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# Fair Play:
# Compensating Fact Witnesses

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Cases often turn on fact witnesses. Yet, fact witnesses can be understandably reluctant to get involved in litigation. Statutory fees at $40 per day under 18 U.S.C. § 1821(b) or analogous state rules don't provide much economic salve for even a cooperative witness. Moreover, in many cases, fact witnesses play a role far beyond simply appearing for a deposition or at trial. A former employee who represents a corporate client's "institutional memory" can offer critical assistance when a case involves events that occurred long ago.

In this column, we'll first look at the guidelines under the professional rules for compensating fact witnesses. We'll then turn to the other side of the coin to discuss remedies if your opponent has improperly bought the content of a fact witness's testimony rather than simply reimbursed expenses for that witness's availability.

***Guidelines***

ABA Model Rule of Professional Conduct 3.4(b), which has counterparts in most states, prohibits a lawyer from "offer[ing] an inducement to a witness that is prohibited by law[.]" Comment 3 to Model Rule 3.4(b) elaborates that "it is not improper to pay a witness's expenses . . . [but] it is improper to pay an occurrence witness any fee for testifying[.]" ABA Formal Ethics Opinion 96-402

(1996) synthesizes Model Rule 3.4(b) and its accompanying comment to counsel that reasonable compensation for time loss and out-of-pocket expenses are both permitted. Echoing Model Rule 3.4(b) and federal statutory law (18 U.S.C. § 201), ABA Formal Ethics Opinion 96-402 contrasts this with improperly buying the *content* of a fact witness's testimony.

What is "reasonable" usually turns on the facts of the particular case. As *Caldwell v. Cablevision Systems Corp.*, 925 N.Y.S.2d 103, 108 (N.Y. App. Div. 2011), *aff'd,* 984 N.E.2d 909 (N.Y. 2013), put it: "While the distinction between compensation for lost time and payment of fees for testimony is easily articulated, the boundary between the two categories may, in practice, prove obscure." ABA Formal Ethics Opinion 96-402 notes that reasonable compensation usually turns on direct economic loss expressed in terms of the hourly wage or professional fees that the witness would otherwise have earned for the time involved. In *Caldwell*, for example, the court concluded that $10,000 paid to a busy orthopedic surgeon was reasonable compensation for the time spent at the courthouse as a key fact witness in a personal injury case. Similarly, if more modestly, the court in *Prasad v. MML Investors Services, Inc.*, 2004 WL 1151735 (S.D.N.Y. May 24, 2004) (unpublished), concluded that a fact witness was appropriately compensated at $125 per hour because that was the rate he charged in his consulting business. When a fact witness is not employed—for example, a retired employee—ABA Formal Ethics Opinion 96-402 suggests

broadly that compensation should be calculated based on the reasonable value of the witness's time. In *Consolidated Rail Corp. v. CSX Transp., Inc.*, 2012 WL 511572 (E.D. Mich. Feb. 16, 2012) (unpublished), for example, the court found nothing improper with compensating a retired employee at $85 per hour for his time spent and reimbursing him for his out-of-pocket expenses.

ABA Formal Ethics Opinion 96-402 also concludes that compensation can extend beyond time "on the record" in a deposition or trial and can include both preparation time and associated time spent reviewing documents and researching information related to the witness's testimony. In *Consolidated Rail*, for example, the retired employee was compensated for time spent reviewing documents and conducting site visits relevant to his potential testimony. *Centennial Management Services, Inc., v. Axa Re Vie*, 193 F.R.D. 671 (D. Kan. 2000), reached a similar conclusion with a former executive and *Smith v. Pfizer, Inc.*, 714 F. Supp.2d 845 (M.D. Tenn. 2010), did the same with a former government scientist.

***Remedies***

By contrast, remedies for simply "buying testimony" range from regulatory discipline to exclusion of the testimony concerned.

*Florida Bar v. Wohl*, 842 So.2d 811 (Fla. 2003), illustrates the former—with a lawyer disciplined for offering a witness a "bonus" of up to $1 million depending on the "usefulness" of her testimony. Lawyers in *Wagner v. Lehman*

*Bros. Kuhn Loeb, Inc.*, 646 F. Supp. 643 (N.D. Ill. 1986), and *In re Complaint of PMD Enterprises, Inc.*, 215 F. Supp.2d 519 (N.J. 2002), in turn, were disqualified for improper witness payments.

*Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 117 F.3d 1328 (11th Cir. 1997), illustrates the latter—with the appellate court concluding that the trial court was within its discretion in excluding improperly paid witness testimony as a sanction. Moreover, *Rocheux Intern. of New Jersey v. U.S. Merchants Financial Group, Inc.*, 2009 WL 3246837 (D. N.J. Oct. 5, 2009) (unpublished), found that this cannot be "cured" through the ruse of improperly attempting to reclassify a fact witness as an "expert."

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