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1. PREPARING A WITNESS TO RESPOND TO A 30(B)(6) NOTICE OF DEPOSITION:

"I'll know my song well before I start singing."

- **After receiving a 30(B)(6) notice of deposition, including the requisite specification of topics of such deposition, the entity that is to be deposed has a duty to:**
  - **Select one or more deponents sufficiently knowledgeable on the subjects of such depositions to testify on behalf of the entity; and to**
  - **Prepare such deponent or deponents to adequately testify as to subjects that the entity should reasonably know, including the entity's interpretation of events and documents.**

Ind. Trial Rule 30(B)(6):

A party may in his notice name as the deponent an organization, including without limitation a governmental organization, or a partnership and designate with reasonable particularity the matters on which examination is requested. ***The organization so named shall designate one or more officers, directors, or managing agents, executive officers, or other persons duly authorized and consenting to testify on its behalf. The persons so designated shall testify as to matters known or available to the organization.*** *This subdivision (B)(6) does not preclude taking a deposition by any other procedure authorized in these rules.*

Case Law:

- *"For a Rule 30(b)(6) deposition to operate effectively, the deposing party must designate the areas of inquiry with reasonable particularity, and* ***the corporation must designate and adequately prepare witnesses to address these matters.***" Canal Barge Co. v. Commonwealth Edison Co., 2001 WL 817853, 1 (2001)

- *"Once the deposing party specifies the topics of the deposition, it becomes the corporation's duty to designate one or more individuals able to testify about the relevant areas." Id.*

- *"The effect of the rule is to place upon the business entity the burden of identifying witnesses who possess knowledge responsive to subjects requested in the Rule 30(b)(6) request."* Hooker v. Norfolk Southern Ry. Co., 204 F.R.D. 124, 126 (2001).

- *"The rule is designed to prevent business entities from "bandying", the practice of presenting employees for their deposition who disclaim knowledge of facts known by other individuals within the entity." Id.*

- *"Consequently, it* ***imposes a duty upon the named business entity to prepare its selected deponent to adequately testify not only on matters known by the deponent, but also on subjects that the entity should reasonably know.***" *Id.*

- *"...if none of defendant's current employees has sufficient knowledge to provide plaintiffs with the requested information,* ***defendant is obligated to 'prepare [one or more witnesses] so that they may give complete, knowledgeable and binding answers on behalf of the corporation.***" Canal barge Co. v. Commonwealth Edison Co. at 3.

- *"A Rule 30(b)(6) deponent's testimony does not represent the knowledge or opinions of the deponent, but that of the business entity...In effect, the deponent is "speaking for the corporation," presenting the corporation's position on the topic... The* ***deponent must testify to both the facts within the knowledge of the business entity and the entity's opinions and subjective beliefs, including the entity's interpretation of events and documents.***" *Id. at 1.*

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2. IDENIFYING EXPERT WITNESSES:

"What's puzzling you is the nature of my game."

• Expert testimony consists of opinions based on "scientific, technical, or other specialized knowledge." Fed.Rules Evid.Rule 702, 28 U.S.C.A. So, it is the nature of the testimony to be given by the witness that determines whether or not the witness must be disclosed as an expert witness, not the nature or profession of the witness.

- So, even a witness who is a professional and could potentially serve as an expert witness if his/her expert testimony, as defined under the federal Rules of Evidence, was called for needs simply to be identified as a witness (fact/lay witness) if he/she is only to testify regarding facts of which he/she has personal knowledge. However, a witness' profession does not yield a presumption that such witness will give expert testimony. Any witness who is to be called to give expert testimony must be identified as an expert witness.

• <u>The Federal Rules of Civil Procedure divide potential witnesses into three categories for the purposes of disclosure:</u>

- **<u>Fact Witness:</u>**
  - ***Must be disclosed by sending to the opposing party the name, address, and phone number (if known) of each potential witness.*** *Fed.R.Civ.P. 26(a) (1)(A).*
  - *This includes anyone "likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment"; and*
  - *The disclosure should identify the subjects of the information.*

- **<u>Expert Witness:</u>**
  - ***In addition to the disclosures required [regarding fact witnesses], a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.***
  - *Unless otherwise stipulated or ordered by the court, this* ***disclosure must state:***
    (i) the ***subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and***
    (ii) ***a summary of the facts and opinions to which the witness is expected to testify***

- **<u>Expert Witness retained or specially employed to provide expert testimony:</u>**
  - ***Disclosure shall be accompanied by a written report prepared and signed by the witness***
  - *The report shall contain:*
    - *A complete statement of all opinions to be expressed and the basis and reasons therefore;*
    - *The data or other information considered by the witness in forming the opinions;*
    - *Any exhibits to be used as a summary of or support for the opinions;*
    - *The qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;*
    - *The compensation to be paid for the study and testimony; and*
    - *A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.*

Musser v. Gentiva Health Servs., 356 F.3d 751, 756 (7th Cir.2004)

Case Law:

- *"Thus,* ***all witnesses who are to give expert testimony under the Federal Rules of Evidence must be disclosed under Rule 26(a)(2)(A)****; only those witnesses "retained or specially employed to provide expert testimony " must submit an expert report complying with Rule 26(a)(2)(B). Id.* at 756-757.

- *"All of these disclosures should be in writing, signed by counsel, and served to opposing counsel. Fed.R.Civ.P. 26(a)(4). Furthermore, each disclosure should be delivered by the deadline for expert disclosures set by the trial judge under Rule 26(a)(2)(C)." Id.* at 757.

• The court in Musser v. Gentiva Health Services stressed the importance of properly identifying a witness as an expert witness and the underlying reasons as to why the distinction between an expert witness and a fact/lay witness is so important:

- *"...disclosing a person as a witness and disclosing a person as an expert witness are two distinct acts." Id.*

- *"The Federal Rules of Civil Procedure...demand this formal designation..." Id.*

- ***"Formal disclosure of experts is not pointless. Knowing the identity of the opponent's expert witness allows a party to properly prepare for trial."*** *Id.*

- ***"There are countermeasures that can be taken with regard to expert witnesses that are not applicable to fact witnesses,*** *such as attempting to disqualify the expert testimony on grounds set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), retaining rebuttal experts, and holding additional depositions to retrieve the information not available because of the absence of a report." Id.* at 758.

• For example, the court in **Musser v. Gentiva Health Services** stated that, *"...even treating physicians and nurses must be designated as experts if they are to provide expert testimony." Id.*

3. SANCTIONS FOR FAILURE TO IDENTIFY AN EXPERT WITNESS:

"So you know you better watch your step, or you're gonna' get hurt yourself."

• Failure to identify a witness as an expert can result in such expert testimony being excluded

Federal Rule of Civil Procedure 37(C)(1):
A party that without substantial justification fails to disclose information required by Rule 26(a)...is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. *In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions.*

Case Law:
• In **Musser v. Gentiva Health Services**, the court affirmed the district court's exclusion of plaintiffs' expert witness testimony on the grounds that plaintiffs did not disclose or identify any of their witnesses

as experts. The witnesses in this case were the treating nurses and doctors in a medical malpractice case, where expert testimony was required to define the applicable duty of care.

- ***"The exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1) unless non-disclosure was justified or harmless."*** Musser v. Gentiva Health Servs., 356 F.3d 751, 758 (7th Cir.2004)

- *"A misunderstanding of the law does not equate to a substantial justification for failing to comply with the disclosure deadline." Id.*

- *"...that (another party) could have obtained the undisclosed information through its own efforts does not provide substantial justification." Id.* at 759.

• **The court in Musser v. Gentiva Health Services urged district courts to *"carefully consider Rule 37(c), including the alternate sanctions available, when imposing exclusionary sanctions that are outcome determinative."*** *Id.* at 760.

- *"...in a case...where exclusion necessarily entails dismissal of the case, the sanction must be one that a reasonable jurist, apprised of all the circumstances, would have chosen as proportionate to the infraction." Id.* at 756.

4. PAYMENT OF WITNESSES FOR DEPOSITIONS:

"The best things in life are free. But, you can keep them for the birds and bees."

EXPERT WITNESSES:

•A party that wishes to depose another party's expert witness must pay that expert witness' fees in responding to such discovery.

Ind. Trial Rule 26(B)(4)(c) :

Unless manifest injustice would result,
(i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery *under subdivision (B)(4)(a)(ii) and (B)(4)(b) of this rule; and*
(ii) with respect to discovery obtained under subdivision (B)(4)(a)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (B)(4)(b) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Case Law:

• The court in **Evans v. Huss** affirmed the trial court's order that the plaintiff pay the fees for the deposition of the defendant's expert witness, where the deposition was used in the plaintiff's case in chief, even though the deposition was taken under an informal procedure, and not under a formal discovery order. ***The expert's fees that the defendant was ordered to pay for included time and travel in responding to the deposition, including reading, correcting, and signing it.***

- ***"Consistent with the underlying notion that it is only fair that one who deposes another's expert should pay a portion of the expert's fees, T.R. 26(B0(3)(c) puts it within the discretion of***

the trial court to apportion the deposed expert's fees between the parties." Evans v. Huss, 415 N.E.2d 783, 786 (Ind.App.1981)

- ***"Courts have long acknowledged that it is unfair that a party should have the benefit of another party's expert without bearing some of the costs.*** *TR. 26(B)(3) was drafted to guide trial courts in alleviating this unfairness, while still permitting the broadest possible discovery." Id.* at 787.

• Even where depositions are taken without the formality of a court order, the party requesting such depositions is still obligated to pay for the fees of another party's expert witness in responding to such discovery.

- ***"A motion under TR. 26(B)(3)(a) is not a prerequisite to relief under TR. 26(B)(3)(c)."*** *Id.* at 785.

- *"If parties voluntarily adopt simplified, informal, and nonadversarial methods of discovery, then the Trial Rules should not be read to discourage such informal methods." Id.* at 786.

- ***"The parties should not be denied the protections of the trial rules merely because they had not previously chosen to burden the courts with matters on which they were disposed to cooperate."*** *Id.* at 787.

• The court in Riggin v. Rea Riggin & Sons, Inc. ordered that the party seeking to depose the other party's expert witness pay the fees for that expert witness's *time spent in preparing for the deposition and during the actual deposition* where the party seeking the deposition had not made a showing that it would not ask the witness to give any expert testimony. See Riggin v. Rea Riggin & Sons, Inc., 738 N.E.2d 292 (Ind. App. 2000)

-Additionally, in **Collins v. Village of Woodridge**, the court stated that, ***"Time spent preparing for a deposition is, literally speaking, time spent in responding to discovery (except where the deposition preparation time actually constitutes trial preparation...)"*** Collins v. Village of Woodridge, 197 F.R.D. 354, 357 (N.D.Ill.1999)

-The court further stated that, *"...the shifting of (an) expert's fees for deposition preparation, as well as for the deposition itself, is consistent with the overall purpose of Rule 26." Id.*

-However, the court went on to state, *"...we think that it is entirely fair, and authorized by Rule 26(b)(4)(C)(i)...to require a party who seeks to depose an expert from whom he has received a written report in conformity with Rule 26(a)(2) to pay the reasonable fees associated with the expert's time reasonably spent preparing for the deposition." Id.* at 357-358.

-So, it is possible that this ruling is limited to circumstances where the party seeking to depose the expert witness has already received a written report from the expert witness.

FACT/LAY WITNESSES:

• In **State v. Bailey**, the court treated a psychologist and social worker as lay witnesses where they gave factual testimony, and, thus, ordered that they need not be paid as expert witness. Thus, **even a witness who could potentially otherwise qualify as an expert witness, but who is not being called to give expert testimony, is only entitled to be paid standard lay witness fees** (mileage and a per diem under IC 33-37-10-2 for witnesses in criminal actions or IC 33-37-10-3 for witnesses in certain actions).

- ***"...(an) expert can be compelled to testify as to facts known to him in the same manner as any "ordinary" witness."*** State v. Bailey, 714 N.E.2d 1144, 1150 (Ind.Ct.App.1999).

- In discussing a hypothetical doctor being called as a fact witness, the court in State v. Bailey stated, *"If (a doctor) knows facts pertinent to the case to be tried, he must attend and testify as any other witness. In respect to facts within his knowledge, his qualifications as a physician—are entirely unimportant. In respect to facts, as before stated, he stands upon an equality with all other witnesses, and the law, as well as his duty to the public, requires him to attend and testify for such fees as the legislature has provided.* ***Not so, however, in respect to his professional opinions. In giving them, he is performing a "particular" service, which cannot be demanded of him without compensation."*** *Id.* at 1149-1150.

• Fact/Lay witnesses in criminal actions may be paid mileage costs and a per diem.

IC 33-37-10-2 Witnesses in criminal action

Sec. 2. (a) A witness in a criminal action may receive a fee if the witness:
(1) is summoned by the state;
(2) is named on the indictment or information; and
(3) testifies under oath to a material fact in aid of the prosecution.
(b) A fee paid under subsection (a) is the sum of the following:
(1) An amount for ***mileage*** *at the mileage rate paid to state officers for each mile necessarily traveled to and from the court.*
(2) For each day of attendance in court equal to:
(A) ***fifteen dollars ($15) for witnesses subpoenaed under IC 35-37-5-4; or***
(B) ***five dollars ($5) for all other witnesses.***

• Fact/lay witnesses in "certain actions" are entitled to be paid mileage costs and a per diem.

IC 33-37-10-3 Witnesses in certain actions

Sec. 3. A witness in an action listed in IC 33-37-4-2, IC 33-37-4-3, IC 33-37-4-4, IC 33-37-4-6, and IC 33-37-4-7 (includes Infractions or Ordinance Violations; Juvenile Actions; Civil Actions; Small Claims Actions; and Probate Actions) is entitled to the sum of the following:
(1) An amount for ***mileage*** *at the mileage rate paid to state officers for each mile necessarily traveled to and from the court.*
(2) ***Five dollars ($5) for each day of attendance in court.***