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Fair Play: Compensating Fact Witnesses

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Fact witnesses often make critical differences at trial. A ready example is the bystander in an automobile accident case who saw that the light was red when the defendant's truck entered the intersection. Assuming they are otherwise subject to service, fact witnesses can be subpoenaed for trial. At the same time, going to court can be a substantial financial burden to a fact witness with no other connection to the case—often involving lost time from work and travel expenses. Although state and federal statutory laws generally require subpoenaed fact witnesses to be compensated, the statutory rates around the Northwest in both state and federal courts are very modest.

The RPCs in both Oregon and Washington, like their ABA Model Rule counterpart, permit lawyers to reasonably compensate fact witnesses for lost time and expenses above the statutory rates. The notion is that the witness is being reimbursed for economic loss rather than being paid for the testimony concerned. The respective Oregon and Washington rules are worded somewhat differently, but arrive in the same place. In this column, we'll look at both and then briefly survey the term "reasonable" in this context and the potential consequences if these rules are violated.

Oregon

Oregon RPC 3.4(b) specifically addresses—and generally permits—fact witness reimbursement for lost time and related expenses as long as they are reasonable:

A lawyer shall not:

...

(b) . . . offer to pay . . . compensation to a witness contingent upon the content of the witness's testimony . . . except that a lawyer may advance, guarantee or acquiesce in the payment of:

(1) expenses reasonably incurred by a witness in attending or testifying; [and]

(2) reasonable compensation to a witness for the witness's loss of time in attending or testifying[.]

Oregon's rule has the same number as its ABA Model Rule counterpart but is drawn from former Oregon DR 7-109(C) and is more explicit than the ABA Model Rule.

Washington

Washington RPC 3.4(b) is patterned directly on the ABA Model Rule:

A lawyer shall not:

...

(b) . . . offer an inducement to a witness that is prohibited by law[.]

Again like the ABA Model Rule, Comment 3 to Washington RPC 3.4 clarifies that “it is not improper to pay a witness’s expenses[.]” ABA Formal Opinion 96-402 (1996) further clarifies that “expenses” in this context includes reasonable compensation for time loss.

“Reasonable”

Although reasonableness implies an objective standard, ABA Formal Opinion 96-402 notes that what is “reasonable” varies with individual circumstances. In an unusual example, the trial court in *Caldwell v. Cablevision Systems Corp.*, 925 NYS2d 103 (NY App Div 2011), found that \$10,000 paid to a busy orthopedic surgeon’s medical practice 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 (SDNY 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. ABA Formal Opinion 96-402 suggests that when a witness is not employed—for example, a retired employee of a party—compensation should be calculated based on the reasonable value of the witness’s time. The ABA opinion also concludes that compensation can extend beyond time “on record” at 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 Corp. v. CSX Transp., Inc.*, 2012 WL 511572 (ED Mich Feb 16, 2012) (unpublished), for example, the court approved compensation paid to a retired employee of one of the parties for time spent reviewing documents and conducting site visits relevant to his testimony. Whether reimbursing an hourly worker or not-time-dependent business owner, prudent lawyers will require—and preserve—written proof of the compensation method in the event that the reasonableness of the payments involved are challenged later.

Consequences

Violation of RPC 3.4(b) can result in regulatory discipline. *In re Noble*, 30 DB Rptr 116, 120 (Or 2016), for example, involved a lawyer who was disciplined for promising a witness extra compensation if the lawyer's client prevailed at the arbitration involved. Moreover, because any violation takes place in the context of a court proceeding, an Oregon ethics opinion (OSB Formal Op 2005-132 (rev 2016)) and a Washington Supreme Court decision (*In re Bonet*, 29 P3d 1242 (Wash 2001)) make the point that improprieties with witnesses can also constitute “conduct prejudicial to the administration of justice” in breach of their respective versions of RPC 8.4.

Bar discipline, however, is not the only potential consequence. In *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Association*, 865 F Supp 1516 (SD Fla 1994), for example, the trial court excluded improperly paid witnesses as a sanction. In *Wagner v. Lehman Bros. Kuhn Loeb, Inc.*, 646 F Supp 643 (ND Ill 1986), the court—again as a sanction—disqualified a lawyer involved in promising an improper payment to a witness. Finally, in *Fernlund v. Transcanada USA Services, Inc.*, 2014 WL 5824673 (D Or Nov 10, 2014) (unpublished), the court (albeit on summary judgment) took the equivalent of an adverse inference based on a witness’s compensation.

ABOUT THE AUTHOR

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