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Fair Pay:
Compensating Fact Witnesses

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Fact witnesses can make a critical difference in case. Their role varies with any given litigation. In one instance, the witness might be a bystander to an automobile accident who can say whether the light was green or red. In another, the witness may be a former employee who can provide the "institutional memory" of why a company involved in litigation did or did not take particular action in the past. Although fact witnesses who are subpoenaed for a deposition or trial are entitled to statutory witness fees, those are modest in both state and federal court and usually do not compensate the witness fully for the time involved.[1] RPC 3.4(b) generally permits a fact witness[2] to be paid for preparing and testifying beyond statutory fees as long as the compensation is for the time involved and related expenses rather than as an inducement to testify in a particular way.[3]

In this column, we'll first briefly survey the development of RPC 3.4(b) in Washington for context. We'll then turn to the dividing line between reasonable compensation and impermissible inducement. We'll conclude with a discussion of the consequences for violating RPC 3.4(b).

Before we do, three qualifiers are in order.

First, for simplicity, we'll address fact witnesses who are unrepresented. RPC 4.2 governs contact with represented "persons" and in some circumstances key witnesses may be represented.[4] When a witness is represented, the lawyer seeking the testimony can ordinarily coordinate the witness's appearance for a deposition, hearing, or trial through the witness's lawyer—including any compensation beyond statutory fees.[5]

Second, interacting with unrepresented fact witnesses can involve a wide spectrum of sensitive issues beyond compensation ranging from avoiding giving them legal advice[6] to not improperly invading an opponent's privilege when talking with a former employee.[7] By focusing on compensation here, these other areas should not be overlooked.

Third, although we will focus on the compensation element of RPC 3.4(b) here, it is important to remember that the Washington rule, like its ABA Model Rule counterpart, also prohibits a lawyer from falsifying evidence and counseling or assisting a client to testify falsely. ABA Formal Opinion 508 (2023), which is available on the ABA website, addresses these other aspects of the rule in detail.

Context

RPC 3.4(b) is straightforward:

> A lawyer shall not:

. . .

(b) . . . offer an inducement to a witness prohibited by law.

The Washington RPC mirrors its ABA Model Rule counterpart. Both trace their lineage to former ABA DR 7-109 (1969) and its still earlier predecessor, ABA Canon 39 (1928).[8] In many respects, the most significant practical development in the history of the Washington rule was the adoption of ABA Model Rule Comment 3 in 2006 explicitly confirming that it is permissible to pay a witness's expenses:

> With respect to paragraph (b), it is not improper to pay a witness's expenses[.]"[9]

The ABA in Formal Opinion 96-402 (1996) found that, read fairly in light of the history of the rule, compensation can include both out-of-pocket expenses and the reasonable value of time loss. The WSBA took the same general approach in Advisory Opinion 1908 (2000).[10]

Reasonable Compensation

Although the term "reasonable" suggests an objective standard, both the ABA and the WSBA opinions just noted concluded that what is reasonable in any given case will vary with the circumstances. The Washington opinion, for example, was painted against the backdrop of compensating a treating doctor

testifying as a fact witness for time loss. ABA Formal Opinion 96-402 concluded that reasonable compensation usually turns on the direct economic loss experienced by the witness expressed in terms of the hourly wage or professional fees that the witness would otherwise have earned for the time involved.[11] A federal court in New York, for example, held that a fact witness was appropriately compensated at $125 per hour because that was the rate he charged in his consulting business.[12]

When a fact witness is not employed—for example, a retired employee of a litigant—the ABA opinion suggests that compensation for time loss should be calculated using "all relevant considerations."[13] A federal court in Michigan, for example, found nothing improper with paying a retired employee at an hourly rate that reflected his compensation when he retired adjusted for the passage of time.[14]

ABA Formal Opinion 96-402 does not distinguish between time actually spent testifying and related preparation—including reviewing relevant documents.[15]

Although not required, prudent practice suggests requiring and maintaining documentation of both the basis and the record of payment.

Improper Inducement

By contrast, offering to pay a fact witness for the content of the witness's testimony is prohibited by RPC 3.4(b).[16]

In a recent Washington case, for example, a lawyer representing the plaintiffs in a commercial case offered that his clients would share the proceeds of a successful recovery with a fact witness if the witness's testimony conformed to talking points the lawyer suggested. After this conversation surfaced during the witness's deposition, the lawyer was disqualified and later resigned his law license in lieu of disbarment.[17]

Improper inducements can involve more than simply money. A Washington lawyer, for example, was disbarred for providing whiskey to a witness with a known drinking problem to induce favorable testimony at the trial of a real estate dispute.[18]

Improper inducements under Washington RPC 3.4(b) have also extended to offers intended to silence witnesses altogether. A Washington deputy prosecutor, for example, was found to have violated RPC 3.4(b) by offering to drop charges against a co-conspirator if the witness invoked the Fifth Amendment to preclude possible testimony favorable to the target's defense.[19, 20]

Consequences

As the Washington cases just discussed illustrate, serious regulatory discipline—including disbarment—has been imposed for offering witnesses improper inducements.[21]

Beyond discipline, lawyers offering improper inducements have been disqualified and the testimony involved has been excluded—both as sanctions for the misconduct involved.[22] In other circumstances approaching—but not reaching—improper inducements, courts have suggested bias instructions if a payment, while not violating RPC 3.4(b), reasonably appears disproportionate to the time involved.[23]

At least where the client was not complicit in the lawyer's improper inducement, the client may have their own remedies against the lawyer ranging from malpractice to fee forfeiture if, for example, the lawyer is disqualified for offering an improper inducement.[24]

ABOUT THE AUTHOR

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[1] *See* RCW 20.40.010-.030 (witness fees and mileage/travel expenses in state court); 28 U.S.C. §1821 (same for federal court).

[2] Comment 3 to RPC 3.4 uses the term "occurrence" witness when referring to fact witnesses. While the latter is arguably broader than the former (*see* Black's Law Dictionary 12th ed. 2004 ("fact witness")), the intent here is to use them interchangeably.

[3] RPC 3.4(b) also governs compensation of expert witnesses. It generally allows broad latitude for expert witnesses as long as the expert's compensation is not contingent on the outcome of the case involved. *See Blair v. Washington State University*, 108 Wn.2d 558, 574-75, 740 P.2d 1379 (1987) (discussing former CPR DR 7-109(C) and RPC 3.4(b)).

[4] For a discussion of whether an employee is "represented" in the organizational context, *see Wright v. Group Health Hospital*, 103 Wn.2d 192, 691 P.2d 564 (1984), and RPC 4.2, cmt. 7.

[5] *See also* WSBA Advisory Op. 201502 (2015) (discussing process server contact with a represented person).

[6] As framed by RPC 4.3, a lawyer is prohibited from giving legal advice to an unrepresented person (other than a recommendation to retain counsel) "if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client." Even when not technically prohibited by RPC 4.3, prudent practice suggests not giving legal advice to an unrepresented person to avoid inadvertently creating an attorney-client relationship. *See generally Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992) (test for determining attorney-client relationship).

[7] *See Newman v. Highland School District No. 203*, 186 Wn.2d 769, 381 P.3d 1188 (2016) (demarcating the boundaries for privilege between current and former employees).

[8] *See generally* ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* at 483-91 (2013) (history of the ABA Model Rule); Thomas R. Andrews, *The Law of Lawyering in Washington* §II.C.2 (2012) (history of the Washington rule). *See also Restatement (Third) of the Law Governing Lawyers* § 117 (2000) (taking an approach similar to the ABA Model Rule).

[9] *See* Supreme Court Order 25700-A-851 (July 10, 2006) (adopting amendments to the text of the Washington RPC and adopting official comments); WSBA, *Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct* 182 (2004) (recommending adoption of the ABA Model rule comment); *see also* Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 868 (1986) (noting the absence of the accompanying comment when Washington adopted RPC 3.4 in 1986).

[10] For a national collection of ethics opinions addressing this area, *see* ABA, *Annotated Model Rules of Professional Conduct* 426-27 (10th ed. 2023) (ABA Annotated Model Rules).

[11] ABA Formal Op. 96-402, *supra*, at 3.

[12] *Prasad v. MML Investors Services, Inc.*, 2004 WL 1151735 at *5-*7 (S.D.N.Y. May 24, 2004) (unpublished).

[13] ABA Formal Op. 96-402, *supra*, at 3.

[14] *Consolidated Rail Corp. v. CSX Transp., Inc.*, 2012 WL 511572 at *3-*13 (E.D. Mich. Feb. 16, 2012) (unpublished).

[15] ABA Formal Op. 96-402, *supra*, at 2. *See, e.g., Centennial Management Services, Inc. v. Axa Re Vie*, 193 F.R.D. 671, 682 (D. Kan. 2000) (citing the ABA opinion); *Smith v. Pfizer Inc.*, 714 F. Supp.2d 845, 852-53 (M.D. Tenn. 2010) (same).

[16] At the extreme, conduct violating RPC 3.4(b) may also—depending on the circumstances—constitute bribery or witness tampering under applicable criminal law. *See* RCW 9A.72.090 (bribing witness); RCW 9A.72.120 (witness tampering); 18 U.S.C. § 201(b)(3) (bribing witness); 18 U.S.C. § 1512 (witness tampering). *See, e.g., Matter of Simmons*, 110 Wn.2d 925, 929, 757 P.2d 519 (1988) (finding overlap of RPC violations and bribery and witness tampering statutes). RPC 8.4(a) prohibits a lawyer from violating the RPCs through the acts of another. In *Wagner v. Lehman Brothers Kuhn Loeb, Inc.*, 646 F. Supp. 643 (N.D. Ill. 1986), a lawyer was disqualified when the improper inducement was made by the lawyer's client with the lawyer's knowledge. For a survey of cases nationally involving improper inducements, *see* ABA Annotated Model Rules, *supra*, at 425.

[17] *Ota v. Wakazuru* 2023 WL 1962363 (Wn. App. Feb. 13, 2023) (unpublished) (recounting underlying facts); *In re Palumbo*, WSBA Disciplinary Bd. No. 24#00043, July 17, 2024 (resignation in lieu of disbarment) (available in the disciplinary notices section of the WSBA website at: https://www.mywsba.org/PersonifyEbusiness/Default.aspx?TabID=1541&dID=2446). Although the Court of Appeals in *Ota* reversed and remanded the disqualification for procedural reasons, the Court of Appeals noted that "substantial evidence supports the [trial] court's finding that '[t]he amount mentioned could be viewed as a substantial financial incentive' for . . . [the witness] . . . to testify at the deposition consistent with . . . [the lawyer's] . . . version of events." *Ota v. Wakazuru*, *supra*, 2023 WL 1962363 at *9.

[18] *Matter of Simmons*, *supra*, 110 Wn.2d 925.

[19] *In re Bonet*, 144 Wn.2d 502, 29 P.3d 1242 (2001). *See also In re Kronenberg*, 155 Wn.2d 184, 117 P.3d 1134 (2005) (disbarring lawyer for, in relevant part, paying witness $6,000 to leave the state so that witness would not be available to testify against the lawyer's client).

[20]The lawyers in *Palumbo* and *Bonet* were also found to have violated RPC 8.4(d), which prohibits conduct prejudicial to the administration of justice. The lawyer in *Simmons* was also found to have violated RPC 8.4(c), which prohibits, in relevant part, conduct involving dishonesty.

[21] The Florida Supreme Court noted in *Florida Bar v. Wohl*, 842 So.2d 811 (Fla. 2003), that the inducement is improper regardless of whether the witness eventually testifies or not.

[22] *See* Note 17, *supra* (disqualification); *Golden Door Jewelry Creations, Inc.*, 117 F.3d 1328, 1135 n.2 (11th Cir. 1997) (exclusion of testimony). In *Rocheux Intern. of New Jersey v. U.S. Merchants Financial Group, Inc.*, 2009 WL 3246837 (D. N.J. Oct. 5, 2009) (unpublished), the court found that an improper payment cannot be cured simply by reclassifying the witness from "fact" to "expert."

[23] *See, e.g., Caldwell v. Cablevision Systems Corp.*, 984 N.E.2d 909, 913 (N.Y. 2013) (suggesting a limiting instruction where a doctor was paid $10,000 as a fact witness to recount entries in his chart notes); *Fernlund v. Transcanada USA Services, Inc.*, 2014 WL 5824673 at *4 (D. Or. Nov. 10, 2014) (unpublished) (taking adverse inference on summary judgment where inducement did not technically violate RPC 3.4(b) but suggested bias by witness).

[24] *See, e.g., Cotton v. Kronenberg*, 111 Wn. App. 258, 264, 44 P.3d 878 (2002) (client sued lawyer under multiple theories when lawyer disqualified for improper inducement to witness and then refused to refund unearned fees).