 WL 13199213, at \*5 (N.D. Ill. Sept. 1, 2011) (quoting *Chambers v. Ingram*, 858 F.2d 351, 360–61 (7th Cir. 1988)).

In *Chambers v. Ingram*, the plaintiff prevailed in a jury verdict against the defendant. . . . The plaintiff argued that his costs, however, were recoverable under Rule 26(b)(4)(C). The defendant objected because the plaintiff did not request the expert fees and costs at the time of the deposition. The Seventh Circuit noted that the Advisory Committee notes to Rule 26(b) stated that the court may issue an order to pay fees as a condition of discovery "or may delay the order until after discovery." Thus, the court held, "we do not believe that the timing of the plaintiff's request for this discovery is a bar to recovery under the rule."

*Id.* (citing 858 F.2d at 360–61).

<sup>141</sup> *Ndubizu*, 2011 WL 6046816, at \*4.

<sup>142</sup> See *Matthews v. United States*, 756 F. Supp. 511, 515 (D. Kan. 1991) ("The court is

discovery fees post-trial under the rule, has expressed hostility to attempts to shift fees post-judgment, calling the party's request for such fees a "late-blooming argument" and "just silly."<sup>143</sup> The Court stated that

Rule 26(b)(4)(C) . . . is a discovery rule, it applies equally to both sides, and if the parties had intended to charge one another for the time their numerous experts spent in responding to discovery, they should have raised the issue at the initial Rule 16 conference, or at least at some point before the discovery was undertaken.<sup>144</sup>

## 2. Disputes Regarding Fee Requests When the Expert's Mandatory Disclosures and Report are Deficient

Occasionally, litigants ask courts to deny fee shifting on grounds that the expert failed to comply with Rule 26(a)(2)(B).<sup>145</sup> Experts are required to disclose, before their deposition,<sup>146</sup> a report that provides their opinions in a

without legal authority under Rule 26(b)(4)(C) to order payment of fees and expenses incurred in taking the deposition of plaintiff's expert witness. Presumably, the deposition was taken upon the parties' agreement subject to whatever conditions and terms that were reached.").

<sup>143</sup> Leggett & Platt, Inc. v. Vutek, Inc., No. 4:05CV788 CDP, 2007 WL 607736, at \*1 (E.D. Mo. Feb. 22, 2007).

<sup>144</sup> *Id.* In that case, the court's hostility was likely based in part on the fact that the retaining party was seeking "expert witness fees of almost a million dollars." *Id.* The party seeking the fees also was the prevailing party, so although the court cites Rule 26(b)(4)(C), it also references the fact that "that provision has nothing to do with a prevailing party's right to recover costs[.]" suggesting perhaps that the request was made in the context of a bill of costs. *Id.* Still, other courts have treated a request for expert discovery fees submitted as part of a bill of costs as nonetheless compensable under Rule 26(b)(4)(C). *See, e.g.,* Halasa v. ITT Educ. Servs., Inc., 690 F.3d 844, 850 (7th Cir. 2012) (collecting cases in which the "district courts have taken different approaches to the way in which § 1821 applies to motions for costs under Rule 26(b)(4)(E) when those particular items are also addressed in § 1821" (citations omitted)).

<sup>145</sup> This issue comes up with some regularity, so much so that a federal practice form for expert fee motions includes this argument. *See, e.g.,* 3A JAY E. GRENI, WEST'S FEDERAL FORMS § 21:37 (5th ed.), Westlaw (database updated 2018).

It has been argued, in informal discussion of this matter (i.e. at the pretrial conference), that Plaintiffs had a choice as to whether to depose the defense experts, and, having made that choice, should pay the cost of doing so. This is, it is respectfully submitted, a specious argument. In the absence of making discovery, Plaintiffs would have been fatally disadvantaged at trial. The defense expert reports, for the most part, contained nothing more than net opinions. Few set forth the materials reviewed or the facts on which the experts intended to rely. None set forth compensation or a listing of other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

*Id.*

<sup>146</sup> The requirement that expert disclosures come before the deposition appears in a different rule—the rule that permits parties to depose the opposing expert. *See* FED. R. CIV. P. 26(b)(4)(A). This rule provides that "[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*

given case, the bases for such opinions, the documents examined and relied upon, as well as information about their background, experience, prior testimony, and fee schedule. Disclosures exist for a reason. For example, one court has explained the significance of disclosure of prior testimony as the way “to give the other party access to useful information to meet the proposed experts’ opinions” and noted that “[t]he proliferation of marginal or unscrupulous experts will only be stopped when the other party has detailed information about prior testimony.”<sup>147</sup>

Thus, when experts fall short in their disclosures, litigants may argue that the failure to disclose should negate, or at least reduce, the shifting of fees. The argument is premised on the fact that a deposition under such circumstances is not only necessary, but also necessarily longer, absent complete and accurate disclosures.<sup>148</sup>

In one case, the deposing party “argue[d] that he should not be required to reimburse Defendants because the reports submitted by some of the experts were deficient under the Federal Rules’ disclosure requirements.”<sup>149</sup> The “expert’s noncompliance with this provision,” the litigant argued, “is a deficiency that renders reimbursement of that expert’s fees unreasonable.”<sup>150</sup> The court acknowledged that the experts had failed to include required information in their reports.<sup>151</sup> Although recognizing this deficiency and the impact on the deposing party having “to spend time in a deposition

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*a report from the expert, the deposition may be conducted only after the report is provided.”* *Id.* (emphasis added). “[T]he disclosure of prior recorded testimony is designed to give the other party access to useful information to meet the proposed experts’ opinions. The proliferation of marginal or unscrupulous experts will only be stopped when the other party has detailed information about prior testimony.” *Elgas v. Colo. Belle Corp.*, 179 F.R.D. 296, 300 (D. Nev. 1998).

<sup>147</sup> *Elgas*, 179 F.R.D. 296 at 300.

<sup>148</sup> See generally Motion in Limine by Defendant, *Stanczyk v. Prudential Insur. Co. of Am.*, No. 1:15-cv-0097 (N.D. Iowa Apr. 28, 2017), 2017 WL 1632874. The author litigated a case in which the opposing expert testified that he had participated in hundreds of cases, yet failed to disclose a list of his prior testimony as required by the rule. Instead, he brazenly stated in his expert disclosure: “Let me note that I have never maintained a list of cases of medical record reviews, Independent Medical Examination, depositions, or trial appearances. Thus, I am unable to produce any list of my prior work where I have been asked to serve as an expert.” That same expert, nonetheless, characterized the nature of his prior testimony as “pro-defendant” in an effort to bolster the credibility of his opinions on behalf of the Plaintiff in that case: “In general probably 90 percent of my work is defense work.”; “And, you know, I think it’s important to note that I call things the way they are. I’m pretty well-known for doing that. And the majority of my work is defense work.” There is no realistic way for a party to test the accuracy and veracity of an expert’s characterization of his prior testimony, and its consistency with testimony in the case at hand, without having access to his prior testimony. See generally *id.*

<sup>149</sup> *Ndubizu v. Drexel Univ.*, No. 07-3068, 2011 WL 6046816, at \*5 (E.D. Pa. Nov. 16, 2011).

<sup>150</sup> *Id.*

<sup>151</sup> See *id.*

developing that information when it should have been included in the report[.]" the court deemed that "impact" to be "nominal."<sup>152</sup> It reduced each experts' compensation by one-half hour, which likely covered but a fraction of the amount the deposing party incurred in litigating the issue.<sup>153</sup>

In another case, the deposing party contended that it should not have to pay for the experts' depositions because the experts had failed to disclose their hourly rate as required under Rule 26(a)(2)(B).<sup>154</sup> It argued that it should not have to pay the experts' allegedly "'excessive' charges which [it] would not have agreed to pay had [it] known the experts' rates before the depositions."<sup>155</sup> The court disagreed, stating that "the fact that the fees were not agreed to or disclosed ahead of time does not preclude defendant from seeking reimbursement for its experts under Rule 26."<sup>156</sup> It reasoned that, because "the timing of a party's request for discovery cost is not a bar to recovery under Rule 26[.]" the fact that the experts' rates were not known in advance was not consequential.<sup>157</sup> While that reasoning is consistent with several courts' admonishments that litigants should bring fee disputes to the

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<sup>152</sup> *Id.* In another case, *Garnier v. Illinois Tool Works, Inc.*, the expert demanded advance payment of \$4000 seven days before the scheduled deposition, yet had not provided adequate expert disclosure. No. 04CV1825(NGG)(KAM), 2006 WL 1085080, at \*1, \*4 (E.D.N.Y. Apr. 24, 2006). The deposing party thus requested that the court order that the fees for the soon-to-occur deposition not be shifted due to the disclosure failure. *Id.* at \*4. The court simply ordered the plaintiff to do what the rule already had required, stating: "[T]hey shall furnish to plaintiff complete expert disclosures, including court information, docket numbers, party and counsel names, and dates, for [the expert] in accordance with Rule 26 within three business days of the entry of this order." *Id.* (citing *Coleman v. Dydula*, 190 F.R.D. 316, 318 (W.D.N.Y. 1999) (Rule 26(a)(a)(B) requires disclosure of "the list of cases in which the witness has testified[, which] should at a minimum include the name of the court or administrative agency where the testimony occurred, the names of the parties, the case number, and whether the testimony was given at a deposition or trial")). While an order to comply was no doubt necessary, without any consequences other than the already-existing obligation to comply with the rule, it is unlikely the order would have much effect on that expert or the retaining party the next time around. Indeed Rule 37(a)(3)(A), which governs discovery sanctions, *already* requires compliance without a motion to compel. *See* FED. R. CIV. P. 37(a)(3)(A); *see also* WRIGHT ET AL., *supra* note 15, § 2289.1 ("The sanction is automatic in the sense that there is no need for the opposing party to make a motion to compel disclosure, as authorized by Rule 37(a)(3)(A) in order to compel a further disclosure, as a predicate for imposition of the sanction of exclusion.").

<sup>153</sup> Indeed, the costs involved in disputing fees discourages some litigants from challenging patently unreasonable fee awards. As one commentator has explained: "[T]he cost of challenging excessive fees can, in some instances, be greater than simply paying the fee in the first place. So again, the fees get paid." Canepa, *supra* note 2.

<sup>154</sup> This Rule requires "a statement of the compensation to be paid for the study and testimony in the case." FED. R. CIV. P. 26(a)(2)(B)(vi).

<sup>155</sup> *Handi-Craft Co. v. Action Trading, S.A.*, No. 4:02 CV 1731 LMB, 2003 WL 26098543, at \*18 (E.D. Mo. Nov. 25, 2003).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (citing *Chambers v. Ingram*, 858 F.2d 351, 360–61 (7th Cir. 1988)).



court “after the deposition has been completed,”<sup>158</sup> the court failed to acknowledge the difference between the disclosure of fees versus an agreement about fees—the former of which is required by the rule.

While not highly litigated, this aspect of the rule would nonetheless benefit from making explicit what is implicit. Namely, at its core, the fee shifting rule contemplates that there has been a full and accurate disclosure, including a complete report.<sup>159</sup> It is that extensive disclosure that forms the rationale behind the fee shifting rule and, specifically, why it is fair to shift fees. When that implicit tradeoff—fees shifting in exchange for a full and thorough disclosure—breaks down because of incomplete disclosure, so too does the underlying rationale and fairness behind the fee shifting rule.

### 3. Disputes Regarding the Process for Handling and Enforcing Fee Disputes

The rule contains no mention of the process for handling and enforcing fee disputes. It does not mention when and how a party should bring the dispute to court, nor does it address who bears the burden of proof. Complicating that void is the rule’s overarching language that makes the fee shifting mandatory “unless manifest injustice would result.” Taken together, these aspects of the rule create unnecessary (or unnecessarily costly) litigation and strike the wrong balance.

Courts appear to uniformly hold that it is the retaining party that bears the burden of proof on the question of fee shifting.<sup>160</sup> Plaintiffs, in this case, bear the burden of establishing that each expert’s fee is reasonable.<sup>161</sup> If an expert’s fee is unreasonable, the Court may, in its discretion, simply fashion a reasonable alternative.<sup>162</sup>

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<sup>158</sup> AP Links, LLC v. Russ, No. CV 09-5437 (JS) (AKT), 2015 WL 9050298, at \*2 (E.D.N.Y. Dec. 15, 2015) (“If the parties are unable to agree upon the reasonableness of [the expert]’s fee, they may make an application to the Court after the deposition has been completed.” (first citing *Conte v. Newsday, Inc.*, No. CV 06-4859 (JFB) (ETB), 2011 WL 3511071, at \*1 (E.D.N.Y. Aug. 10, 2011); and then citing *Biernacki v. United States*, No. 11-CV-973(Sr), 2012 WL 6100291, at \*5 (W.D.N.Y. Dec. 7, 2012))).

<sup>159</sup> See *supra* Part II.A, B.

<sup>160</sup> In the author’s experience, it is not uncommon for the retaining attorney to pass along the expert’s invoice, which may be sorely lacking in detail or description despite requesting a large sum, as if the retaining lawyer is nothing more than the courier. The rule encourages this mentality to the extent it does not suggest rigorous scrutiny at any juncture of whether the requested fee should be shifted, but instead seems to imply a rubber stamp in all but the most extreme situations. See FED. R. CIV. P. 26(b)(4)(E).

<sup>161</sup> See *Fiber Optic Designs, Inc. v. New Eng. Pottery, LLC*, 262 F.R.D. 586, 589 (D. Colo. 2009).

<sup>162</sup> See *Nester v. Textron, Inc.*, No. 1:13-CV-920 RP, 2016 WL 6537991, at \*5 (W.D. Tex. Nov. 3, 2016) (“Plaintiffs bear the burden of establishing that each expert’s fee is reasonable under Rule 26(b)(4)(E)(i). If an expert’s fee is unreasonable, the Court may, at its discretion, fashion a reasonable alternative.” (citing *Fiber Optic Designs, Inc.*, 262 F.R.D. at

But saying that the retaining party bears the burden of proof and actually holding the party to that burden are two different matters. In numerous cases, courts suggest that both parties failed to explain why or why not the fees billed were reasonable, even though that burden lies with only one party.<sup>163</sup> And even when there is a noted lack of evidentiary support regarding the reasonableness of fees, courts still largely award such fees with only minor reductions.<sup>164</sup> Likewise, in cases in which the lack of evidence produced by the party who bears the burden of proof renders the court unable to assess a critical factor, the courts still award fees and simply ignore that missing factor.<sup>165</sup>

Despite how few words the rule contains, it decidedly puts a thumb on the scale in favor of fee shifting in two separate places, no matter how large the bill or extreme the claimed fees. First, it states that fees shift “unless manifest injustice” would result, implying that there has to be an exceptionally compelling reason not to shift fees.<sup>166</sup> Second, it says that the

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589; then citing *Jensen v. Lawler*, 338 F. Supp. 2d 739, 747 (S.D. Tex. 2004); and then citing *Borel v. Chevron U.S.A. Inc.*, 265 F.R.D. 275, 276 (E.D. La. 2010)); *Ball v. LeBlanc*, No. 13-00368-BAJ-SCR, 2015 WL 5793929, at \*1 (M.D. La. Sept. 30, 2015).

<sup>163</sup> See, e.g., *EEOC v. Johnson & Higgins, Inc.*, No. 93 Civ. 5481 LBS AJ, 1999 WL 32909, at \*4 (S.D.N.Y. Jan. 21, 1999) (“And because neither the EEOC nor J & H has provided the Court with any useful information about other factors, the Court . . . will focus on the rate the expert usually charges and the rate the expert charges the retaining party (here, J & H), tempered by the Court’s sense of what is unreasonable.” (citing *McClain v. Owens-Corning Fiberglas Corp.*, No. 89 C 6226, 1996 WL 650524, at \*4 (N.D. Ill. Nov. 7, 1996) (“The court may use its discretion, however, where the parties offer scant evidence in support of their positions” as to reasonable expert fees.))).

<sup>164</sup> See, e.g., *Reit v. Post Props., Inc.*, No. 09 Civ. 5455(RMB)(KNF), 2010 WL 4537044, at \*10 (S.D.N.Y. Nov. 4, 2010) (acknowledging that the retaining party “failed to submit competent evidence . . . to support Dr. Head’s request for compensation” and thus “did not meet [its] burden of showing that Dr. Head’s requested fees are reasonable[,]” yet concluding in the apparent absence of evidence that “\$400 is a reasonable hourly fee for Dr. Head’s preparation time as well as his deposition time”).

<sup>165</sup> See, e.g., *Garnier v. Ill. Tool Works, Inc.*, No. 04CV1825(NGG)(KAM), 2006 WL 1085080, at \*3 (E.D.N.Y. Apr. 24, 2006).

With respect to the fee actually being charged to the retaining party, defendants’ counsel, in response to this Court’s order, has represented that Dr. Glass cannot in good faith estimate the time he expended examining plaintiff and preparing a report of that examination. The Court is troubled by this position, given that Dr. Glass has testified as an expert in over 500 cases, and claims to have examined “thousands of plaintiffs and defendants in civil law suits.” Dr. Glass should be able to estimate the amount of time he expended in this case, but has not done so. In any event, this factor is not dispositive; instead, the Court must balance the defendants’ need for competent experts with the need to protect the opposing party with being “unfairly burdened by excessive ransoms which produce windfalls for the defendants’ expert.”

*Id.* (alterations in original omitted) (quoting *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 645 (E.D.N.Y. 1997)).

<sup>166</sup> See FED. R. CIV. P. 26(b)(4)(E).

court “must order” the fee shifting.<sup>167</sup> Of course, the rule also says that only “reasonable fees” are shifted.<sup>168</sup> Yet, in failing to set parameters as to what is reasonable, the rule leaves wide discretion to courts already predisposed to shift whatever fees are billed. Likewise, the rule’s lack of attention to what level of scrutiny and oversight the court should apply undermines whatever teeth the “reasonable fees” language was intended to supply, and stands in stark contrast to any other fee-shifting rule. So, while it is true that a few courts have scrutinized and drastically limited the amount of fees that are shifted,<sup>169</sup> those courts are in the minority.

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<sup>167</sup> The MDL Protocol resolves much of this ambiguity regarding how disputes are handled by establishing protocols that favors the presumptive fee request. MDL PROTOCOL, *supra* note 69. Most notably, the protocol establishes methods of resolution for disputes regarding fees, such as providing that a party must “disput[e] the reasonableness of an expert’s deposition fee . . . within thirty (30) days upon receipt of the expert’s invoice” or be deemed to have waived any objection to the fees. *Id.* ¶ 9. The protocol further specifies that if a party has to file a motion to compel for payment of expert fees, “to the extent the motion proves successful, at the discretion of the court the moving party may be entitled to assess from the delinquent party the costs of collecting including reasonable attorney fees.” *Id.* ¶ 10. The protocol does not contain a similar paragraph for shifting attorneys’ fees to the deposing party if the motion proves unsuccessful.

<sup>168</sup> *Auto. Rentals, Inc. v. Keith Huber, Inc.*, No. 1:10CV385-LG-RHW, 2012 WL 12854841, at \*1 (S.D. Miss. Jan. 10, 2012) (“[T]he Court ‘has discretion to limit or alter those costs if they appear to be unreasonable.’” (quoting *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 356 (5th Cir. 2007))).

<sup>169</sup> For example, one court recognized the risk of abuse in expert fee shifting:

To be sure, we live in an age where a grown man may be paid a seven figure annual salary to dribble a small round ball. But, the forces of the marketplace are at work in such a situation: not only supply and demand, but the variegated effects of the superstar’s presence on attendance, television revenues, and the all-hallowed won/lost record. And, most important, the employer and the employee square off and bargain at arm’s length in order to determine an equitable stipend, each with something to lose and something to gain. In the Rule 26(b)(4)(C) context, however, such factors are noticeably absent; the plaintiffs have handpicked the expert, and the defense has neither options nor bargaining power if it desires to obtain the pretrial discovery which the rule permits. Unless the courts patrol the battlefield to insure fairness, the circumstances invite extortionate fee-setting.

In the final analysis, the mandate of Rule 26(b)(4)(C) is not that an adverse expert will be paid his heart’s desire, but that he will be paid a “reasonable fee.” The ultimate goal must be to calibrate the balance so that a plaintiff will not be unduly hampered in his/her efforts to attract competent experts, while at the same time, an inquiring defendant will not be unfairly burdened by excessive ransoms which produce windfalls for the plaintiff’s experts. Decisionmaking in this entropic field must be fair to the parties, equitable vis-a-vis the witness, and comprehensible to the community at large.

*Mann v. Taser Int’l, Inc.*, No. 4:05-CV-0273-HLM, 2007 WL 9712069, at \*6–7 (N.D. Ga. July 24, 2007) (quoting *Anthony v. Abbott Labs.*, 106 F.R.D. 461, 464–65 (D.R.I. 1985)).

Exacerbating the problem is the lack of consequences for unfair play under the rule. It is almost unheard of in the context of Rule 26(b)(4)(E) for the court to award attorneys' fees to the party that prevails on the fee-shifting motion. For example, even when a court recognizes deficiencies or unreasonableness in one party's fee demand, it still does not award attorneys' fees. For example, in *AP Links, LLC*, the deposing party brought a motion to require the expert to appear for his deposition. The expert had refused to appear unless the deposing party paid him a flat fee in advance of the deposition. The case was pending in the Eastern District of New York, a jurisdiction that had well-established law that an expert "may not insist on advance payment, and may not set a flat fee before he knows what he will be called upon to do."<sup>170</sup> Even so, the court refused to award attorneys' fees to the party that was forced to bring the motion, stating:

Finally, the request by Plaintiffs' counsel that he be awarded attorneys' fees in connection with bringing the instant motion is DENIED. Plaintiffs' counsel has not cited any case law in support of his conclusory request, nor has he identified the rule or legal authority demonstrating his entitlement to the relief he seeks. The parties are cautioned that if, going forward, the Court finds that either party is not operating in good faith with regard to the issues referenced in this Order, the Court will take appropriate action.<sup>171</sup>

It is hard to understand the court's statement that the moving party did not "identif[y] the rule . . . demonstrating his entitlement" to fees given that the motion, like all discovery disputes, clearly falls under the purview of Federal Rule of Civil Procedure 37. In addition, the court's reticence to shift attorneys' fee is a little ironic since the underlying rule is a fee-shifting provision, such that relative fairness concerns should be heightened.

### C. Policy Problems: Issues Arising from the Rule's Overbreadth

In some of the areas in which the rule is clear, it strikes the wrong balance. First, it does so by requiring fee shifting even for discovery of experts who have not submitted expert reports. Second, it does this by invoking the term "unless manifest injustice would result."

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<sup>170</sup> *AP Links, LLC v. Russ*, No. CV 09-5437 (JS) (AKT), 2015 WL 9050298, at \*3 (E.D.N.Y. Dec. 15, 2015) (quoting *Johnson v. Spirit Airlines, Inc.*, No. CV 07-1874 (FB)(JO), 2008 WL 1995117, at \*1 (E.D.N.Y. May 6, 2008)).

<sup>171</sup> *Id.*; see also *Rote v. Zel Custom Mfg. LLC*, No. 2:13-cv-1189, 2018 WL 2093619, at \*6 (S.D. Ohio May 7, 2018) (citing FED. R. CIV. P. 37(a)(5)(A)(iii) and denying moving party's "request for attorney's fees incurred in bringing this Motion . . . as unjust under the circumstances"). As ironic as it may be, the one case in which a court entertained the possibility of awarding attorneys' fees, the attorney had not requested them: "Defendant . . . did not request an award of attorneys' fees and expenses in its Motion. If Defendant . . . had made such a request, the Court would have given serious consideration to granting it." *Mann*, 2007 WL 9712069, at 8 n.4.

1. The Problem with Shifting Fees for Experts Who Have Not Submitted Reports

The fee shifting rule applies to discovery of all experts, but some experts are not subject to the mandatory disclosures and do not have to submit reports. These experts, sometimes called “non-retained experts,” are experts who are “not retained or specially employed to provide expert testimony in the case.”<sup>172</sup>

Numerous reasons exist as to why experts who do not have to provide a report should not be included in the fee shifting rule. The expert discovery fee shifting rule is premised on the fact that the expert to be deposed has already provided a complete and detailed disclosure and report, and thus a deposition is viewed as less necessary and more discretionary. Therefore, similar to the argument that fees should not shift when an expert submits an incomplete or deficient report,<sup>173</sup> the argument is that, with no report, a deposition is hardly a luxury but rather a necessity.

In addition, the expert discovery rule is premised on the proposition that it is “unfair” for the deposing party to get for free what the other party had to pay for—a proposition that has no validity in the context of an expert who has not submitted a report. By their very nature, experts who are not required to submit reports have not been retained, and thus have not been paid by one party for opinions reached and work performed in the litigation. Accordingly, there exists no concern that the deposing party will “get for free” what the other party has had to pay for. Finally, the deposition of an expert who has not provided a report will likely take longer. Thus, the potential “unfairness” cuts in the opposite direction, insofar as it is unfair for the deposing party to have to pay for the expert to sort through what her opinions are, the bases for them, and more during the deposition.

2. The Problem with Shifting Fees for Experts Who Are the Party’s Employee

For somewhat similar reasons, it is problematic to include experts who are “the party’s employee” under the fee shifting rule. First, only large, corporate defendants are likely to have such employees and thus are the only parties who benefit from such a rule. Second, an expert “whose duties as the

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<sup>172</sup> FED. R. CIV. P. 26(a)(2)(B) (“Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony.”). It is beyond the scope of this Article to address which experts fall into which categories—suffice to say that is a less-than-clear delineation, e.g., should a treating physician be treated as an expert that must provide a report. *See* Shea, Kreps & Solade, *supra* note 1, at 1.

<sup>173</sup> *See supra* Part III.B.2.

party's employee regularly involve giving expert testimony" most likely is salaried and thus has no market-based hourly rate. In addition, not shifting such an expert's fees does not raise the fairness concerns that exist with regard to specially retained experts. It is typical for a party to pay for the time its own employee, whether a layperson or expert witness, spends responding to discovery. Litigation is, by definition, burdensome and expensive for parties, and responding to discovery is one of the biggest burdens. Even so, the discovery rules do not provide for fee shifting, and parties already incur significant discovery-related expenses occasioned by the other side's discovery requests and performed for the other side's benefit. If those requests are irrelevant, unduly burdensome, or otherwise objectionable, the party has the ability to seek a protective order. No justification exists to treat discovery costs related to a party's expert employee any differently than those costs for non-expert employees.

### 3. Problems Arising from the "Unless Manifest Injustice Would Result" Language

The rule's introductory language that a court must require that an expert's "reasonable fees" be shifted "[u]nless manifest injustice would result" is also problematic.<sup>174</sup> Such language is more commonly found in rules of criminal law and procedure than in a rule of civil procedure.<sup>175</sup> In any event, what "manifest injustice" entails is not defined in the rule.<sup>176</sup> The advisory notes to the rule suggest that the standard relates only to the ability of the deposing party to pay.<sup>177</sup> Thus, as one court has described it: "Implicit in the 'manifest injustice' caveat[] is that a 'rich' party should not be allowed to agree to pay excessively high fees to its expert in order to prevent a 'poorer' opposing party from being able to afford to depose the expert."<sup>178</sup>

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<sup>174</sup> FED. R. CIV. P. 26(b)(4)(E).

<sup>175</sup> See GREINIG, *supra* note 145, § 21:37 (discussing areas in which the "manifest injustice" standard arises, including "retroactive application of statutory provisions" and "departure on manifest injustice ground" under Federal Sentencing Guidelines, and Federal Rule of Civil Procedure 16 governing pretrial orders). Notably, in Federal Rule of Civil Procedure 16(e), which permits the court to modify the final pretrial order "only to prevent manifest injustice," unlike Rule 26, the rest of the rule contains detailed substantive and procedural provisions that explain and justify the "manifest injustice" language. FED. R. CIV. P. 16(e).

<sup>176</sup> See FED. R. CIV. P. 26(2)(b)(4)(E).

<sup>177</sup> See WRIGHT ET AL., *supra* note 15, § 2034 n.28 ("Even in cases where the court is directed to issue a protective order, it may decline to do so if it finds that manifest injustice would result. Thus, the court can protect, when necessary and appropriate, the interests of an indigent party." (citing FED. R. CIV. P. 26 advisory committee's note to 1970 amendment)).

<sup>178</sup> *EEOC v. Johnson & Higgins, Inc.*, No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at \*4 (S.D.N.Y. Jan. 21, 1999) (citing *Pudela v. Swanson*, No. 91 C 3559, 1993 WL 532546, at \*3 (N.D. Ill. Dec. 20, 1993) ("Plaintiffs may have less financial resources than defendants, but they are not 'indigent' . . . [and] this court perceives no injustice in requiring them to pay the

Even so, other courts suggest that the “unless manifest injustice would result” language serves as a general safeguard against unreasonable fee shifting.<sup>179</sup> The case law, however, reveals that to be more aspirational than actual—other than a party’s abject inability to pay, the manifest injustice language provides no safeguard.<sup>180</sup>

To the contrary, the unintended effect of that language has been to justify the lack of scrutiny applied to experts’ fee requests. It is not uncommon for courts to rubber-stamp the shifting of extraordinary expert fees on grounds that the fees do not offend the “manifest injustice” caveat. Because that reflects a misunderstanding of the limited safeguard that the language actually supplies, the impact of the rule’s limited safeguard—that the fees must be “reasonable”—ends up being minimized.<sup>181</sup>

Experts come in all forms—some charge exorbitant rates and tack on fees to their invoices for anything remotely related to the deposition, whereas others err on the side of caution, and charge only for actual time spent in the deposition. The thumb on the scale that arises from the “unless manifest injustice would result” standard incentivizes and rewards less scrupulous experts to shift greater expenses, while at the same time disincentivizing the deposing party from challenging such fees.

#### IV. OVERALL IMPACT OF CURRENT RULE’S SHORTCOMINGS

Fee shifting of any variety is extraordinary in the American legal system and perhaps for good reason—the inherent and unintended consequences of fee shifting are many.<sup>182</sup> Thus, on the rare occasion in

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fees charged by their opponents’ experts for time spent in testimony at deposition.” (“That, however, is not the case here. There is no disparity between J & H’s and the EEOC’s ability to afford experts.”)).

<sup>179</sup> See, e.g., *Reit v. Post Props., Inc.*, No. 09 Civ. 5455(RMB)(KNF), 2010 WL 4537044, at \*10 (S.D.N.Y. Nov. 4, 2010) (“Absent any evidence that manifest injustice would result from failing to pay Dr. Head for the time he ‘reserved’ for the March 12, 2010 deposition, the Court finds that charge to be unreasonable.”).

<sup>180</sup> In *Rogers v. Penland*, the district court did reference the “manifest injustice” standard in denying fee-shifting to an expert who was subsequently excluded from the case on *Daubert* grounds: “To require a party to pay for the costs of a witness who was not even called, and against whom the court had sustained a *Daubert* challenge is manifestly unjust.” 232 F.R.D. 581, 583 (E.D. Tex. 2005).

<sup>181</sup> See *Mann v. Taser Int’l, Inc.*, No. 4:05-CV-0273-HLM, 2007 WL 9712069, at \*6 (N.D. Ga. July 24, 2007) (“The mandatory language of the rule is tempered by two limitations: 1) the costs may not be imposed if doing so would result in manifest injustice, and 2) the expert’s fees must be reasonable.” (quoting *Gwin v. Am. River Transp. Co.*, 482 F.3d 969, 975 (7th Cir. 2007))).

<sup>182</sup> While these reasons are beyond the scope of this Article, for an interesting discussion of them, see David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule”*, 15 IND. INT’L & COMP. L. REV. 583, 607–09 (2005).

which fee shifting is permitted, the statute or rule is typically carefully worded to achieve its purpose. Not so with Rule 26(b)(4)(E), however. That rule represents an anomaly not only from the typical ebb and flow of litigation, but also from other fee shifting rules. Despite its drastic impact—forcing one side to pay the other side’s expert that it neither selected nor entered into an arm’s length agreement with—the rule is plagued by the problems detailed in Part III. Taken together, these problems impact civil litigation involving experts in numerous, global ways.

*First*, disputes about the rule’s interpretation abound because there is no clarity or uniformity regarding what types of fees the rule covers or standards for reasonableness. These disputes cost litigants and the courts time and money, and are avoidable with a better drafted rule.

*Second*, the lack of uniformity is anathema to the federal rules, which are premised on the uniform application of rules in the federal court system.

*Third*, discovery fees are often shifted even when the expert’s work was not controlled by or for the benefit of the deposing party. This is not only unfair to the deposing party, but likely results in experts being paid unreasonable sums.

*Fourth*, the rule lacks mechanisms to fairly and efficiently shift fees and, in particular, provide the parties with proper incentives. Ideally, the retaining party and expert should be incentivized to only bill for truly reasonable fees, and the deposing party should be incentivized to only pay for truly reasonable fees.

*Fifth*, the rule strikes the wrong balance in terms of the courts’ involvement. It tends to disincentivize and minimize a court’s role in the areas in which a court is most sorely needed while involving the court for matters that are of little consequence.

*Sixth*, the problems with the rule are not resolving themselves, thus necessitating correction by amendment. The rule’s lack of clarity, combined with the dearth of appellate review, has resulted in long-standing inconsistency.

## V. FIXING THE RULE: PROPOSED CHANGES TO THE RULE AND BENEFITS

When a rule consistently yields inconsistent interpretations and unfair results, as this rule has for almost twenty-five years, it is time to amend it.<sup>183</sup> The proposed changes to the rule are set forth below, followed by an explanation of the changes and related benefits.

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<sup>183</sup> While the rule has been in effect for longer, the 1993 amendment that freely permitted expert depositions triggered the slew of problems discussed in this Article. *See supra* note 30.



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## DISCOVERY OF EXPERT WITNESSES

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A. *Proposed Amended Rule 26(b)(4)(E)*

The proposed amended rule is below, the version showing the changes is first, followed by a clean version that incorporates all of the changes.

**Revised Rule Showing All Changes Proposed to Current Rule**

~~Unless manifest injustice would result, The~~ Except as provided in part (vi), the court must require that the party seeking discovery . . . pay ~~the~~ an expert who is required to submit a report under Rule 26(a)(2)(B) a reasonable hourly fee for time spent in responding to discovery under Rule 26(b)(4)(A);<sup>22</sup>

- (i) “Time spent responding to discovery” includes only: (1) the actual time the expert spends in a deposition, including any breaks during the day, and does not include time or fees spent preparing for a deposition, traveling to or from a deposition, reviewing a deposition transcript, or time otherwise relating to being deposed; and (2) time the expert spends responding to written discovery requests and/or subpoenas served by the opposing party that require the expert to perform work that is not already required under the disclosure rule.
- (ii) In determining what constitutes “reasonable fees,” the party that retained the expert has the burden to prove that the amount billed is reasonable, both in terms of hourly rate and the number of hours billed. The hourly rate that the retaining party actually paid for the expert’s work is the presumptively reasonable rate.
- (iii) The request for payment of fees may not be filed until after the expert discovery has occurred and must include an itemized statement that includes the date and purpose for the hours billed, the rate at which each hour was billed, and a statement of the hourly rate that the expert has been paid by the retaining party. The request must be personally signed and attested to by both the expert and the retaining attorney.
- (iv) Any objection to the request for fees, including an objection arising under (vi)(4), must be filed within fourteen days of the date on which the request was filed or is deemed waived.
- (v) Unless a resistance to the request for fees has been timely filed: (1) payment by the deposing party of the reasonable fees is due within thirty (30) days of the date on which the request for fees was filed; and (2) interest accumulates daily for any unpaid and due balance at the statutory rate for judgments, and is automatically added on to the amount due and owing. If a resistance to the request for fees was timely filed, fees are not due until the court enters an order specifying the amount, if any, that must be paid. If the resistance is deemed frivolous, the court shall order that interest be paid from the date on which payment was due absent the resistance.

- (vi) No payment is required if: (1) the party that engaged the expert failed to comply with and serve complete and accurate disclosures and a report as set forth in Rule 26(a)(2)(B) seven or more days before the date of the expert's deposition; (2) the party that engaged the expert fails to file a request for fees that complies with part (iii) within 30 days after completion of the discovery to which the fee request relates; (3) the witness is the party's employee; or (4) manifest injustice would result due to the financial circumstances of the deposing party.

### **Revised Rule Incorporating All Proposed Changes**

Except as provided in part (iv), the court must require that the party seeking discovery . . . pay an expert who is required to submit a report under Rule 26(a)(2)(B) a reasonable hourly fee for time spent in responding to discovery under Rule 26(b)(4)(A)

- (i) "Time spent responding to discovery" includes only: (1) the actual time the expert spends in a deposition, including any breaks during the day, and does not include time or fees spent preparing for a deposition, traveling to or from a deposition, reviewing a deposition transcript or time otherwise relating to being deposed; and (2) time the expert spends responding to written discovery requests and/or subpoenas served by the opposing party that require the expert to perform work that is not already required under the disclosure rule.
- (ii) In determining what constitutes "reasonable fees," the party that retained the expert has the burden to prove that the amount billed is reasonable, both in terms of hourly rate and the number of hours billed. The hourly rate that the retaining party actually paid for the expert's work is the presumptively reasonable rate.
- (iii) The request for payment of fees may not be filed until after the expert discovery has occurred and must include an itemized statement that includes the date and purpose for the hours billed, the rate at which each hour was billed, and a statement of the hourly rate that the expert has been paid by the retaining party. The request must be personally signed and attested to by both the expert and the retaining attorney.
- (iv) Any objection to the request for fees, including an objection arising under (vi)(4), must be filed within fourteen days of the date on which the request was filed or is deemed waived.
- (v) Unless a resistance to the request for fees has been timely filed: (1) payment by the deposing party of the reasonable fees is due within thirty (30) days of the date on which the request for fees was filed; and (2) interest accumulates daily for any unpaid and due balance at the statutory rate for judgments, and is automatically added on to the amount due and owing. If a resistance to the request for fees was timely filed, fees are

not due until the court enters an order specifying the amount, if any, that must be paid. If the resistance is deemed frivolous, the court shall order that interest be paid from the date on which payment was due absent the resistance.

- (vi) No payment is required if: (1) the party that engaged the expert failed to comply with and serve complete and accurate disclosures and a report as set forth in Rule 26(a)(2)(B) seven or more days before the date of the expert's deposition; (2) the party that engaged the expert fails to file a request for fees that complies with part (iii) within 30 days after completion of the discovery to which the fee request relates; (3) the witness is the party's employee; or (4) manifest injustice would result due to the financial circumstances of the deposing party.

B. *Breakdown of Proposed Amendments to the Rule and Related Benefits*

1. Changes to "Costs of Responding to Discovery"

As discussed, many disputes arise under the rule due to the lack of clarity and resulting inconsistencies regarding what is included in "costs of responding to discovery."<sup>184</sup> The proposed amended rule should eliminate virtually all of these disputes because it provides a bright-line definition of what that its terms entail. No longer will parties be uncertain and thus pay for questionable fees because it is less expensive than bringing a motion. And no longer will courts be asked to examine and resolve whether and under what circumstances "preparation time" is covered.

In addition to the time and resources saved, the amended rule strikes a proper balance in terms of what is covered. Subject to certain caveats discussed below, there is no question that an expert should be paid for time spent in the deposition, and that time can be fairly and objectively calculated. And while it is true that the deposing party is not entirely in control of the length of the deposition—i.e., a cagey or verbose expert will necessarily take longer to depose—the deposition's length is most controlled by that party. This is especially true given that one of the reasons depositions under the current rule take longer than the deposing party controls is due to the lack of complete and accurate expert disclosure and report—a problem that is directly solved by not shifting fees if the expert has not met his obligation before the deposition.<sup>185</sup> Thus, the rule's shifting of fees for time spent in the deposition is sound and workable.

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<sup>184</sup> See *supra* Part III.A.1.

<sup>185</sup> See *supra* Part III.B.2.

But, there is no simple way to determine how much preparation time is necessitated by the deposition, and even less of a way to determine which party benefits from that preparation time. Further, the difficulty and risks of determining whether preparation time and travel time are “reasonable” in any given case is very factually-intensive and in most cases not warranted. Any benefits of fee shifting in a given case do not justify the overall expenditure of courts’ time and resources spent determining which party is “responsible” for the fact that the expert is incurring such fees.

Thus, the best way to ensure that an expert expends and bills for only a reasonable amount of preparation time is for that amount to be paid by the party that retained the expert.<sup>186</sup> As one court exploring this issue concluded, “[t]o the extent that the inquiring party wishes to ensure that an expert is well-prepared, that party may voluntarily pay for the expert’s preparation time.”

Likewise, by not including travel time and expenses to and from the deposition, the rule eliminates disputes about whether and how much travel time and expenses are covered, as well as the potential abuse that arises by imposing costs on the other party. Not only has the retaining party not had to pay the expert for any travel, but the retaining party also knew about the expert’s location and chose to retain the expert knowing the additional fees and expenses that would be incurred. In contrast, the deposing party neither selects, nor benefits from, the expert’s location.

Like lay witnesses who are located outside of the jurisdiction in which the lawsuit is pending, parties can and should negotiate where expert witnesses should be deposed. Sometimes the best location will be at the expert’s location, in which the parties will have to travel. Other times it will be at the parties’ location, in which case the expert will be required to travel. Having the rule provide that expert travel expenses should shift to the deposing party unnecessarily changes the incentives by imposing more of the expenses of travel on the deposing party. Because the rationale behind expert fee shifting is that one party should not get for free what the other party paid for, there is scant rationale for shifting travel expenses, which by definition the retaining party has not paid for.

The amended rule also strikes a fair balance between the parties. The party that hired the expert can and should reasonably anticipate that the costs associated with preparing its expert for deposition and the costs associated with the expert travelling to and from that deposition are part of that engagement. Despite the new disclosure rules, it remains typical for parties in federal cases to depose the opposing expert.<sup>187</sup> Thus, those fees are

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<sup>186</sup> See *Eastman v. Allstate Ins. Co.*, No. 14-cv-00703-WQH (WVG), 2016 WL 795881, at \*5 (S.D. Cal. Feb. 29, 2016).

<sup>187</sup> See *id.* (explaining the need not only for deposition but deposition of more than one

foreseeable and reasonably should be part of what the retaining party considers as the costs of hiring the expert.

## 2. Changes to “Reasonable Fees”

As discussed, many disputes arise under the rule due to the definitions and guidance regarding what constitutes “reasonable fees.”<sup>188</sup> First, the proposed amendment requires that the expert bill the deposing party at an hourly rate, not a flat fee. In making clear that flat fees are not simply “disfavored,” they are not allowed, the amended rule will eliminate the disputes that arise regarding the uncertainty of the question of flat fee billing.<sup>189</sup> Additionally, this change will eliminate a large source of potential unfairness in the fee shifting rule: the imposition of a large cost on the deposing party that is untethered to the actual amount of time spent being deposed.

Further, the rule is not unfair to the expert or to the retaining party. Like many issues of expert payment, the question is not whether the expert will get paid her “flat fee” rate, but instead whether the deposing party must pay it. As one commentator has explained, “If the expert wants a minimum, the balance should come from the party who hired him and not from [the deposing party].”<sup>190</sup>

In addition, the proposed amended rule introduces a presumption that the experts’ hourly fee charged to the deposing party should be the same as the hourly fee charged to the retaining party. That presumption is reasonable.<sup>191</sup> A lawyer, for example, does not charge different rates for office work versus in-court work; all of that work is part of being a lawyer and equally ties up a lawyer’s time. The same is true of an expert witness who voluntarily takes on the professional role of an expert witness and, with that, all of the concomitant roles. The presumption also avoids the risks of

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day: “However, with regard to expert witnesses, ‘there may more often be a need for additional time—even after the submission of the report required by Rule 26(a)(2)—for full exploration of the theories upon which the witness relies.’” (citing FED. R. CIV. P. 30(d) advisory committee’s note to 2000 Amendment)).

<sup>188</sup> See *supra* Part III.A.2.

<sup>189</sup> For example, despite the fact that flat fees are disfavored and struck down when brought to a court’s attention, the practice remains prevalent. See *Expert Witness Fees: How Much Does an Expert Witness Cost?*, SEAK, <https://blog.seakexperts.com/expert-witness-fees-how-much-does-an-expert-witness-cost/> (last visited Aug. 9, 2018) (“33% of all expert witnesses charge a minimum number of hours for deposition testimony.”).

<sup>190</sup> Canepa, *supra* note 2.

<sup>191</sup> See, e.g., *Ball v. LeBlanc*, No. 13-00368-BAJ-SCR, 2015 WL 5793929, at \*2 (M.D. La. Sept. 30, 2015) (“With respect to Balsamo’s deposition testimony, Defendants assert that Plaintiffs should only be reimbursed at a rate of \$125 per hour because that is the rate that Balsamo charged Plaintiffs for his services.” (citing *Borel v. Chevron U.S.A. Inc.*, 265 F.R.D. 275, 277 (E.D. La. 2010))).

abuse and unfairness to the deposing party.<sup>192</sup> Given the lack of any arm's length negotiation, it is all-too-easy for the expert to charge the deposing party a higher rate, such that the deposing party ends up effectively subsidizing the expert's work for the retaining party.

Of equal importance, the presumption of a single hourly rate—rather than a range of rates—provides a bright-line so that litigants have clarity regarding what rate is “reasonable,” and courts need not expend resources examining the minutiae of whether and why a billed rate is reasonable. To the extent an expert demands a higher hourly rate for deposition time than for writing her report, the retaining party is in the best position to be aware of that at the time the expert is retained. It can attempt to negotiate the expert's rates so that the expert charges a single hourly rate, accept responsibility for making up any difference in the permitted rate of recovery, or select a different expert.

The amendment also effectively will require that a party who wants the benefit of the fee shifting rule must have compensated the expert at an hourly rate rather than flat fee. While this undoubtedly will create problems for experts whose practice is to bill a flat fee for their work on behalf of the retaining party,<sup>193</sup> that downside is outweighed by the fact that the hourly rate an expert charges the retaining party is by far the best measure of the expert's actual hourly rate. The risk of unfairness to the deposing party from the expert having an hourly rate that is, for all intents and purposes, only charged to the opposing party is significant. Further, because that hourly rate will serve as a presumption for the rate that is reasonable, many disputes will be eliminated.

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<sup>192</sup> See *Garnier v. Ill. Tool Works, Inc.*, No. 04CV1825(NGG)(KAM), 2006 WL 1085080, at \*2 (E.D.N.Y. Apr. 24, 2006) (“[A] Court should ‘balance’ a party’s need for competent experts with the need to protect the opposing party from being ‘unfairly burdened by excessive ransoms which produce windfalls for the [party’s] experts.’” (quoting *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 645 (E.D.N.Y. 1997))).

<sup>193</sup> For example, doctors who perform independent medical exams (“IME”) and medical record reviews often charge a flat fee for their work rather than an hourly rate. See Alex Babitsky, *How Much Does an IME (Independent Medical Examination) Cost?*, IME: RESOURCES & TRAINING, <https://independentmedicalexamtraining.com/how-much-does-an-ime-independent-medical-examination-cost/> (last visited Aug. 9, 2018) (“A slight majority of independent medical examiners charge a flat fee for their IMEs.”). While these doctors would have to change this practice in order to have their deposition fees shifted, that is not a bad thing overall. A doctor that performs an IME, for example, may charge a \$1000 flat fee and issue a report that necessitates that the retaining party conduct a five-hour deposition. If the expert charges a rate of \$500 per hour for a deposition, that means that the deposing party is paying 2.5 times as much as the retaining party. That is not only an imbalance that makes one question whether each party is paying their true portion of the doctor's work, but it also significantly lessens the concern that the deposing party is “getting for free” what the other party had to pay for.

Because preparation time and travel time are not covered by the amended rule, there is no need to address whether an expert's hourly rate for travel should be the same as the rate for work performed. That change to the rule will eliminate the inconsistencies among courts on this issue and provide much-needed uniformity in the federal courts.

### C. *Timing of Payments*

As discussed, issues of timing regarding when fees must be paid and when fees may be billed consume a substantial portion of litigants' and courts' time.<sup>194</sup> That is wholly unnecessary and there is no reason that the rule should not provide clarity regarding the timing issues that routinely arise.

The proposed change creates bright-lines for when fees must be billed and when fees must be paid, and it eliminates advance billing. That is consistent with the better approach under the rule's current language. The prohibition of advance billing also makes sense as a practical matter. When going into a deposition for any witness, whether a lay witness or expert, no one typically knows how long the deposition will last. Thus, there is no reliable way to accurately calculate what is a reasonable advance payment. If the expert insists on advance payment, that can and should be provided by the retaining party with whom the expert has a professional relationship.

The amended rule also eliminates uncertainty and disputes about when fees are due. It makes the due date enforceable by making the amount due automatic and by automatically charging interest on any amount not timely paid.<sup>195</sup> This practice—having a set due date after which time interest accrues—is consistent with other court-ordered payments.<sup>196</sup>

### D. *Make Fee Shifting Contingent on Having an Expert Report*

As discussed, under the current rule, expert deposition fees shift for all experts, including those experts that have not provided a report.<sup>197</sup> The primary justification for fee shifting is the fact that the expert already has provided a detailed report—and has done so at the expense of the retaining party—thus reducing or even eliminating the need for a deposition. When that justification does not exist because there is no report, it does not make sense and is not fair to shift expert deposition fees.

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<sup>194</sup> See *supra* Part III.B.

<sup>195</sup> While the amount of requested fees is presumptively considered reasonable, a party may file a resistance to a fee request. When that happens, payment is not due until the court decides the dispute and issues an order. See *supra* Part V.A.

<sup>196</sup> See, e.g., 28 U.S.C. § 1961 (2012).

<sup>197</sup> See *supra* Part III.B.3.

For the same reason, fee shifting is not justified when the expert has failed to provide a complete and accurate report. A report that is deficient—i.e., does not comply with the disclosure requirements—is, in many respects, similar to having no report. It makes a deposition unquestionably necessary in order to learn the information that should have been, but was not, disclosed. It also makes it likely that the deposition will take longer insofar as counsel will have to explore information that the expert failed to provide. In addition, when a report is deficient, the retaining party by definition has not paid for the expert to do work that the expert was supposed to do, and there thus exists far less “potential unfairness” that the deposing party will free ride off work for which the retaining party paid.

Finally, by categorically denying fee shifting when a report is deficient, the rule provides an incentive for the retaining party and expert to comply with the disclosure requirement. It is not uncommon for an expert to fail to include some required information, such as the list of prior testimony. That failure is significant because it precludes the opposing party from exploring that prior work in the deposition and eventually at trial. The solution that some courts have taken—to simply reduce the hours billed for time attributable to the failure to provide a complete disclosure—is inadequate. It not only sends the wrong message and provides poor incentives to the retaining party, but it also results in courts having to make the case-by-case determination of how much of a reduction in hours is reasonable. That is not only time consuming when it happens but also costly enough that some deposing parties will just pay the excess amount because it is less expensive. This revised rule incentivizes a party to comply with the basic disclosure requirements and places the burden where it belongs—on the party that has failed to comply rather than on the deposing party.

#### E. *Process for Fee Disputes*

As discussed, the current rule is silent as to how litigants should handle disputes about fees.<sup>198</sup> That leaves uncertain why a party has the obligation to file a motion if a disagreement occurs, thereby creating the unintended consequence of the “reasonable” party (or at least the party that ultimately prevails) having to decide whether to incur the costs of filing a motion, and sometimes deciding not to. When the latter occurs, the unreasonable party—i.e., the expert that is charging unreasonable fees or the deposing party who is refusing to pay reasonable fees—may end up being rewarded in their unreasonable position.

On the other hand, the current rule’s silence also may imply that there is no basis to challenge a fee request. Certainly aspects of the rule would

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<sup>198</sup> See *supra* Part III.B.3.



counter this implication, such as if fees cannot be challenged then why does the rule only provide for payment of “reasonable fees.” As the cases in this area demonstrate, however, the tendency of courts is to rubber stamp fee requests rather than apply scrutiny, and having a set process creates balance and signals the courts’ role.

Because the rule streamlines the question of what fees shift and how much, it is likely that parties will only rarely have to involve courts in disputes about fees. What constitutes a reasonable fee should almost never be disputed given the rule’s bright-lines and presumptions. In instances in which it is, however, the rule provides the process by which the fee should be challenged. Further, that process does not automatically penalize the party that challenges the fees, nor does it automatically reward that party. Instead, the rule provides that a court must determine if the challenge was frivolous in its order. If it was, then interest is charged from the date the payment was due absent the challenge. If it was not frivolous, though, then the party is not charged with interest.

Related to the fee dispute process, the amended rule should provide in the advisory notes that disputes arising under this rule are subject to the provisions of the discovery sanctions rule.<sup>199</sup> That means that, if a litigant—whether the retaining party or the deposing party—takes a frivolous position that causes the other party to incur attorneys’ fees, a court should consider that action in the context of the sanctions rule. While an advisory note of that sort normally would not be necessary, here it is based upon the tendency under the current rule to not award sanctions when the retaining party acts unreasonably.<sup>200</sup> Because the fee shifting rule should incentivize all parties to take reasonable positions, an advisory note that makes this clear would be beneficial. That is particularly true under the revised rule which provides clarity and bright-lines, such that good faith disputes should be few and far between.

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<sup>199</sup> See FED. R. CIV. P. 37(a)(3)(A).

<sup>200</sup> In *Rote v. Zel Custom Manufacturing LLC*, the retaining party argued that “that the law is ‘clear in this district that an expert’s deposition preparation time and travel time are reimbursable[,]’” while citing an authority in that federal district court. No. 2:13-cv-1189, 2018 WL 2093619, at \*1 (S.D. Ohio May 7, 2018). Thus, the retaining party sought “attorney’s fees for the costs incurred in bringing [a] Motion” to get its expert’s preparation time and travel time paid. *Id.* Although it appears that the law in that particular district was well-settled, the court nonetheless refused to award the retaining party the attorney’s fee it incurred in bringing the motion, denying the motion “as unjust under the circumstances.” *Id.* at \*6 (citing FED. R. CIV. P. 37(a)(5)(A)(iii)).

F. *Move “Manifest Injustice” Language to the Part of the Rule to Which it Relates*

As discussed, the rule’s prefatory language of “unless manifest injustice would result” is more problematic than not. Further, without a definition of “manifest injustice,” it also is oddly out-of-place in a rule that pertains to shifting of an expert’s discovery fees, and it sends the wrong signal to litigants and courts about the courts’ role. Thus, the revised rule makes two changes. First, it moves the phrase “unless manifest justice would result” to the part of the rule to which it relates—the payment of fees. That is consistent with the direction in the advisory notes to the current rule in making clear that the standard has nothing to do with whether the fees are objectively “reasonable,” but rather pertains solely to the deposing party’s ability to pay. Second, and related to that, the rule expressly qualifies “manifest justice” as relating to a party’s ability to pay.

The amended rule also adds in language to clarify the fee dispute process when a party contends it should not have to pay because such “manifest injustice would result.” Specifically, it makes clear that the process for objecting to a fee request on “manifest injustice” grounds is the same as the process for any other objection to fees.

G. *Overall Benefits of the Proposed Amendments to the Rule*

Taken together, these proposed changes to the rule will result in a fee shifting that is not only clear, but that also better effectuates its purpose.

First, litigants will be on notice of what fees are covered by the rule as well as the process for fee shifting. With a shared understanding of the contours of the rule, very few disputes should arise under the rule. Moreover, when such disputes do arise, the process for handling them will be clear, with consequences attached to unreasonable demands or refusals under the rule. Put differently, the fee shifting rule will be clear and, on the flip side, litigants will have an incentive to play by the rule.

In addition, because the rule provides bright lines regarding what is covered and what is presumptively reasonable, the rule will require little court involvement. And when court involvement is necessary, it will be streamlined. Courts will not have to interpret ambiguous provisions of the rule.

Moreover, the rule’s parameters are fair. By ensuring that only fees that are controlled by and of benefit to the deposing party are shifted, the rule better serves its purpose. A rule that automatically shifts fee must be fine-tuned to ensure it properly incentivizes the parties.

Finally, these changes will provide uniformity in the rule. For almost twenty-five years, such uniformity has been lacking in this rule’s implementation. Aside from the fact that disputes about the rule’s meaning

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have been costly, such disputes have resulted in different courts adopting conflicting interpretations of the rule. As a practical matter, that has meant that the types of fees and the amount of fees shifted has been contingent on which federal court happens to hear the case.