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Depositions in a Business Dispute Requiring Expert Witnesses

Indiana Continuing Legal Education Forum (ICLEF)

Depositions in a Business Dispute Requiring Expert Witnessses
June 3, 2022
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DEPOSITIONS IN A BUSINESS DISPUTE THAT REQUIRE THE USE OF EXPERT WITNESSES

June 3, 2022

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DEPOSITIONS IN A BUSINESS DISPUTE THAT REQUIRE THE USE OF EXPERT WITNESSES

Agenda

8:30 A.M. Registration and Coffee

8:55 A.M. Welcome and Introduction
Aaron D. Grant, Program Chair

9:00 A.M. Preparing Witnesses for Their Deposition (both fact and 30(b)(6))
Eric J. McKeown

9:45 A.M. Making Proper Deposition Objections and Dealing with Improper Objections
Aaron D. Grant

10:30 A.M. Coffee Break

10:45 A.M. Taking and Defending 30(b)(6) Depositions
Aaron D. Grant
- Including preparing a proper 30(b)(6) notice under federal and commercial court rules

11:30 A.M. Taking and Defending an Expert Deposition
Erik C. Johnson

12:15 P.M. Adjourn

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June 3, 2022

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Aaron Grant concentrates his practice in the areas of business litigation and regulatory compliance, with a particular emphasis on contract disputes, restrictive covenant litigation, and representing agribusiness clients. Aaron earned his Bachelor of Arts in American history from DePauw University in 2002. He received his juris doctorate from Washington University in St. Louis School of Law in 2005. Aaron is admitted to practice in the state of Indiana, United States District Court for the Southern District of Indiana and the United States District Court for the Northern District of Indiana.

Erik C. Johnson, McNeely Stephenson, Indianapolis

Erik Johnson is a business lawyer, providing strategic advice to companies of all sizes. He was previously the Assistant General Counsel of a Fortune 500 company, and his business experience includes multi-million dollar mergers and acquisitions, entity formation and reorganization, employment guidance, and negotiation of business agreements.

He has also litigated and tried business cases in Indiana and across the country. Representative lawsuits have included allegations of civil fraud, claims of force majeure, contractual disputes, professional malpractice, and matters related to real estate.

Erik is a registered civil mediator in the State of Indiana.

Eric J. McKeown, Ice Miller LLP, Indianapolis

Eric McKeown is Of Counsel in the Litigation Group and the Data Security and Privacy Practice. Eric concentrates his practice in domestic and international data security and privacy, intellectual property litigation and government investigations.

Eric joined Ice Miller in 2015 after practicing for more than six years at Arnold & Porter LLP. He has represented clients in complex civil and criminal litigation in federal and state courts, and in investigations and regulatory proceedings involving the U.S. Department of Justice, the Securities and Exchange Commission, the Public Company Accounting Oversight Board and the Federal Communications Commission. Eric's litigation experience includes a multitude of practice areas, including patent infringement disputes, antitrust litigation and securities fraud.

Eric served as a judicial clerk for the Honorable John Daniel Tinder of the United States Court of Appeals for the Seventh Circuit.

Before starting his legal career, Eric worked for six years as a software developer, focusing on the design and implementation of web-based applications integrated with relational databases. Eric's experience included the development and maintenance of business-critical software for a large, multinational aerospace and defense company.

Eric graduated valedictorian, summa cum laude in 1996 from Saint Joseph's College, where he earned his Bachelor of Science in political science and economics. He earned his juris doctorate in 2007 from the Indiana University Maurer School of Law, where he graduated valedictorian, summa cum laude, Order of the Coif. There, he served as a notes and comments editor for the Indiana Law Journal.

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Section One

Preparing a Fact Witness for a Deposition

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Section One

Preparing a Fact Witness for a Deposition…….. Eric J. McKeown

Preparing a Fact Witness for a Deposition

Below are some useful ground rules, instructions, and practices in preparing a fact witness for a deposition.

1. Tell the Truth

    a. This is rule number one. It is essential that the witness is aware of the importance of being truthful at all times.

2. Your Testimony is Based Only on Your Personal Knowledge

    a. You are not expected to know everything about the case.

    b. There will almost certainly be questions to which you do not know the answer.

    c. If you don't know the answer to a question, that is ok. You should say so explicitly.

    d. Do not speculate or guess if you do not know the answer to a question.

    e. If you are badgered by the deposing attorney to answer a question when you do not know the answer based on your personal knowledge, then I will object, and it is my role to deal with opposing counsel.

3. Listen Carefully and Answer Only the Question Asked

    a. Listen carefully to the question asked by the deposing attorney.

    b. Pause for a moment after the question. Ensure that you understand the question before answering.

        i. This also provides a moment for me to object if I need to do so.

    c. If you do not understand the question, ask for clarification.

    d. Answer only the question asked.

        i. Do not answer a different question, and do not anticipate questions by the deposing attorney.

        ii. Do not volunteer information beyond the scope of the question asked.

        iii. If the question lends itself to a yes/no answer, then answer yes/no.

        iv. If the question requires more than a yes/no answer, then try to answer the question in a concise manner.

4. Listen Carefully to Objections

    a. If I object, I am doing so for a reason. Listen with extra care when I object to a question.

    b. In most instances, you will be required to answer the question even if I object. But feel free to take a moment and gather your thoughts if I interpose an objection.

    c. In very limited instances (confined mostly to privileged information), I may instruct you not to answer. If I instruct you not to answer, then do not answer.

5. Other Items to Remember

    a. If you need a break, ask for one.

    b. If you don't ask for a break, I will likely suggest one approximately once per hour.

    c. Unless otherwise instructed by me, do not talk to others to prepare for your deposition, or about the anticipated substance of your deposition.

        i. You will be asked questions about those conversations, and they are unlikely to be privileged.

    d. Don't bring documents to the deposition. If you are going to be shown documents, that is the role of the deposing attorney. You don't need to bring anything.

6. Covering Important Documents and Topics Before the Deposition

    a. Prior to the deposition, I will go over important documents with the witness that I anticipate they may be asked about.

        i. This may include key emails on which the witness is copied, text messages, or other documents that I expect the witness to be asked about.

        ii. Giving the witness the opportunity to anticipate questions about those documents in advance of the deposition is important for preparation.

        iii. It is better for the witness not to be blindsided by documents that may involve difficult questions.

        iv. This gives the witness the opportunity to formulate truthful answers to difficult questions without panicking in the moment.

    b. The same is true for important topics and/or questions that I anticipate the witness will be asked about, apart from any documents.

        i. I may ask the witness some of the questions that I expect I would ask if I were opposing counsel.

ii. This is a good opportunity to for the witness to practice following the ground rules discussed above.

iii. It also helps the witness to formulate truthful answers to difficult questions in advance of the deposition, and to feel calmer and more composed in the moment.

Preparing a Rule 30(b)(6) Witness for a Deposition

Many of the same ground rules apply in preparing a Rule 30(b)(6) witness for a deposition, but with the critical distinction that the Rule 30(b)(6) witness is testifying on behalf of the organization, and is expected to prepare for the deposition accordingly.

1. Selecting the proper Rule 30(b)(6) witness is a topic that is beyond the scope of this presentation, but it bears mentioning that:

    a. You are not limited to current officers or employees of the organization (Rule 30(b)(6) also allows the designation of "other persons duly authorized and consenting to testify on its behalf"); and

    b. You are not limited to one witness, and you may designate different witnesses for different topics.

2. Carefully review the Rule 30(b)(6) notice to ensure that you prepare the witness for all topics that are included in the notice (and/or for which you designate that witness).

3. For each topic, gather information and documents relevant to that topic.

    a. This will likely require interviews of current and former officers and employees of the organization.

4. For each topic, walk through the relevant documents and information with the witness, and ensure that the witness is prepared to testify as to the organization's knowledge regarding that topic.

5. It is critical to remember and reinforce that the witness is not limited to testifying based on personal knowledge. Rather, you must prepare the witness to testify as to the knowledge of the organization as a whole.

Section Two

For the Record: Proper and Improper Deposition Objections

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Section Two

For the Record: Proper and Improper Deposition Objections…….. Aaron D. Grant
Michael D. Heavilon

For the Record: Proper and Improper Deposition Objections

I. Objections: Purpose and Standard Practice

Objections made during an oral deposition serve two purposes. First, they can alert the attorney conducting the deposition to issues with a question so that the attorney may correct any errors and ask a proper question. Second, objections preserve the issue so that the court may rule on the objection prior to the introduction of deposition testimony at trial.

An objection should be specific and state the basis for the objection. 2A INPRAC R 30. Objections to evidentiary-related issues are waived if not made during the deposition; especially those that relate to questions that could be cured. 2A INPRAC R 30. Examples include objections to leading questions, lack of foundation, or misstating prior testimony. Objections to the witness's competency, the relevancy of the witness's testimony, or materiality are not waived and may be made for the first time at trial. 2A INPRAC R 30.

Objections based on the relevancy of a question or series of questions should be made infrequently, as such objections are rarely warranted considering the broad scope of relevancy during the discovery phase of litigation. Notwithstanding that general rule, irrelevant questions that "unnecessarily touch sensitive areas or go beyond reasonable limits" may justify a refusal to answer during a deposition. *Henman v. Ind. Harbor Belt R. Co.*, 2015 WL 6449693 at *3 (N.D. Ind. Oct. 22, 2015) (quoting *Eggleston v. Chi. Journeymen Plumbers' Local Union No. 130, U.A.*, 657 F.2d 890, 903 (7th Cir. 1981) (denying motion to compel answer to deposition questions relating to employer discipline for events other than those related to the claim or defense at issue in the case).

Under the Federal Rules of Civil Procedure, objections "must be stated concisely in a nonargumentative and nonsuggestive manner." F.R.C.P. 30(c)(2). Longer, argumentative

objections, also known as "speaking objections," are disfavored and, in some jurisdictions, outright improper. *See* United States District Court for the Eastern District of New York Standing Orders of the Court on Effective Discovery in Civil Case, 102 F.R.D. 339, 382 ("Objections in the presence of the witness which are used to suggest an answer to the witness are presumptively improper."). Although the Indiana Rules of Trial Procedure do not contain the same language as their Federal analogue, it is typically good practice to limit "speaking" objections. The Indiana Commercial Court Handbook – which governs practice in Indiana's five commercial courts – expressly provides that it "prohibit[s] speaking objections and require[es] that objections be stated concisely in a non-argumentative manner." (Indiana Commercial Court Handbook, p. 58). Instead, simply stating "object to form" will usually adequately preserve the issue. *See Applied Telematics, Inc. v. Sprint Corp.*, 1995 WL 79237 (E.D. Pa. Feb. 22, 1995) (citing 8A Wright, Miller & Marcus, *Federal Practice and Procedure*: Civil 2d § 2156, p. 206 (1994)).

Additionally, speaking objections can cause significant delays in a deposition. Lengthy and numerous objections can warrant the extension of time to finish a deposition that otherwise may have concluded on time but for those objections. *See Indpls. Airport Auth. v. Travelers Property Cas. Co. of America*, 2015 WL 4458903 at *5 (S.D. Ind. Jul. 21, 2015) ("The Court agrees . . . that [] counsel impeded efficient use of the presumptive seven-hour deposition by leveling numerous objections (240 by Travelers' count) some of which were lengthy speaking objections, and many of which lacked merit."); *see also* F.R.C.P. 30(d)(1) (requiring the Court to grant additional time if "any other circumstances impedes or delays the examination.").

II. Instructions Not to Answer and Termination of Deposition

As discussed, *supra*, deponents must typically answer questions following an objection. There are, however, generally three occasions in which a party may properly be instructed not to

answer: (1) to preserve a privilege; (2) to enforce a limitation ordered by the court; or (3) to present a motion under Rule 30(d)(3). *Crabtree v. Angie's List*, 2017 WL 3720192 (S.D. Ind. Aug. 28, 2017). Additionally, there are other limited circumstances in which an objection outside of those three may be warranted. *See Henman*, cited supra. In *Henman*, a plaintiff brought an action under the Federal Employers' Liability Act and sought the testimony of an employee for the defendant. *Henman*, 2015 WL 6449693 at *1. The witness did not see the incident but provided assistance to emergency response personnel in moving plaintiff to an ambulance after the incident. *Id.* Despite the fact that the witness received no disciplinary action resulting from the incident, the witness was questioned at length about his disciplinary history with the company. *Id.* The witness refused to answer. *Id.* Plaintiff's counsel sought a motion to compel deposition testimony, but the Northern District of Indiana court rejected that motion, noting that "the scope of discovery is broad, but it is not unlimited." *Id.*at *2. The court found that the "unsubstantiated desire" of plaintiff's counsel "to find anything in the background of [the witness], a person who is not a party to this case and is only testifying as to his role and observations in events that happened after the occurrence, does not justify such a personal fishing expedition into his background, does not appear to be calculated to lead to the discovery of admissible evidence, and is likely to invade his right to privacy." *Id.* *Henman* represents an outlier to standard practice, and instructions not to answer should rarely be given. *See Maxwell v. South Bend Work Release Center*, 2010 WL 4318800 at *4 (N.D. Ind. Oct. 25, 2010) (awarding sanctions where "a deponent refuses to answer a question, and the opposing party successfully moves to compel).

Similarly, there are rare occasions to request the termination of a deposition. Ind. Tr. R. 30(D) provides the standard by which a party may terminate a deposition:

> At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is

> being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(C). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion.

The burden rests with the party seeking to terminate the deposition to prove that the suspension was proper. Under the Federal Rules, that requires a motion for a protective order pursuant to F.R.C.P. 30(d). *See Smith v. Logansport Comm. School Corp.*, 139 F.R.D. 637, 643 (N.D. Ind. 1991). Additionally, counsel many only suspend the deposition, not entirely terminate it. *Id.* Failure to adhere to the rules or justify the basis for suspending the deposition may result in the imposition of fees on the party seeking suspension. *See Id.* (length of deposition alone is not indicative of bad faith). The court has the discretion to either terminate the deposition entirely or "limit its scope and manner." F.R.C.P. 30(d)(3)(B).

When moving for a protective order, the party must state his or her complaints on the record before suspending the deposition, and "immediately" apply to the court for protection under F.R.C.P. 30(d). *Smith*, 139 F.R.D. at 643; *Blair v. H.K. Porter Co., Inc.*, 1986 WL 9593 at *4 (E.D. Pa. Aug. 29, 1896) ("Even in the case of a 'proper' instruction not to answer . . . the party who instructs the witness not to answer should immediately seek a protective order[.]"). If a party objects to the taking of a deposition itself, that party must move for a protective order prior to the scheduled deposition date. *In re Air Crash Disaster at Detroit Metro. Airport on Aug. 16, 1987*, 130 F.R.D. 627, 630 (E.D. Mich. 1989).

III. Improper Objections

As discussed, *supra*, numerous improper objections may result in additional time to examine the witness. *See Henman*. Additionally, any allegations of conduct that unreasonably annoys, embarrasses, or oppresses the deponent or party should be stated on the record for the Court's review. *Crabtree*, 2017 WL 3720192 at *3. Should the conduct continue, the party should contact the Court to intervene. *Id.*

Other types of improper objections are "suggestive objections," or those made by the attorney as an attempt to coach the deponent towards a best answer. F.R.C.P. 30(d)'s requirement to make "concise" and "non-argumentative" objections was added in a 1993 amendment to discourage such tactics. For example, "[i]nstructions to a witness that they may answer a question 'if they know' or 'if they understand the question' are raw, unmitigated coaching, and are *never* appropriate." *Cincinnati Ins. Co. v. Serrano*, 2012 WL 28071 at *5 (D. Kan. Jan. 5, 2012) (emphasis in original). Coaching tactics like that are "misconduct and sanctionable." *Id.* Similarly, rephrasing the question as part of an objection can amount to "helping the witness to formulate answers." *Hall v. Clifton Precision, a Div. of Litton Systems, Inc.*, 150 F.R.D. 525, 528 (E.D. Pa. 1993). The deposing party should make a record that he or she believes the objections are in reality suggestions and coaching.

Section Three

A Voice for the Voiceless: Tips for Taking and Defending Rule 30(B)(6) Organization Depositions

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Section Three

A Voice for the Voiceless: Tips for Taking and Defending Rule 30(B)(6) Organization Depositions…….. Aaron D. Grant
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A Voice for the Voiceless: Tips for Taking and Defending Rule 30(B)(6) Organization Depositions

I. Purpose and Procedure of Rule 30(B)(6) Deposition

An organization may only speak through its agents. Accordingly, to obtain the testimony of an "organization" – be it a corporation, limited liability company, or non-profit – the information sought must be obtained from natural persons who may speak on behalf of that organization. Indiana Trial Rule 30(B)(6), modeled after F.R.C.P. 30(B)(6), allows just that by requiring an organization to "designate one or more officers, directors, or managing agents, executive officers, or other persons duly authorized and consenting to testify on its behalf." In some instances, there may be multiple individuals that have sufficient knowledge on the various subject matters at issue in a case. Accordingly, a party may designate more than one corporate designee to testify about different topics. Wright & Miller, FPP § 2103. In that case, both corporate designees still only count as "one" witness. *Id.*

A rule 30(B)(6) deposition requires a notice in the same manner as a standard deposition. However, the notice does not name an individual, only the organization. Instead, the notice identifies topic for the deposition to allow the organization to name the individual (or individuals) knowledgeable on those topics to testify. *See* Section II, *infra*.

II. Scope of Deposition: Designating Proper Topics

Because Rule 30(b)(6) requires an organization to present a witness or witnesses prepared to testify on subject matters designated in the deposition notice , the party seeking the deposition must identify with "reasonable particularity the matters on which [the] examination is requested." Ind. Tr. R. 30(B)(6). Many courts have gone further than simply requiring "reasonable particularity," framing F.R.C.P. 30(b)(6) as requiring the requesting party to take care to designate, with ***painstaking specificity***, the particular subject areas that are intended to be questioned, and

that are relevant to the issues in dispute." *McBride v. Medicalodges, Inc.*, 250 F.R.D. 581, 584 (D. Kan. 2008) (*citing E.E.O.C. v. Thorman & Wright Corp.*, 243 F.R.D. 421, 426 (D. Kan. 2007)); *Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049, 1057 n.5 (7th Cir. 2000). Only when the requesting party has "reasonably particularized" the subjects about which it wishes to inquire can the responding party produce a deponent who has been suitably prepared to respond to questioning within the scope of inquiry. *Lee v. Nucor–Yamato Steel Co. LLP*, 2008 WL 4014141, at *3 (E.D. Ark. Aug. 25, 2008) (*citing Dwelly v. Yamaha Motor Corp.*, 214 F.R.D. 537, 539–40 (D. Minn. 2003)); *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000)).

Overbroad topics subject the designated organization with the "impossible task" of identifying the proper designee(s). *Lee*, 2008 WL 4014141, at *3. When the notice is overbroad, the responding party is unable to identify the outer limits of the areas of inquiry noticed, and designating a representative in compliance with the deposition notice becomes impossible. *Lipari v. U.S. Bancorp, N.A.*, 2008 WL 4642618, at *5 (D. Kan. Oct. 16, 2008) (*citing McBride*, 250 F.R.D. at 584)); *see also Prokosch*, 193 F.R.D. at 638; *Mitsui & Co. (U.S.A.) v. PR. Water Res. Auth.*, 93 F.R.D. 62, 66 (D.P.R. 1981).

In addition, a proper 30(B)(6) notice must limit the deposition topics to specific claims, matters, actions, individuals, time periods, and geographic locations, *see, e.g., Young v. United Parcel Serv. of Am., Inc.*, 2010 WL 1346423, at *9 (D. Md. Mar. 30, 2010) (explaining that the topics for "the 30(b)(6) deposition must not be overbroad and must be limited to a relevant time period, geographic scope, and related to claims"), and must do more than describe the topics as anything concerning the complaint, answer, or affirmative defenses. *See, e.g., Catt v. Affirmative Ins. Co.*, 2009 WL 1228605, *6-7 (N.D. Ind. Apr. 30, 2009) (explaining that topics listed as

allegations in the complaint, answers, affirmative defenses did "not identify the subject matter to be covered with 'reasonable particularity'").

For example, a notice that simply designate "any matters relevant to this case" fails to meet the "reasonable particularity" requirements. *Kalis*, 231 F.3d at 1057, n. 5 (citing *Alexander v. Federal Bureau of Investigation*, 188 F.R.D. 111, 114 (D.D.C. 1998). Additionally, topics without a reasonable time frame may also fail to identify with "reasonable particularity." *Ball Corp. v. Air Tech of Mich., Inc.*, 329 F.R.D. 599, 603 (N.D. Ind. 2019) (finding topic "relating to in any way to the [organization's] facility prior to May 23, 2014" failed to state topic with requisite particularity).

A party defending a 30(B)(6) deposition should rely on the strong language contained in federal cases[1] to object to overbroad topics and properly limit the scope of the deposition to the issues at hand.

III. Selecting the Proper Witness

The deposing party cannot select which witness or witnesses will serve as 30(B)(6) representatives. *Lyons v. State*, 431 N.E.2d 78 (Ind. 1982). Although Rule 30(B)(6) identifies a variety of individuals that may testify for the organization, including "officers, directors, or managing agents, executive officers," the rule also includes a catch-all which allows for "other persons duly authorized and consenting to testify[.]" This, in essence, allows a corporate entity to select whomever they want so long as the witness is properly prepared to testify. *CMI Roadbuilding, Inc. v. Iowa Parts, Inc.*, 322 F.R.D. 350, 361 (N.D. Iowa 2017) ("responding party must make conscientious, good-faith effort to designate knowledgeable persons and to prepare them to fully and unevasively answer questions about the designated subject matter."). Failure to

[1] When an Indiana Trial Rule is based on a corresponding Federal Rule of Civil Procedure, it is appropriate to look at and rely upon federal court interpretations when applying the Indiana rule. *See Chicago Title Ins. Co. v. Gresh*, 888 N.E.2d 779, 782 (Ind. Ct. App. 2008).

properly prepare a witness to testify for the organization may result in sanctions. *Allstate Ins. Co. v. Scroghan*, 851 N.E.2d 317, 325 (Ind. Ct. App. 2006).

Proper preparedness requires the good faith of both parties. *CMI*, 322 F.R.D. at 361. While the deposing party may not demand that a corporate designee "be prepared to speak with encyclopedic authority," the responding party must "make a conscientious, good-faith effort to designate knowledgeable persons . . . and to prepare them to fully and unevasively answer questions about the designated subject matter." *Id.* Failing to answer every question alone does not equate to a failure to prepare. *Bell v. Pension Committee of ATH Holding Co., LLC*, 2018 WL 7350951 at *2 (S.D. Ind. 2018).

Because the individual speaks on behalf of the organization, the individual need not have personal knowledge for corporate documents so long as the Rule 30(B)(6) notice adequately identifies those documents. Still, it is good practice to ask the witness about his or her role with the organization, how he or she is involved personally in the suit, and (if multiple witnesses are testifying in a 30(B)(6) capacity) the topics about which that particular witness intends to testify. Additionally, asking questions about what the witness did to prepare for the deposition can help determine if the witness was adequately prepared.

Testimony offered by a 30(B)(6) witness is binding on the corporate entity and can be used in all subsequent court proceedings. *Town of Montezuma v. Downs*, 685 N.E.2d 108 (Ind. Ct. AP. 1997). That does not, however, operate as a judicial admission for the organization. *See Everage v. Northern Ind. Pub. Serv. Co.*, 825 N.E.2d 941 (Ind. Ct. App. 2005). Witnesses may also testify again in their personal capacities, during which the witness may be asked the same question again for his or her personal testimony. Wright & Miller, § 2103; *Ball Corp. v. Air Tech of Michigan, Inc.*, 329 F.R.D. 599 (N.D. Ind. 2019). The same is true inversely; "prosed depositions under Rule

30(b)(6) are not duplicative" of prior personal capacity depositions. *Id.* Similarly, a party cannot designate prior testimony given in a personal capacity as "organization" testimony after the fact. *Id.*"[T]here is a qualitive difference in the testimony that one witness may give as an individual and as a Rule 30(b)(6) deponent." *Id.* (quoting *Alloc. Inc. v. Unilin Décor N.V.*, 2006 WL 2527656 at *2 (E.D. Wis. 2006)).

IV. Topic Objections

It is important to provide written objections to the scope of 30(B)(6) topics prior to the deposition to preserve the issue with the court and on appeal. Accordingly, FRCP 30(b)(6) was amended in 2020 to respond to "problems that have emerged in some cases," particularly "overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses." Under that amendment, the parties are expected to confer before and promptly after the notice of subpoena about the matters of examination. Proper objections include the topic lacks specificity and the topic exceeds the scope of the organization's knowledge. All objections must be made prior to the deposition. *Kartagener v. Carnival Corp.*, 380 F.Supp.3d 1290 (S.D. Fla. 2019).

The 2020 Committee's guidance on the "[c]andid exchange" about designated topics cuts both ways, as a party cannot simply object to a topic and rely on that objection to not prepare its witness. "Rather, those objections must be resolved through a meet and confer process or through a protective order issued by the court." Wright & Miller, § 2103 (citing *Guinnane v. Dobbins*, 479 F.Supp.3d 989 (D. Mont. 2020).

Despite the exchange of topics, a deposing party may still ask questions outside the scope of the topics agreed upon. It is proper (and good practice) to object to questions not within the designated topics but that objection does not serve as a basis to instruct the witness not to answer.

Instead, the witness may testify about the subject matter in his or her personal capacity and does not bind the corporation to that answer. The witness may also testify that he or she lacks knowledge about the subject matter of the outside-the-scope question.

Section Four

TAKING AND DEFENDING AN EXPERT DEPOSITION

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Section Four

Taking and Defending an Expert Deposition……..…Erik C. Johnson

I. Taking Expert Depositions

a. Preparation, Preparation, Preparation. The #1 way to take an effective expert deposition is to prepare for it. A good expert will be deeply immersed in the facts of your case that form the basis of their opinions. Therefore, in order to effectively examine them, you need to be equally knowledgeable regarding all facts that underlie their opinions. Specifically:

i. **Know the Report**. Review the expert's report in detail. What specific opinions have they offered? Have they adequately explained the facts upon which they relied? Are there facts that are inconsistent with other depositions or depositions?

ii. **Study the CV**. Study the expert's CV in detail. The expert's CV can help establish whether they truly have expertise in the subject matter. However, it is not unheard of for an expert to embellish their credential. Study externally available resources, like linkedin.com. Get copies of the expert's published articles, if any, and cross-check them against the CV. Inconsistencies or embellishments in the CV can lead to good early challenges to an expert's qualifications and credibility.

iii. **Search for Old Opinions**. Very often, experts in a particular subject matter may use different metrics, methods, or analysis in different cases. Sometimes, you can find their old opinions in published case law. By searching dockets and calling attorneys who have taken the expert's deposition previously, I have been able to get copies of prior expert reports, deposition transcripts, and trial transcripts. Analyze

the similarities of those opinions to your case, and search for areas where the expert's approach or methods are notably different. Finally, a basic westlaw or lexis search may reveal instances where the expert's testimony has been excluded or limited, which can be powerful lines of inquiry during deposition.

iv. **Know the Key Documents.** Sometimes the documents that are most important to the experts are less important to other lay witnesses. Before taking expert depositions, feel fully confident regarding all of the detailed documents upon which the expert relies.

v. **Identify the Judgment Calls.** Nearly every expert report involves some critical question of judgment. By parsing apart the report and specifically listing out each of those judgement calls and analyzing them, you may find the weaker points in the expert's analysis, or identify critical facts that would undercut the opinion.

vi. **Review the Expert's File Materials**. If you can receive the expert's underlying file materials in advance of the deposition, they can provide critical evidence for the deposition. For example, if the expert's workpapers are missing depositions they claimed to rely upon, it may demonstrate that they were gaining summaries of those depositions from opposing counsel. Or, if an expert's file materials contain calculations clearly intended for other opinions, they could lead you to opinions formed by the expert that opposing counsel hoped not to disclose. A detailed review of the expert's file materials and communications is a critical part of preparation.

vii. **Consult Your Expert**. If you have retained your own expert witness, they can be a valuable source of material in preparing to take the opposing expert. Budget an adequate amount of time with your

expert to hear their thoughts on the strengths and weaknesses of the opposing expert's report.

b. Identify Your Goals. Understanding the primary goals for the deposition is critical to being effective, and clearly identifying your goal(s) should be part of your preparation. Common goals are:

i. Exclusion. If you believe you may have good grounds for exclusion of the expert from trial, the deposition provides an important opportunity to set up that motion. Whether the basis is a lack of qualification or expertise, reliance on unreliable data or methodologies, or some other basis for exclusion, those issues can be explored and nailed down in the deposition room.

ii. Trial Preparation. Assuming the expert will not be excluded from trial, your goal is likely to prepare for your cross-examination of that expert on the stand. In that case, a full exploration of the facts and circumstances underlying the opinion, clear delineation of the scope and extent of the opinions, and eliminating the possibility of additional opinions, becomes paramount.

iii. Affirmative Motion Practice. In certain circumstances, you can elicit testimony from the opposing expert that can help establish an affirmative motion – summary judgment, motion in limine, etc. Knowing that goal in advance through preparation will enable you to drill down on those questions during the deposition and maximize the opportunity.

c. Strategy

i. Manage Ego – Yours and Theirs.

1. Expert's Ego. Remember that the expert has been designated because they have special knowledge and credibility within

their field. Professional expert witnesses thrive on their own reputation and are often eager to explain their credentials and skills. Consider whether giving the expert additional "leash" to explain their experience and background may expose some exaggeration or inconsistency. Ego may also play into how an expert addresses inconsistency with prior reports or testimony that was excluded or limited.

2. **Your Ego**. A professional expert is reasonably likely to have as much or more deposition experience than you do. A good expert is also likely to have as much knowledge of your key case documents, and they likely have more knowledge of their subject matter of expertise. Therefore, managing your own ego is important. Make sure that your own ego isn't interfering in a detailed, thorough, and nuanced analysis of the expert's proffered opinions.

ii. **Define the Included and Excluded Opinions**. Prior to the deposition, experts typically will have disclosed their opinions in a report, interrogatory answer, or otherwise. The exact scope of each of those opinions should be identified and defined. However, equally important is identification of what opinions the expert has **not** formed. Common questions include:

- "I understand your opinion that X. But, have you formed any opinion in this case as to Y?"
- "I understand your opinion that X because of a certain fact. However, do you have any opinion if X would still be true if that fact was proven false?"

- "Did you do any calculations as to anything other than X or Y? Do you have those?"

An expert who fails to identify their opinions will often be precluded from offering them at trial. Just one caselaw example appears below.

iii. **Give a Lot of Rope**. In exploring the expert's opinions, it is usually best to give them a lot of leeway to explain themselves. An unprepared expert may stretch or overstate key evidence, offering a strong opportunity for cross examination. Until the weaknesses in the expert's opinions clarify, provide ample room for the expert to talk and expound.

iv. **Seek Confirming Facts**. One strong trial strategy is to use the opposing expert to confirm facts that support your expert report or theory of the case. For example, if both experts will testify that a constructed building was in substantial disrepair but they disagree on the causes, the opposing expert may agree with detailed facts about the building's condition. Use the deposition to establish a list of facts that the expert would agree with at trial. With that list of uncontested facts upon which the experts agree, you can use testimony from the expert on cross examination to highlight and reiterate your factual story and gain credibility with the finder of fact.

v. **3:00 Rule**. One regular expert witness I spoke to said that, even for experts accustomed to testifying, fatigue in the afternoons is a real factor. Therefore, consider saving your harder questions for mid-afternoon when the expert is tired.

vi. **Sequestration.** In some jurisdictions, courts are willing to sequester expert witnesses from the attorneys who retained them during breaks

in the depositions to avoid coaching. Consider whether to request such a sequestration, particularly if a zoom or remote deposition structure is being used.

vii. **Always Think Trial**. It seems like expert depositions are more likely to be directly introduced at trial than are lay witness depositions. The reasons could involve experts not local to the dispute, cost considerations of bringing them for trial, double-booked expert witnesses, agreements between counsel, or the like. Therefore, when taking an expert deposition, always have the possibility that the transcript or video will be used at trial somewhat in mind. Sometimes that means "laundering" your key questions by going back over already covered territory in a clear and clean summary near the end of the deposition. Sometimes that means double- and triple-checking that you've covered all the topics you would want to ask at trial. Keeping the possibility of portions of the deposition as direct trial testimony in mind may guide your deposition strategy.

II. Defending Expert Deposition

a. **Baseball Defense (Get Off The Field With No Damage).** A regular expert witness told me that his goal in most depositions is the "baseball defense" – work to get off the field with as little damage done as possible. If you are fully confident that your expert will be available for trial, the deposition is not the opportunity for scoring points -- it's purely the moment for reducing damage.

b. **Preparation**. If the budget allows for it, good expert deposition defense involves several preparation sessions between the attorneys and the expert. Discrepancies between the expert and the opposing expert's reports can be

explored, key facts can be discussed, and judgment calls identified and discussed. That preparation can lead to the expert feeling more confident walking into the deposition room and avoid surprises for both the expert and the retaining attorney.

c. **Objections**. As discussed below, the work product objections available differ between Federal and Indiana state courts, at present. However, other defending objections remain effectively the same – defending counsel can object to form, foundation, etc, consistent with objections during any lay witness deposition.

d. **Work Product (State versus Federal).** In 2010, the Federal Rules were amended to protect draft expert reports from disclosure, subject to limited exceptions. Certain communications with retaining counsel were also excluded from discovery as work product. A copy of the amended FRCP 26 is attached. Indiana has not followed the Federal approach. Therefore, the scope of permissible deposition objections based on work product will be defined by the court in which the case is pending.

e. **Zoom Depositions**. More and more these days, depositions are occurring by zoom or other videoconferencing methods. That is particularly true for expert depositions, given that experts may not be local to the dispute. When defending an expert deposition that will occur via zoom, give particular attention to the expert's videoconferencing ability. Key issues include:

    i. **Technology.** Does the expert have sufficient technology to ensure a smooth connection? Is the expert's microphone adequate?

    ii. **Mic Placement.** If the deposition will be via zoom, do some practice sessions where the expert can experiment with microphone placement. Such work can improve audio and improve video captures, which can be important if the video capture is eventually used at trial.

iii. **Background**. Does the expert have a neutral background, free of pictures, logos, or distractions? Again, if the video capture is used at trial, such issues can be important.

Relevant Portions of Federal Rules of Civil Procedure 26

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) REQUIRED DISCLOSURES.

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* 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. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, 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.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(b) DISCOVERY SCOPE AND LIMITS.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(4) *Trial Preparation: Experts.*

(A) *Deposition of an Expert Who May Testify.* 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 a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect 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, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, 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. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

Relevant Portions of Indiana Trial Rule 26

Rule 26. General provisions governing discovery

(A) Discovery methods. Parties may obtain discovery by one or more of the following methods:

(1) depositions upon oral examination or written questions;

(2) written interrogatories;

(3) production of documents, electronically stored information, or things or permission to enter upon land or other property, for inspection and other purposes;

(4) physical and mental examination;

(5) requests for admission.

Unless the court orders otherwise under subdivision (C) of this rule, the frequency of use of these methods is not limited.

(B) Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(3) Trial preparation: Materials. Subject to the provisions of subdivision (B)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (B)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(A)(4) apply to the award of expenses

incurred in relation to the motion. For purposes of this paragraph, a statement previously made is

(a) a written statement signed or otherwise adopted approved by the person making it, or

(b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (B)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

(a) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (B)(4)(c) of this rule, concerning fees and expenses as the court may deem appropriate.

(b) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(B) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means,

788 N.E.2d 881
Court of Appeals of Indiana.

John BEAUCHAMP, Appellant–Defendant,
v.
STATE of Indiana, Appellee–Plaintiff.

No. 41A05–0110–CR–467.
|
May 21, 2003.

BAKER, Judge.

This case might very well be illustrative of the old maxim, "penny wise and pound foolish,"[1] with regard to whether an indigent defendant should be afforded public funds with which to retain an expert witness. Appellant-defendant John Beauchamp appeals his conviction for Battery Resulting In Serious Bodily Injury,[2] a class B felony, challenging the denial of his access to medical experts and the trial court's determination that several witnesses called by the State could testify. Beauchamp also urges that certain evidence was improperly admitted because the State had violated the trial court's ***883** discovery order and challenges the propriety of his sentence.

FACTS[3]
The facts most favorable to the verdict are that on August 6, 1998, eleven-month-old Chance Chilton was brought to the Methodist Hospital emergency room in Indianapolis with a skull fracture. Chance's mother, Suzanne Tolbert, as well as Beauchamp, her boyfriend, told the hospital physician that they were at home when they heard a thump in the baby's room followed by crying. While Tolbert's mother informed the doctor of her suspicion that the child had been abused, no report was made because Tolbert and Beauchamp's version of the events was consistent with the injuries that Chance sustained that day.

Thereafter, on September 6, 1998, Scott Alexander, an Emergency Medical Technician with the local fire department, was dispatched to Tolbert's residence following a report that an infant was not breathing. When Alexander arrived, he observed another paramedic rendering treatment to Chance.

Beauchamp initially told Alexander that the baby had just stopped breathing. However, Beauchamp then explained to other paramedics that Chance had hit his head on a desk in the bedroom. As various medical personnel attempted to stabilize Chance's head, Alexander felt the back of the baby's head and observed that it was soft and mushy. Chance was then placed on a backboard and transported to Wishard Hospital in Indianapolis.

When the police interviewed Beauchamp, he told them that he had picked Chance up from his crib and tripped over a beanbag chair. Beauchamp then indicated that he fell forward and Chance hit the back of his head on a desk. At one point, an officer with the Johnson County Sheriff's Department requested Beauchamp to demonstrate how the incident had occurred. Beauchamp indicated that when he fell, Chance's head was resting on his chest. Beauchamp then stated, however, that he had prevented Chance from hitting his head during the fall. Each time Beauchamp demonstrated to the officer how the incident occurred, his version of the events differed.

After Chance arrived at Wishard Hospital, a CT scan was performed. The test revealed fractures to the skull and Chance's brain density appeared abnormal and unusually dark. It was also discovered that Chance had a subdural hematoma over the surface of the brain near the top of his skull and his brain was swollen. Moreover, it was discovered that Chance had sustained a number of spinal injuries.

Chance eventually underwent surgery to have a blood clot removed and pressure relieved from the skull. However, Chance died from his injuries and an autopsy was performed. Blood was found inside Chance's eyes and both optic nerves were swollen. The results of the autopsy revealed that Chance died from blunt force injuries that had been inflicted upon his head and spine. The injuries were determined to be severe enough to cause brain swelling and brain death. It was ultimately concluded that the force necessary to cause such injuries was greater than a two-story fall and could have resulted from slamming Chance into a wall. Thus, ***884** Chance could not have been injured in this fashion by falling out of a crib. Additionally, the physician who performed the autopsy determined that those types of injuries could not have been sustained if Chance had fallen to the floor in Beauchamp's arms. In light of these findings, child abuse was implicated and the cause of Chance's death was ruled a homicide.

Beauchamp was arrested on September 21, 1998, and charged with battery as a class B felony, involuntary manslaughter as a class C felony, and reckless homicide as a class C felony. Prior to trial, Beauchamp filed a number of motions with the trial court requesting public funds that would enable him to retain expert witnesses to testify on his behalf. While Beauchamp had initially retained private counsel to represent him in this case from the time that the charges had been filed and members of his family had paid nearly $12,000 in legal fees,[4] as of November 23, 1999, Appellant's App. p. 234, his appellate counsel at oral argument before this court acknowledged that his trial lawyers ultimately undertook pro bono representation of Beauchamp.

In each of the motions requesting expert witness fees, Beauchamp maintained that he was indigent and argued that such funds were necessary because the evidence to be adduced at trial was complex and pointed out that the State had identified thirteen physicians that it intended to call at trial. Beauchamp alleged that the case called for extensive review and analysis of medical records, literature and concepts that were far beyond the purview of legal counsel. Thus, he argued that expert assistance was required and would be used for the purpose of advising defense counsel of the evidence that would be offered by the State and to aid in the preparation of appropriate cross-examination in specialized areas of medicine. In each instance, although the trial court determined that Beauchamp was indigent, it concluded that he failed to show that such experts were necessary. The trial court entered an order on October 14, 1999, denying three of Beauchamp's requests for expert witness funds. However, the trial court also noted that it had approved an appropriation of $3500 on December 19, 2000, to be paid to Beauchamp's counsel representing the costs incurred in taking the depositions of six witnesses. After that date, Beauchamp obtained a loan from family members in the amount of $7500 that was "primarily used to engage the services of an expert witness, Dr. Jan Leestma." Appellant's App. p. 438. After filing yet another request for funds, the trial court denied that motion on June 18, 2001. It found that Beauchamp's family had expended a total of approximately $25,000 for his defense. Appellant's App. p. 438. Notwithstanding such findings, the judge approved an allowance of $1500 to Beauchamp for the "purpose of utilizing an expert in framing questions to [one of the physicians]" in that same June 18 order. Appellant's App. p. 441. In all other respects, his requests for funding were denied.

At some point during the trial that commenced on July 17, 2001, the court allowed Dr. Mary Edwards–Brown to testify for the State during its case-in-chief. It was revealed that Beauchamp had retained Dr. Edwards–Brown and consulted with her at some point during the discovery process regarding various defense strategies and ***885** theories that he might present at trial. Beauchamp's counsel subsequently decided not to identify her on the witness list, but she was listed by the State in spite of her prior consultation with Beauchamp's counsel regarding the merits of the case.

Also during the trial, the court permitted Dr. Thomas Luerssen to testify as a rebuttal witness for the State. The trial court had issued a pretrial discovery order essentially requiring both parties to disclose the names and addresses of expert witnesses, as well as reports or summaries of their expected testimony. At some point prior to trial, Beauchamp's counsel had deposed Dr. Luerssen regarding the injuries that Chance had sustained. Dr. Luerssen essentially formed no opinion as to how Chance was injured. It was Beauchamp's theory of defense that Chance's death was the result of the injuries he sustained in August, in addition to those that occurred on September 6. Thereafter, during rebuttal testimony that Dr. Luerssen presented at trial, he offered opinions that were new and substantially different from those he had provided in the deposition. Specifically, Dr. Luerssen was of the opinion that Chance's injuries could not have been caused by a fall from a crib and that they had likely been intentionally inflicted. Even though the State had listed Dr. Luerssen as a potential witnesses, it had not provided any reports or summaries of his expected testimony to Beauchamp's counsel that differed from the deposition testimony.

The State also attempted to introduce certain photographs of Chance at trial that had not been supplied to Beauchamp's counsel until the fifth day of the trial—a clear violation of the discovery order. Those photographs showed Chance playing on a slide and swinging on park equipment at a family gathering just prior to the fatal injuries. Even though the trial court initially excluded some of the photos from evidence because of the State's discovery violation, it later reasoned that the pictures could be offered because one of Beauchamp's defense witnesses, Jessica Miller, had "opened the door" when she testified in narrative form that they had put Chance "on swings and took pictures and everything." Tr. p. 2239–40.

Beauchamp's jury trial concluded on July 26, 2001, and he was convicted on the battery charge. Thereafter, Beauchamp was sentenced to a twenty-year term of imprisonment and he now appeals.

Because we reverse on the issue regarding the admission of the rebuttal testimony that was offered by the State, inasmuch as it failed to disclose the substance of the testimony prior to trial, the propriety of Beauchamp's sentence need not be addressed. However, we choose to discuss the remaining issues that Beauchamp raises, given the likelihood that those questions might again surface in the event of a retrial.

DISCUSSION AND DECISION

I. Indigency—Hiring Expert Witness

Beauchamp first contends that the trial court erred in requiring him to show, in open court, his need for expert funds as well as demonstrating how he intended to use those experts. Specifically, Beauchamp argues that such a requirement violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the Privileges and Immunities Clause under Article I,

Section 23 of the Indiana Constitution because such a directive places an indigent defendant in a position not otherwise occupied by those defendants who are not indigent. Thus, Beauchamp maintains that the hearings the trial court conducted regarding his need for the experts amounted to invidious ***886** discrimination based solely upon economic status and bears no reasonable or substantial relationship to the class indigents who are accused of committing criminal offenses.

A. Federal Claim

[1] In addressing Beauchamp's federal claim that the equal protection clause has been violated, we first note that the guarantee of equal protection is a right to be free from invidious discrimination in statutory classifications or other governmental activity. *Harris v. McRae*, 448 U.S. 297, 322, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980). Social and economic legislation that neither impinges on fundamental rights nor employs suspect classifications must be upheld against constitutional attack when legislative means are rationally related to a legitimate governmental purpose. *Gary Comty. Mental Health Ctr., Inc. v. Ind. Dep't of Pub. Welfare*, 507 N.E.2d 1019, 1023 (Ind.Ct.App.1987). A challenged classification will be upheld if there is a rational relationship between the disparity of treatment and some legitimate government purpose. *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). To show that certain legislation is irrational, an appellant is required to negate every conceivable basis that might support it, whether or not the basis has a foundation in the record. *Id.* at 320–21, 113 S.Ct. 2637.

Additionally, when confronting an equal protection challenge, this court must first determine which level of scrutiny applies: the traditional "rational basis" analysis or the more stringent "strict scrutiny" test. In general, the strict scrutiny analysis applies only if the classification "impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). We have previously recognized that indigency is not a suspect classification that would justify strict judicial scrutiny. *Gary Cmty. Mental Health Center*, 507 N.E.2d at 1023.

Turning to the circumstances here, our supreme court has determined that a defendant is first required to show that he is indigent and secondly, that he show a "need" for the expert in open court before public funds will be allotted to him. *Scott v. State*, 593 N.E.2d 198, 200 (Ind.1992). The defendant must then show that an expert's services are necessary to assure an adequate defense and he must specify precisely how the requested expert services would benefit him. *Id.* The trial court then makes a determination as to whether the expert is necessary to assure an adequate defense.

Here, Beauchamp complains that requiring an indigent defendant to "reveal defense theories, trial strategies, investigations, and possibly inculpatory evidence in an open hearing subject to prosecutorial cross-examination and objection before a trial court will grant funds for expert assistance," Appellant's Br. p. 8, amounts to discrimination that is based solely upon economic status and bears no reasonable or substantial relationship to inherent characteristics of the class of those indigents who are accused of committing crimes. Therefore, Beauchamp points out that it is only the indigent defendants who must reveal confidential trial strategy and possible theories of defense to the court and the prosecution.

The rational basis here justifying the requirements in *Scott* is rooted in the State's compelling interest in ensuring that public funds are not spent needlessly, wastefully or extravagantly. An indigent defendant is required to show a need for the funds that he seeks and, through this ***887** procedure, the trial court can become assured that it is not required to spend limited public funds in a useless or foolish fashion and that there is a legitimate purpose for the expert. *Scott*, 593 N.E.2d at 200. *Id.* A rational basis therefore exists requiring an indigent criminal defendant to meet additional showings for expert witnesses that is not required of those defendants who are able to afford their own witnesses.

B. State Claim

[2] In a related argument, Beauchamp contends that the requirements set forth in *Scott* violate the Privileges and Immunities Clause under our State Constitution. In essence, Beauchamp urges that the disparate treatment between indigent defendants and those who can afford their own experts is arbitrary and capricious and, therefore, must be declared unconstitutional.

Article I, § 23 of the Indiana Constitution provides that "the general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." The purpose of the equal privileges and immunities clause is to prevent the distribution of extraordinary benefits or burdens to any group. *State v. Price*, 724 N.E.2d 670, 675 (Ind.Ct.App.2000), *trans. denied*.

There are two considerations as to whether unequal privileges or immunities to differing classes should apply and be declared a violation of the Indiana Constitution. First, the disparate treatment accorded by the legislation

must be reasonably related to the inherent characteristics that distinguish the unequally treated classes. *Collins v. Day*, 644 N.E.2d 72, 80 (Ind.1994). Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. *Id.* We will exercise substantial deference to legislative discretion and the challenger carries the burden to negate "every reasonable basis for the classification." *Teer v. State*, 738 N.E.2d 283, 288 (Ind.Ct.App.2000).

With respect to the first component, our supreme court in *Collins* determined that the basis for the classification must inhere in the subject matter. 644 N.E.2d at 78. That is, where the legislature has singled out one class of persons to receive a privilege or immunity not equally provided to others, such a classification must be based upon distinctive, inherent characteristics that rationally distinguish the unequally treated class, and the disparate treatment accorded by the legislature must be reasonably related to such distinguishing characteristics. *Id.* at 78–79.

The second prong required for a statute to pass muster under our constitution is that the disparate treatment must be applied equally and evenly to all those within the classification. As the *Collins* court observed, "any privileged classification must be open to any and all persons who share the inherent characteristics which distinguish and justify the classification, with the special treatment accorded to any particular classification extended equally to all such persons." *Id.* at 79. Legislative classification becomes a judicial question only where the lines drawn appear arbitrary or manifestly unreasonable. So long as the classification is based upon substantial distinctions with reference to the subject matter, we will not substitute our judgment for that of the legislature; nor will we inquire into the legislative motives prompting such classification. *Id.* at 80.

Here, the requirements set forth in *Scott* apply to any defendant who seeks public funds to hire an expert witness. Put another way, the *Scott* provisions that ***888** require a defendant to show indigency as well as "need" and how the witness will benefit him, do not create or grant unequal privileges or immunities to differing classes of people. The fact that an individual who does not need public funds to hire an expert witness is not required to meet the same requirements does not automatically establish unequally treated classes. The requirements uniformly apply and funds are equally available to all individuals who are similarly situated. That is, any indigent defendant who comes before the court seeking public funds to hire an expert witness must satisfy the same requirements. Moreover, it cannot be said that Beauchamp has negated every reasonable basis for the classification. To the contrary, the rational and legitimate purpose of protecting the public treasury exists here. Therefore, Beauchamp has also failed to demonstrate that there was a violation of the Privileges and Immunities Clause under the Indiana Constitution.

II. Denial of Funds To Hire Expert Witnesses

[3] Beauchamp also argues that his conviction must be reversed because the trial court erred in denying his motion for funds to hire expert witnesses that were necessary for trial. Specifically, Beauchamp maintains that the trial court abused its discretion in denying his requests because he demonstrated indigence and a need for expert witnesses. Moreover, Beauchamp urges that he adequately demonstrated how he would use such expert assistance at trial.

[4] [5] In addressing this claim, we note that the appointment of experts for indigent defendants is left to the trial court's sound discretion. *Jones v. State*, 524 N.E.2d 1284, 1286 (Ind.1988). *Jones* determined that it is within the trial court's discretion to determine whether the requested service would be needless, wasteful or extravagant. *Id.* at 1350. The trial court is not required to appoint at public expense any expert that the defendant might find helpful. *See Graham v. State*, 441 N.E.2d 1348, 1350 (Ind.1982). Additionally, the defendant requesting the appointment of an expert bears the burden of demonstrating the need for the appointment. *Kennedy v. State*, 578 N.E.2d 633, 639 (Ind.1991). The State also notes that the central inquiry in deciding the issue at bar are whether the services are necessary to ensure an adequate defense, *Himes v. State*, 273 Ind. 416, 403 N.E.2d 1377, 1379 (1980), and whether the defendant specifies precisely how he would benefit from the requested expert services. *Davidson v. State*, 558 N.E.2d 1077, 1084 (Ind.1990). In other words, a defendant cannot simply make a blanket statement that he needs an expert absent some specific showing of the benefits that the expert would provide. *See Scott*, 593 N.E.2d at 200. In addition to the requirements set forth in *Scott*, there are other guidelines that a trial court should follow when public funds are sought for expert assistance:

> Issues which the trial court should consider in determining whether a defendant is entitled to funds for an expert include (1) whether defense counsel already possesses the skills to cross-examine the expert adequately or could prepare to do so by studying published writings, (2) whether the purpose of the expert is exploratory only, *Hough v. State*, (1990), Ind., 560 N.E.2d 511, 516; and (3) whether the nature of the expert testimony involves precise physical measurements and chemical testing, the results of which were not subject to dispute. *Schultz v. State*, (1986), Ind., 497 N.E.2d 531, 533–34.

Harrison v. State, 644 N.E.2d 1243, 1253 (Ind.1995).

***889** In this case, Beauchamp cites the trial court's order of October 14, 1999, which provided that "[t]he

Defendant's current financial position, as shown by the evidence on the record before this Court, indicates that he is unable to fully fund expert assistance in his defense, should the same be deemed necessary." Appellant's App. p. 155. Similarly, the trial court's order of December 19, 2000, concluded that Beauchamp was indigent for the purpose of obtaining financial assistance in taking depositions of the physicians listed by the State as witnesses. Appellant's App. p. 295.

Beauchamp then notes that in his first three motions for funds to hire expert witnesses, assistance was necessary because he was charged with a class B felony, that the case involved the death of a child, that the evidence to be adduced at trial was going to be complex and the State had listed numerous medical professionals on its witness list. Appellant's App. p. 98, 131, 134. In light of the complexities of the case, Beauchamp requested the assistance of a forensic pathologist, ophthalmologist, and a pediatric neurologist or neurosurgeon. Appellant's App. p. 98, 131, 134. After a hearing on those motions, the trial court denied Beauchamp's request, determining that he failed to show that his counsel would be unable to adequately cross-examine the State's witnesses without the assistance of experts. Beauchamp filed a fourth motion on May 22, 2000, where he noted that the State had identified thirteen physicians as anticipated witnesses. Appellant's App. p. 419. Therefore, Beauchamp asserted in his request for funds that: (1) the case called for the extensive review and analysis of medical records, literature and concepts far beyond the purview of lawyers; (2) the charges are serious; and that (3) the issues of timing, causation, and mechanism/feasibility of injury are seminal and all hinge largely on medical testimony. Appellant's App. p. 419–20. He went on to precisely state that expert assistance would be used for the purpose of advising defense counsel regarding evidence and opinions of the State's witnesses, to aid defense counsel in investigating the matter and to assist him in preparing appropriate cross-examination in specialized areas of medicine. Appellant's App. p. 420. Notwithstanding these assertions, the trial court again denied Beauchamp's request, ruling that "medical testimony will be significant in this case, although the Defendant makes no assertions that he otherwise experienced difficulty with the subject matter in taking the depositions of the State's expert witnesses." Appellant's App. p. 437.

Beauchamp contends that because the State's case hinged only upon the inferences that could be drawn from the testimony of six medical doctors with various specialties, the assistance of qualified experts was required to review the records and testimony, to aid in cross examination and to testify to the medical evidence. Thus, Beauchamp maintains that it was unjust, unfair and unrealistic to require his legal counsel to learn the specialties of various areas of medicine in order to present an adequate and effective defense. Appellant's Br. p. 24. In short, Beauchamp urges that because his counsel sufficiently demonstrated his need for expert assistance and indicated the type of assistance that was needed as well as how defense counsel expected to use those experts, his requests for funding should have been granted.

We must reject the State's contention that Beauchamp failed to establish even "a threshold showing of need" for expert witnesses. Appellee's Br. p. 15. In our view, it is apparent that Beauchamp successfully satisfied the requirement of showing legitimate ***890** need for the experts and how they might inure to his benefit, thereby satisfying the requirements of *Scott.* Beauchamp pointed out in his first motion that "defense counsel is not knowledgeable in the field of medicine or the sub-specialty of forensic pathology and he is unable to adequately prepare and present a defense." Appellant's App. p. 98. Beauchamp then made a similar contention in the second request for funds in the context of ophthalmology and again in the third motion as to the field of pediatric neurology and neurosurgery. Appellant's App. p. 131, 134. Finally, in his fourth motion, Beauchamp urged that the "proper presentation of the Defendant in this case calls for extensive review and analysis of medical records, literature and concepts that are far beyond the purview of lawyers." Appellant's App. p. 134.

By the same token, it is apparent from our review of the record that Beauchamp indeed established the necessity requirements of *Scott* for an outlay of expert witness funds at an earlier juncture as determined by the trial court—one month later. The trial judge likely realized this and, in our view, Beauchamp was called upon to jump an insurmountable hurdle with respect to his request for expert witnesses. That is, defense counsel was asked to prove a need for those witnesses in light of his own lack of expertise. Naturally, such a burden cannot and should not have to be met. Although Beauchamp may have been ultimately awarded access to a medical advisor by approving $1500 in public funds shortly before the trial commenced, he was not afforded the benefit of his own expert witness, despite the showing he made under *Scott.* Again, while the trial court determined that Beauchamp was able to pay for part of his defense, the record shows that he could not pay for most of the costs including those charged by the experts as well as attorney's fees in light of his indigency.

We certainly recognize and appreciate a trial court's desire and duty to protect the public treasury. However, in circumstances such as the ones presented here today, it is certainly possible to be "penny wise and pound foolish"—given the tremendous expense of taxpayer dollars in bringing this cause to trial. Thus, we would urge the trial court to reconsider its ruling with regard to this issue in the event of a retrial.

III. Testimony of Dr. Edwards–Brown

[6] Beauchamp next asserts that the trial court erred in permitting Dr. Mary Edwards–Brown to testify at trial during the State's case-in-chief because she had previously been retained and consulted by Beauchamp's counsel. Inasmuch as Dr. Edwards–Brown was permitted to testify for the State after she was contacted, consulted and retained by Beauchamp's counsel, he claims that the cause must be reversed because the provisions of Indiana Trial Rule 26 were violated.

T.R. 26(B)(4)(b) provides that:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(B) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

In support of his argument, Beauchamp points to *R.R. Donnelley & Sons Co. v. North Texas Steel Co., Inc.*, 752 N.E.2d 112 (Ind.Ct.App.2001), *trans. denied*, where this court was confronted with the issue of whether an individual who was ***891** retained as a consulting expert witness could be called to testify at trial by the opposing party. In *R.R. Donnelley*, the plaintiff filed suit against a number of defendants after several steel storage racks collapsed in its warehouse. As a result of the incident, R.R. Donnelley sued North Texas Steel (North Texas), the manufacturer of the component parts of the storage racks, Associated Material Handling Industries, Inc. (Associated), the party who purchased the racks from Frazier Industrial Company, the designer of the racks. North Texas received raw steel from the mill and constructed the racks according to the plan that Frazier had designed. The racks were then sent to R.R. Donnelley and were built under Associated's supervision.

Prior to trial, Associated hired an expert witness, Raymond Tide, to review the case and provide consultative services with respect to Associated's liability in the case. Associated and Frazier eventually settled their differences with R.R. Donnelley, leaving only North Texas at trial. Prior to settlement, however, Associated supplied a copy of Tide's opinion to R.R. Donnelley, North Texas and Frazier.

When the trial commenced, North Texas called Tide to testify as to his opinions concerning the cause of the rack's collapse. Tide testified that the welds were not the primary cause of the collapse and contradicted the testimony of R.R. Donnelley's expert, Kenneth Wood. R.R. Donnelley objected to the admission of this testimony based upon an affidavit of Associated's counsel, which averred that Tide had been hired as a consultative expert for the purpose of reviewing file materials, to render an opinion regarding the collapse of the racks, and to discuss the merits of the claims.

On appeal, we determined that Tide's testimony should have been excluded on two different grounds. On one basis, relevant to this appeal, we determined that the trial court violated T.R. 26(B)(4)(b) by admitting Tide's testimony at trial because Tide was a consulting expert who had been retained by Associated in preparation for trial.[5] We noted that the discovery of a consulting expert in this State is not permitted absent "a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." *Id.* at 131. Therefore, we determined that permitting Tide to testify had the effect of subverting the very purpose behind T.R. 26.

In this case, Beauchamp points out that a meeting took place on July 10, 2000, between Dr. Edwards–Brown and his defense counsel. Appellant's App. p. 402. During that forty-five minute consultation, the two discussed the medical records and films of Chance and how they related to Beauchamp's trial strategy. Hypothetical scenarios were also discussed that revealed certain defense strategies. Appellant's App. p. 402. Subsequent to the meeting, Dr. Edwards–Brown generated a bill, sent it to Beauchamp's counsel and payment was tendered for her services. Tr. p. 1403.

In light of these circumstances, Beauchamp points out that several other individuals in Dr. Edwards–Brown's office could have performed substantially the same services that she provided to the prosecution and points to her testimony acknowledging that another staff member in the office actually read the initial medical ***892** films of Chance. Tr. p. 1523. Dr. Edwards–Brown also testified that there was a person in Chicago who could have provided the same service. Tr. p. 1524. Therefore, Beauchamp urges that the provisions of T.R. 26(B)(4)(b) were violated because the State did not adequately demonstrate that the required "exceptional circumstances" existed whereby it was permitted to present the testimony of Dr. Mary Edwards–Brown.

Although the State maintains that the trial court had granted a motion in limine instructing Dr. Edwards–Brown not to reveal that she had consulted with Beauchamp's counsel or to refer to any statements or information she had received from defense counsel, the spirit behind preventing such a practice exercised by the State in these circumstances is to "reinforce each litigant's motivation to aggressively develop his own side of any given case by retaining and relying on his own expert." *Reeves v. Boyd & Sons, Inc.*, 654 N.E.2d 864, 875 (Ind.Ct.App.1995), *trans. denied*, *quoting* *Brown v. Ringstad*, 142 F.R.D. 461, 465 (S.D.Iowa 1992). Even though Dr. Edwards–Brown acknowledged that she did not remember the substance of her conference with Beauchamp's counsel, Tr. p. 1402,

there still remains a real risk of substantial prejudice resulting from the fact that various defense strategies had been disclosed and discussed. Thus, in the event of a retrial, we would caution the trial court to reconsider its ruling with respect to allowing this testimony. Permitting Dr. Edwards–Brown to testify under these circumstances may very well have violated the spirit and intent behind T.R. 26(B)(4)(b), inasmuch as a party should certainly be protected when obtaining expert advice he requires in order to properly evaluate and present his case without fear that every consultation will be discoverable. That is, one party should not be allowed to benefit from the effort and expense borne by the other party in preparing his case.

IV. Rebuttal Testimony of Dr. Luerssen

[7] Beauchamp next complains that the rebuttal testimony of Dr. Thomas Luerssen should not have been admitted because he proffered opinions at trial that were different from his pretrial deposition testimony that had not been supplied to Beauchamp in violation of T.R. 26 and the pretrial discovery order. Thus, Beauchamp contends that he was denied a fair trial because the State waited to call Dr. Luerssen as a rebuttal witness when the evidence showed it was aware of his newly formed opinions that had not been provided to him.

In addressing this contention, we note that the trial court typically enjoys broad discretion in ruling on violations of discovery and we will reverse only if the court has abused its discretion. *Palmer v. State*, 640 N.E.2d 415, 421 (Ind.Ct.App.1994). With respect to rebuttal witnesses, nondisclosure is excused when that witness was unknown and unanticipated. *Sloan v. State*, 654 N.E.2d 797, 804 (Ind.Ct.App.1995), *trans. denied*.[6] Additionally, the purposes of a pretrial discovery order are to enhance the accuracy and efficiency of the fact-finding process and to prevent surprise by permitting the parties adequate time to prepare their cases. *Wiseheart v. State*, 491 N.E.2d 985, 990 (Ind.1986). Exclusion of evidence as a discovery ***893** abuse sanction is proper where there is a showing that the State engaged in deliberate or otherwise reprehensible conduct that prohibits the defendant from receiving a fair trial. *Palmer*, 640 N.E.2d at 421.

In support of his argument that he is entitled to a reversal on this issue, Beauchamp first sets forth the following provisions of T.R. 26(E)(1):

> A party is under a duty seasonably to supplement his response with respect to any question directly addressed to:
>
> (a) the identity and location of persons having knowledge of discoverable matters, and
>
> (b) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

Additionally, Beauchamp points to the trial court's standing discovery order to disclose:

> (a) The names and last known addresses of persons whom the State may call as witnesses (including rebuttal or expert witnesses who can be reasonably anticipated), together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements and a list of memoranda reporting or summarizing their oral statements, and, if no statements were taken, a summary of their testimony.

Appellant's App. p. 32.

Here, Beauchamp notes that his trial counsel deposed Dr. Luerssen eleven months prior to trial with the anticipation that he would elicit certain opinions with respect to the injuries that Chance sustained. At that deposition, Dr. Luerssen testified that he was unable to form an opinion as to the relationship between the injuries Chance received in August and those that were sustained in September. Defense counsel also extended Dr. Luerssen the opportunity to offer any other information concerning Chance, to which he declared that he had not formed any additional opinions.

However, when Dr. Luerssen was called as a rebuttal witness by the State, he offered opinions that substantially differed from those he provided in his deposition. Dr. Luerssen acknowledged at trial that he had reviewed "some of the records in the case" and was "familiar with some of the things that happened in [the] case." Tr. p. 2430–31. On the other hand, Dr. Luerssen stated in his deposition that he had not had the opportunity to review any chart notes from the hospital and had no knowledge of "what level the skull fractures from the August confinement at Methodist [Hospital] were." Appellant's Supp.App. p. 6. Moreover, the State did not provide any subject matter or reports to Beauchamp prior to trial. Instead, Beauchamp was only provided with Dr. Luerssen's name and a vitae sheet. It was only during the rebuttal testimony offered by Dr. Luerssen that Beauchamp learned that he had formed new opinions regarding the case and that his opinion as to Chance's injuries would be elicited at trial.

In his testimony, Dr. Luerssen declared that Beauchamp's explanation for Chance's injuries, combined with a compression fracture of the spine was not compatible. Tr. p. 2445. Dr. Luerssen also could not agree with the proposition that all the injuries Chance suffered could have been caused by falling out of a crib onto a box. Tr. p. 2448–49, 2452. To the contrary, he stated that a child falling from a height of "say four feet" would not sustain the types of fractures that Chance had sustained. Tr. p. 2434. In the end, Dr. Luerssen was of the opinion that Chance's injuries were ***894** characteristic of those that had been inflicted

and he could not agree that "a fall on top of a child caused these injuries." Tr. p. 2452, 2457.

In reviewing this testimony, it is quite apparent here that Dr. Luerssen was a known and anticipated expert rebuttal witness by the State. Moreover, the State was certainly aware that Dr. Luerssen was prepared to offer such new opinions even though they had not been provided to Beauchamp. This conduct violated the trial court's standing discovery order. Moreover, the State's actions here were in violation of the requirement under T.R. 26(E)(1) that the parties supplement the substance of their expert's testimony in a timely fashion.

The State responds that Beauchamp "could have requested a continuance if he had been concerned about Dr. Luerssen's testimony," Appellee's Br. p. 19, and points to *Hill v. State*, 531 N.E.2d 1382 (Ind.1989) in support of this proposition. Although a continuance may be an appropriate remedy in some circumstances, our supreme court in *Hill* determined that it was not error to deny the defendant's motion for a continuance to gather evidence in order to rebut "surprise" testimony that had been offered at trial by an arresting officer. *Id.* at 1384. The *Hill* court reasoned that although the officer had given deposition testimony offering one version of the events and then later changed his testimony at trial offering yet another version, a continuance was not warranted because the defendant could have recross-examined the officer and could very well have impeached him. *Id.*

Here, the remedy of a continuance would likewise be futile because Beauchamp had already offered the testimony of Dr. Luerssen establishing that he had not formed any opinion with respect to Chance's injuries. Until the State had introduced the damaging rebuttal testimony, Beauchamp could continue presenting his defense that the injuries occurring to Chance in both August and September of 1998 had contributed to the death. Thereafter, this testimony that was not disclosed to Beauchamp substantially impeded the likelihood of proceeding with that defense. Therefore, we cannot perceive of any plausible way that Beauchamp might be able to extricate himself from this dilemma. We would also note that in the event that continuances could routinely be granted in circumstances such as these, a defendant would never be able to plan a defense strategy.

It is quite apparent to us that the State engaged in a bit of "rope-a-doping" here—a term commonly used in the sport of boxing. In such instances, one fighter pretends to be trapped against the ropes while his opponent wears himself out throwing punches. Here, the State lies in wait as Beauchamp offers his defense and then goes on the offensive with the undisclosed, damaging testimony of Dr. Luerssen. Given the prejudicial impact of the testimony as a result of the violation of the discovery order as well as the provisions of T.R. 26(E)(1), we are compelled to conclude that the trial court's decision to allow Dr. Luerssen to offer his new and undisclosed opinions as to how Chance was injured amounted to reversible error. Thus, Beauchamp is entitled to a new trial on this issue.

V. Admission of Photographs

[8] Although issue IV discussed above merits a reversal, we nevertheless address Beauchamp's argument that the trial court erred in permitting the State to offer certain photographs of Chance into evidence that were material to the defense but had not been provided to him until the fifth day of trial in the event that a similar issue ***895** would surface in the event of a retrial. The crux of Beauchamp's claim is that the State's failure to disclose this evidence to him in a timely fashion was material enough to result in a denial of due process. Beauchamp points out that the State's failure to disclose the photographs in a timely fashion substantially impeded his defense that Chance had an evolving condition beginning with the August injury because the pictures were evidence that Chance appeared to be in good health just prior to the injuries that had caused his death.

Before proceeding to the merits of this argument, we note that the admission and exclusion of evidence is within the trial court's discretion and the ruling will be reversed on appeal only for an abuse of discretion. *Dunlap v. State*, 761 N.E.2d 837, 841 (Ind.2002). An abuse of discretion occurs if the court's decision is clearly against the logic and effect of the facts and circumstances before the court. *Palmer v. State*, 704 N.E.2d 124, 127 (Ind.1999). In determining whether the State's failure to disclose evidence amounts to a violation of due process, we note that *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), discussed three considerations in instances where the State suppresses "Brady"[7] evidence that is favorable to an accused. For a due process violation to occur, the defendant must demonstrate that: (1) the evidence is favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence has been suppressed by the State, either willfully or inadvertently; and (3) the suppressed evidence was material. The evidence should be deemed "material" only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). A "reasonable probability" is one that is sufficient to undermine confidence in the outcome. *Farris v. State*, 732 N.E.2d 230, 233 (Ind.Ct.App.2000).

The photographs here depicted Chance playing on a slide and swinging on some playground equipment on the day that Beauchamp allegedly caused the injuries that resulted in Chance's death. Those photos were evidence that

Chance was in fine health, contrary to the defense that Beauchamp had advanced at trial. The State's neglect in not supplying the photos in a timely fashion served to undermine Beauchamp's defense that Chance's health began to deteriorate in August and progressed into September, thus rendering him more susceptible to internal bleeding and spinal fractures. Tr. p. 1799–1800. To be sure, it is apparent that Beauchamp was attempting to convey to the jury that Chance was in a state of malaise and was physically ill at the September 6 party. The timing of Chance's injuries was crucial to Beauchamp's defense, Tr. p. 1793–94, and because those injuries were complex, the photographs were material and favorable to his defense.

While the State did not dispute that the photos were in their possession for quite some time, it argued that it did not realize that they were relevant. Tr. p. 2133. As we determined in *Turney v. State*, however, even the "inadvertent" suppression of evidence by the State may be error. 759 N.E.2d 671, 675 (Ind.Ct.App.2001), *trans. denied*. At trial, nearly every physician testified that the event causing the injury ***896** most likely occurred within six to twenty-four hours prior to his admission to the emergency room at Wishard Hospital. Tr. p. 1571, 1580–81. Inasmuch as the photos had not been disclosed and provided to Beauchamp at an earlier time, his defense counsel was effectively prevented from cross-examining and impeaching the expert witnesses—he could not display or even refer to the photos at trial. In essence, Beauchamp's defense counsel was compelled to base his defense on the theory that Chance's injuries were gradual and evolving without the knowledge that the State possessed the photographs. As a result, we reject the State's argument that these photos were not material and find the State's contention that the photographs were "inadvertently suppressed" of no moment.

We note, however, that the State's failure to disclose the photographs in a timely fashion did not prejudice Beauchamp. As explained below in further detail in issue VI, Jessica Miller acknowledged that Chance was playful, having fun on a swingset and was out running around at the September party. Therefore, her testimony suggesting that Chance appeared to be in good health on the day he was admitted to the hospital served to render any error on the part of the State in failing to disclose the photographs harmless. *See* *Badelle v. State*, 754 N.E.2d 510, 538 (Ind.Ct.App.2001), *trans. denied* (recognizing that where proper evidence was admitted regarding the identification of the defendant, any error stemming from other identification evidence that could be regarded as improper was harmless error, as no prejudice resulted to the defendant).

VI. Opening the Door For Admission of Photographs

[9] In a related issue, Beauchamp urges that the trial court erred in determining that he had "opened the door" for the admission of a number of photographs that had previously been excluded. In particular, Beauchamp contends that Miller's statement that "we put [Chance] on swings and took pictures and everything," constituted an unintended and unanticipated response to one of defense counsel's questions. Appellant's Br. p. 39. Therefore, because there was no intent to place the photos at issue, Beauchamp maintains that the trial court erred in determining that the door had been opened for the admission of the photographs.

This court has determined that when a defendant interjects an issue in a trial, he opens the door to otherwise inadmissible evidence. *Tawdul v. State*, 720 N.E.2d 1211, 1217 (Ind.Ct.App.1999), *trans. denied*. However, evidence relied upon to open the door must leave the trier of fact with a false or misleading impression of the facts related. *Roth v. State*, 550 N.E.2d 104, 106 (Ind.Ct.App.1990), *trans. denied*.

Here, Beauchamp's counsel had not posed a question to Miller before she interjected that photos of Chance had been taken at the family party. Miller testified that when she first arrived at the family picnic, she observed some of the people cooking food and others taking a walk in the woods. Following Beauchamp's counsel's response of "okay," Tr. p. 2240, Miller immediately continued, stating that "at the beginning ... Chance wouldn't go to anyone else and then he eventually came to me before we put him on the swings and took pictures of him and everything." Tr. p. 2240.

We fail to see how defense counsel's statement of "okay" served to interject the photographs into issue as argued by the State. However, even though the trial court may have erroneously determined that Beauchamp opened the door with respect ***897** to the admission of the photographs, that error was harmless in light of Miller's testimony that Chance appeared to be in good health and was energetic and playful at the party.

CONCLUSION

In light of our disposition of the issues set forth above, we conclude that permitting Dr. Luerssen to testify as a rebuttal witness for the State amounted to reversible error. The record establishes that the opinions and substance of that testimony were known to the State before trial and had not been supplied to Beauchamp. Moreover, Dr. Luerssen's opinions differed remarkably from those he presented during his pretrial deposition testimony

regarding Chance's injuries, thereby undermining Beauchamp's defense and resulting in substantial prejudice to him.

We also note that requiring Beauchamp to show, in open court, his need for expert witness funds as well as demonstrating how he intended to use those experts, is not a violation of the Equal Protection Clause under the Fourteenth Amendment or the Equal Privileges and Immunities Clause under the Indiana Constitution. However, the record demonstrates that Beauchamp satisfied the requirements of *Scott,* where he established a legitimate need for his own expert witnesses and how they might benefit his defense.

Additionally, we conclude that Dr. Edwards–Brown should not have been permitted to testify for the State because she had previously met with Beauchamp's counsel to discuss various theories and defense strategies that would be presented at trial. Also, Beauchamp established that the photographs of Chance playing at the family reunion were relevant and material to his defense, and the State's argument that they were "inadvertently suppressed" must fail. However, such error was harmless, inasmuch as a defense witness acknowledged that Chance was playing and appeared to be healthy at the family party just prior to his admission at the hospital. Finally, while the evidence did not support the trial court's conclusion that a defense witness "opened the door" for the admission of photographs that had been previously excluded from the evidence, that ruling did not prejudice Beauchamp and was, therefore, harmless.

Reversed and remanded for a new trial.

SULLIVAN, J., and DARDEN, J., concur.

All Citations

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Footnotes

1 Robert Burton, *The Anatomy of Melancholy* (1621).

2 Ind.Code § 35–42–2–1(a)(4).

3 This court heard oral argument at Indianapolis on April 17, 2003 in the Indiana Supreme Court chambers. We were joined by a number of Carmel High School students and a group of international students from the Indiana University School of Law—Indianapolis. We appreciate counsel for their able presentations in the presence of so many who were witnessing our appellate process for the first time.

4 Beauchamp indicated in a "Statement of Income, Expenses and Assets" filed with the court on June 19, 2000, that he was a self-employed subcontractor with a weekly take-home pay in the amount of $350. Appellant's App. p. 271. His total monthly expenses amounted to $1371, and the only asset he listed was under the category of "vehicles," which was a 1987 Ford F150, valued at $50. Appellant's App. p. 272.

5 Inasmuch as Associated was no longer an adverse party when Tide was called by North Texas to testify, *R.R. Donnelley & Sons* may be distinguished from the case at bar on this basis.

6 This case was abrogated on other grounds in *Hicks v. State,* 690 N.E.2d 215 (Ind.1997). We note that in *McCullough v. Archbold Ladder Co.,* 605 N.E.2d 175, 179–80 (Ind.1993), our supreme court strongly condemned the concealment of known and anticipated rebuttal witnesses. As we observed in *Sloan,* "such condemnation implies that such concealment should rarely be found to be harmless error." *Sloan,* 654 N.E.2d at 804.

7 *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (holding that suppression of evidence by the prosecution favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution).