

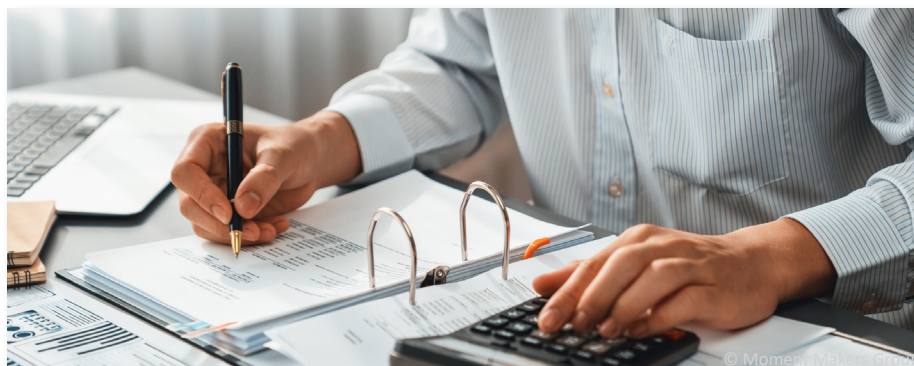
Ninth Circuit Ruling on Expert Witness Fees: A Game-Changer for California Consumer Attorneys

By Matthew Bourhis

A recent Ninth Circuit decision concerning expert witness fees has significant implications for California plaintiff attorneys. In *Miller v. Sawant*, No. 23-35197 (Aug. 22, 2024), the court ruled that parties may recover expert deposition preparation fees under Federal Rule of Civil Procedure 26(b)(4)(E). This decision aligns the Ninth Circuit with several other circuits and settles a previously unresolved question in our jurisdiction.

The underlying case involved two Seattle police officers who sued city council member Kshama Sawant for defamation after she publicly characterized a fatal police shooting as “murder.” While the court affirmed summary judgment for Sawant on these claims, the pivotal issue lies in the court’s ruling on expert witness fees.

The Ninth Circuit held that FRCP 26(b)(4)(E) allows for the recovery of reasonable expenses for time an expert witness spends preparing for a deposition, not just the time spent in the deposition itself. This opinion broadens the scope of recoverable expenses and has significant implications for how you manage expert witnesses and address litigation costs.



The key takeaway from the ruling is that Rule 26 allows recovery of reasonable expenses for time an expert witness spends “responding to discovery,” which includes expert witness preparation time for an adverse party’s deposition. The court joined the Fifth, Sixth, Seventh, and D.C. Circuits in holding that reasonable expert witness deposition preparation fees are recoverable. Moreover, a party’s objection to the admissibility of an expert’s opinions does not negate the obligation to pay reasonable fees under Rule 26. Importantly, the court clarified that recovery of these fees is not contingent on prevailing at trial, or even using the expert witness at trial. The fees are recoverable as part of the discovery process, regardless of the case’s ultimate outcome.

The court emphasized that recoverable fees must be “reasonable,” and their award must not result in “manifest injustice.” The implication for California plaintiff attorneys is that there is an increase in cost recovery. We can now potentially recover a broader range of expert-related

expenses. This includes not just the time experts spend in depositions, but also their preparation time. This will significantly increase the amount of recoverable costs, especially in complex cases involving extensive expert testimony. Furthermore, the costs are recoverable during discovery and thus mitigate the expense of prolonged litigation for trial lawyers.

When budgeting for cases, factor in potential recovery of preparation fees, but also account for the possibility of paying such fees to opposing experts.

But as the court noted, the guidepost for seeking reimbursement of expert preparation time is “reasonableness.” Predictably, parties will dispute high bills for expert preparation time and question the amount



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of time that is reasonably necessary to prepare for a deposition. This may result in increased motion practice.

You will need to adjust your cost projections for cases involving expert witnesses. While the potential for recovering more fees is beneficial to plaintiffs, it also means that when taking expert depositions, you must also be prepared for the possibility of paying the defendants' expert witness preparation fees. While this increases the costs you may need to front for litigation, the ruling ultimately levels the playing field for plaintiffs. In many cases, defense experts tend to be less expensive than plaintiffs' experts, due to the higher volume of business for repeat players, like insurance companies.

Under *Miller v. Sawant*, you may find yourself successfully opposing defense requests to recover expert witness preparation costs. Given the court's emphasis on "reasonableness," and preventing "manifest injustice," courts may weigh the disparate impact that litigation expenses have on plaintiffs, particularly in David versus Goliath lawsuits. There is a persuasive argument that manifest injustice would result by awarding high expert witness expenses for the defense, particularly when it is used as a tactic to increase the cost of litigation for indigent plaintiffs.

Miller v. Sawant represents a significant development in the landscape of expert witness fees. This ruling implicates strategic changes in expert selection and preparation.

While it opens the door to recovering more litigation costs, it also requires careful management of expert witnesses and strategic consideration of when and how to engage in expert discovery. As with many aspects of litigation, the key lies in balancing the potential benefits with the risks and costs. Adapting your practice to this new reality will better position you to maximize cost recovery while minimizing exposure to excessive fees from opposing experts. As always, thorough preparation, detailed documentation, and strategic foresight remain critical.

Practical Advice for Plaintiff Attorneys

1. Revise expert witness agreements to clearly delineate between deposition time and preparation time.

2. Implement systems to track and document expert preparation time meticulously.
3. When budgeting for cases, factor in potential recovery of preparation fees, but also account for the possibility of paying such fees to opposing experts.
4. Develop guidelines for "reasonable" preparation time based on case complexity and expert specialization.
5. Consider the impact of *Miller v. Sawant* on settlement strategies and timing.
6. Be prepared to justify the reasonableness of your expert's preparation time if challenged.
7. Be proactive about disclosing your anticipated experts early, such as in a case management statement. And use this against defendants when they designate more experts than they disclosed in the Rule 26(f) report.
8. When deposing opposing experts, carefully consider the necessity and scope of the deposition, given the potential for increased costs. ■



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