One Lawyer’s Opinion

By: Edward K. Grassé
Busse, Busse & Grassé, P.C.

Time for a Change:
Placing a Cap on Physician’s Deposition Fees

Supreme Court Rule 204(c) allows for physicians to charge “a reasonable fee” for the giving of deposition testimony. As most practitioners are aware, the definition of “reasonable fee” used by most physicians is patently unreasonable. It is not uncommon for physicians to charge in excess of $1,500 per hour and require a two-hour minimum. Many physicians set unreasonable cancellation policies and require pre-payment of their fees. Absent payment of these fees, the physicians may refuse to testify.

Until Supreme Court Rule 204 was amended in 1985, physicians were only legally entitled to the statutory minimum fee plus mileage. Supreme Court Rule 204(c) was intended to be the attempt of the legal industry to “regulate this practice” of seeking a fee for testimony.

A party may agree to pay a reasonable professional fee to a physician or surgeon for the time he or she will spend testifying at any deposition. The fee should be paid only after the doctor has testified, and it should not exceed an amount which reasonably reimburses the doctor for the time he or she actually spent testifying at deposition. Sup. Ct. Rule 204, Comments (emphasis added).

As a practical matter, however, physicians and surgeons usually do request a professional fee, in addition to the statutory witness fee, to reimburse them for the time they spend testifying at depositions, and the party at whose instance the physician or surgeon is subpoenaed is normally loathe to refuse. This rule is intended to regulate this practice. A party may agree to pay a reasonable professional fee to a physician or surgeon for the time he or she will spend testifying at any deposition. The fee should be paid only after the doctor has testified, and it should not exceed an amount which reasonably reimburses the doctor for the time he or she actually spent testifying at deposition. Sup. Ct. Rule 204, Comments (emphasis added).

As any practitioner knows, however, this practice is far from regulated and continues to spiral out of control. Physicians now feel empowered to charge a “reasonable fee” which they create and control. They believe that they can charge cancellation fees and require pre-payment of fees before they will even schedule depositions. If not for Rule 204(c), physicians would only be entitled to the statutory witness fee plus mileage. The physicians have taken the rule that the Illinois Supreme Court has adopted as the only means to obtain “a reasonable fee” and made their fees patently unreasonable. This practice must stop. If the Supreme Court has the right to mandate a fee be paid to physicians, the Supreme Court also has the right to put a limit on those fees. Every practitioner has fretted over the decision to file a motion to reduce a physician’s fee. Every practitioner can recite or has heard a story of filing such a motion, only to have the doctor provide negative testimony. There is no way to know if the testimony of the physician is clouded by the attempt to reduce the fee charged; however, that concern is usually enough for counsel to simply pay the fee requested and to comply with the cancellation and pre-payment charges.

Judges are usually more than willing to enforce the terms of Rule 204. Judges will routinely grant motions to reduce fees charged by physicians, if a motion is brought before them. Cook County judges have begun using a form order which incorporates much of the language of the Comments to Rule 204. The order provides for the following:
1. The motion to adjudicate said physician’s discovery deposition fee is granted;

2. Supreme Court Rule 204 does not require any pre-payment and/or deposit to be paid prior to the scheduling of a physician’s discovery deposition and no payment and/or deposit is required to be paid prior to the taking of a physician’s discovery deposition;

3. Supreme Court Rule 204(c) provides that a party shall pay a “reasonable fee” based on custom and practice to a physician for time spent testifying at such a discovery deposition;

4. The Court finds that a reasonable fee to be paid to Dr. ______ is $_____ per hour, and therefore, said physician shall be paid $_____ per hour for his/her discovery deposition testimony, and said hourly rate shall be paid in ¼-hour increments at the conclusion of the deposition.

It is with these facts in mind that I have proposed a change to paragraph c of Rule 204, as follows:

(c) Depositions of Physicians. The discovery depositions of nonparty physicians being deposed in their professional capacity may be taken only with the agreement of the parties and the subsequent consent of the deponent or under a subpoena issued upon order of court. A party shall pay a reasonable fee to a physician for the time he or she will actually spend testifying at any such deposition, which shall not exceed $400 per hour, except upon order of court for good cause shown. The fee shall be paid by the party at whose instance the deposition is taken. The above provisions will not apply if the physician was retained by a party for the purpose of rendering an opinion at trial, or unless otherwise ordered by the court, the fee shall be paid by the party at whose instance the deposition is taken.

The first major change is to limit the amount that a physician can charge for giving a discovery deposition. The amount contained in this proposal is not truly relevant. The Illinois Supreme Court can fix any reasonable fee to this proposal or even make this a sliding scale based on the type of physician. The key aspect is that there must be a limitation on the amount that can be charged. Also, the rule requires that the physician provide good cause to the court as to why the fee should be increased. Since Rule 204 was created by the Illinois Supreme Court to regulate the practice of physicians charging fees for depositions, the rule should put the power to regulate in the hands of the courts. The physicians have taken advantage of the system for too long and have profited from this rule for numerous years. This practice needs to stop.

The proposal also places the word “actually” before “spends testifying.” This is to import the portion of the comments to Rule 204(c) in which doctors shall only be paid for the time actually spent testifying. This word was left out of the rule and many doctors try to charge minimum hours or charge for time spent preparing for the deposition.

I encourage everyone to support this rule change. This is not a rule that favors the defense or the plaintiff’s bar and is a change that is desperately needed.

About the Author

Edward K. Grassé is a partner at the law firm of Busse, Busse & Grassé, P.C. He has practiced in the area of tort litigation for over 10 years and concentrates his practice in the defense of personal injury, construction, fire and explosion and premises liability suits. He is presently the co-chair of the IDC Civil Practice Committee and is a former chair of the Civil Practice and Procedure Committee of the Chicago Bar Association.

About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation.