

Subpoenaed for a Deposition: Does the Professional get Paid?

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It is not uncommon for a professional who is not a party to a lawsuit to be subpoenaed to provide deposition testimony. Given a professional's knowledge and experience, the scope of the testimony requested of the professional as well as compensation for the professional's time may become questionable.

The deciding factor is whether the professional is being called as an expert or as a fact witness. If called to provide factual information the professional is aware of, then the only compensation that is allowed is the statutory witness fee (which is currently \$25 a day plus mileage, see RSMo. 491.280). If subpoenaed, the professional may also be required to state his or her opinion based upon hypothetical facts or other questions involving his or her professional knowledge that the professional is already conversant on. The courts believe professionals, like all other witnesses, owe a public duty to provide the benefit of his or her knowledge stored at the time. *Burnett v. Freeman*, 103 S.W. 121 (Mo.App. 1907); *Barnes v. Boatmen's Nat. Bank of St. Louis*, 156 S.W.2d 597 (Mo. 1941).

If, however, the professional is asked for an opinion that is based upon the facts of the case and/or requires the professional to examine and/or study the facts of the case to reach the opinion, then he or she may be considered an expert and the professional cannot be compelled to provide such an opinion, especially without extra compensation. The court has discretion to determine when a witness remains a fact witness versus an expert witness to determine if extra compensation is necessary. *Mulberry v. Baker*, 897 S.W.2d 624 (Mo.App. W.D. 1995). Whether the professional has been disclosed as a retained/non-retained witness may weigh into this decision.

If a professional is subpoenaed to provide deposition testimony in a case to which he or she is not a party, the professional should understand he or she may be compelled to provide factual information as well as professional opinions that involve hypothetical situations. For this, he or she will only receive the \$25 witness fee plus mileage.

However, if the professional is asked a question that would lead to an expert opinion relating to the facts of the case, the professional should be aware that he or she cannot be compelled to provide an answer if it would require him or her to further examine the facts. The professional should not be forced or persuaded into providing expert opinions without the proper foundation or without the proper compensation. If the professional foresees that this may be an issue during the deposition, it is recommended the professional retain his or her own attorney to represent the professional during the deposition.