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Compensating Fact Witnesses: The Price is Sometimes Right

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COMPENSATING FACT WITNESSES: THE PRICE IS SOMETIMES RIGHT

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I. INTRODUCTION

In 2007, Feld Entertainment, Inc. ("Feld"), which produces circus shows under the trade name Ringling Bros. & Barnum & Bailey Circus, sued the American Society for the Prevention of Cruelty to Animals ("ASPCA") and other animal welfare and wildlife organizations and individuals for alleged offenses related to a lawsuit wherein the defendants—then plaintiffs—had unsuccessfully sued Feld for allegedly mistreating its circus elephants.[1] A former Feld employee, Tom Rider, was the star witness for the then-plaintiffs in what we will call the "elephant case."[2] Rider purportedly quit his job as an elephant attendant because of the mistreatment of an elephant he worked with, and he testified about the alleged abuse of the animals, which was central to the elephant case.[3] His testimony in the elephant case lacked credibility and was unpersuasive,[4] but remunerative.[5] Indeed, Rider was paid handsomely for his service in the losing cause, having received cash payments exceeding $190,000, plus "non-cash compensation, such as a van, hotel rooms, cell phone use, a video camera, zoom

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1. First Amended Complaint at 1, Feld Entm't, Inc. v. Am. Soc'y for the Prevention of Cruelty to Animals, Civ. Action No. 1:07-01532 (D.D.C. Feb. 16, 2010) [hereinafter FEI Complaint]; Jessica Gresko, *Animal Rights Group Settles Lawsuit with Ringling*, DENVER POST (Dec. 28, 2012, 9:03 AM), http://www.denverpost.com/breakingnews/ci_22273969/animal-rights-group-settles-lawsuit-with-ringling.

2. *See* Am. Soc'y for the Prevention of Cruelty to Animals v. Feld Entm't, Inc., 677 F. Supp. 2d 55, 57-58, 66-73 (D.D.C. 2009) (explaining Rider's factual role in the elephant case).

3. *Id.* at 67-72.

4. *Id.* at 67 & n.12.

5. *See id.* at 73-83 (describing Rider's compensation as a witness).

camera equipment and a lap top computer" from the now-defendant organizations.[6]

In holding for Feld in the elephant case, the district court determined that Rider's compensation, which the organizations allegedly tried to disguise as grants and expense reimbursements, and which they later attempted to conceal from Feld in discovery, was principally intended to motivate Rider to advance their purposes in the litigation.[7] In its lawsuit, Feld bluntly characterized the organizations' payments to Rider as "bribery of a witness."[8] Regardless of the label affixed to Rider's compensation by the organizations, the eventual cost to the ASPCA was substantial.[9] In December 2012, the ASPCA settled Feld's claims against it for $9.3 million.[10]

Rider's compensation as a fact witness in the elephant case was extraordinary in its amount, structure, and purpose. The litigation is also remarkable because the payments to Rider—at least as reported in the district court opinion in the elephant case and as described in Feld's pleadings—were so glaringly improper and prejudicial.[11] At the same time, former employees of parties are frequently vital fact witnesses.[12] They often have unique factual knowledge. From former employees' perspectives, however, participating in litigation may take them away from their current jobs, thereby costing them income or vacation time, it may impede their self-employment or it may interrupt their retirements. It is therefore understandable that former employees may want to be paid for devoting time to litigation in which they have no stakes. They may well seek compensation for time spent testifying, meeting with lawyers, or otherwise assisting with case preparation.[13] Other fact witnesses likewise may be interested in compensation for their time connected to litigation.[14] In patent litigation, for example, an inventor who is a fact witness also may be an essential consultant who deserves compensation for time spent in the latter role.[15] Passersby who witness

6. FEI Complaint, *supra* note 1, at 9; *see also Am. Soc'y for the Prevention of Cruelty to Animals*, 677 F. Supp. 2d at 73-83 (detailing the organizational defendants' payments to Rider in the underlying case and their alleged efforts to conceal and disguise them).

7. *Am. Soc'y for the Prevention of Cruelty to Animals*, 677 F. Supp. 2d at 79-83.

8. FEI Complaint, *supra* note 1, at 10.

9. Gresko, *supra* note 1.

10. *Id.*

11. *Am. Soc'y for the Prevention of Cruelty to Animals*, 677 F. Supp. 2d at 67, 73-83.

12. *See* John K. Villa, *Paying Fact Witnesses*, ACCA DOCKET, Oct. 2001, at 112, 112-14, *available at* http://www.wc.com/assets/attachments/ACC_Docket_Paying_Fact_Witnesses_Oct_2001.pdf.

13. *Id.* at 112.

14. *Id.* at 112-13.

15. *See, e.g.*, Aristocrat Techs. v. Int'l Game Tech., No. C-06-03717, 2010 WL 2595151, at

accidents may be critical to the outcome in resulting litigation and parties may want to compensate them for taking time off from their jobs to testify. The list goes on.

It was once the rule that fact witness compensation was limited to statutory witness fees or subpoena rates.[16] The prohibition on greater compensation rested on several factors, including the concern that such payments could entice fact witnesses to perjure themselves, the concern that greater compensation might simply influence witnesses to shade or shape their testimony in ways favorable to the parties paying them, the worry that greater compensation could price justice out of the reach of some parties, and the concern that extra compensation would create an appearance of impropriety.[17] Courts further considered fact witnesses' testimony to be their civic duty.[18] On the other hand, conscientious fact witnesses may be required to devote considerable time to preparing their testimony and actually testifying in cases in which they are called. The overwhelming majority of witnesses faithfully honor their oaths to testify truthfully;[19] assuming that their compensation is timely disclosed, witnesses' alleged biases attributable to such payments can be exposed on cross examination.[20] Not all witnesses believe that losing income or incurring unreimbursed expense in connection with litigation qualifies as civic duty.[21] In any event, over time, restrictions on fact witness compensation have loosened.[22] Compensating fact witnesses beyond

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*2-3 (N.D. Cal. June 28, 2010) (concluding that a party's $100,000 lump sum payment to an the inventor of the patents-in-suit to consult in litigation would not support a claim that the party had unclean hands; although the inventor was already contractually required to cooperate with the party in litigation and to testify as needed, the contracts did not obligate the inventor to consult in litigation).

16. *See, e.g.*, Wright v. Somers, 125 Ill. App. 256, 257 (1906). The court noted that:

> The legislative department of our State has declared that every witness attending in his own county upon trials in the courts of record shall be entitled to receive the sum of one dollar for each day's attendance and five cents per mile each way for necessary travel . . . . This is all the witness is entitled to receive. To demand more is forbidden by the policy and spirit of this statute.

Id. (citation omitted).

17. Ayesha B. Hardaway, *Unpatriotic or Commonplace Practice? Compensating Fact Witnesses*, FOR THE DEF., Apr. 2010, at 50, 51, *available at* http://www.dritoday.org/ftd/2010-04F.pdf; Villa, *supra* note 12, at 112.

18. Hardaway, *supra* note 17, at 50.

19. Witnesses under oath are presumed to testify truthfully until it is shown otherwise. State v. Dorsey, 74 So. 3d 603, 626 (La. 2011) (quoting Fridge v. Talbert, 158 So. 209, 212 (La. 1934)); Fletcher v. Bolz, 520 N.E.2d 22, 25 (Ohio Ct. App. 1987).

20. State v. Kelly, 770 A.2d 908, 930 (Conn. 2001).

21. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 668 (1994) [hereinafter N.Y. Op. 668].

22. Jeffrey S. Kinsler & Gary S. Colton, Jr., *Compensating Fact Witnesses*, 184 F.R.D. 425, 427 (1999).

statutory witness fees and expenses to which they are entitled is now a common practice, and has been for some time.[23]

But while restrictions on fact witness compensation are looser than they once were, they are not lax.[24] Lawyers and parties may not pay fact witnesses for their testimony, even if the testimony is truthful.[25] The general rule, in condensed form, is that lawyers and litigants may compensate fact witnesses for time spent testifying, preparing to testify, or assisting in the litigation, and may reimburse witnesses' associated expenses, provided that the amounts paid or reimbursed are reasonable, are not conditioned on the act of testifying or the content or substance of the witnesses' testimony, and are not contingent upon the outcome of the litigation.[26] Lawyers cannot condition fact witnesses' compensation on their agreements not to voluntarily speak with other parties or their counsel.[27] If a fact witness asks that her lawyer attend an interview, meeting, or deposition, it is generally permissible to pay that lawyer's reasonable fees and expenses for attending, again provided that any payment is not tied to the outcome of the case or conditioned on the content or substance of the witness's testimony.[28]

Of course, general rules are subject to exceptions, as where the law of a jurisdiction compels a different result, and the reasonableness of payments to fact witnesses frequently is in the eye of the beholder. No two courts are guaranteed to evaluate reasonableness the same way.[29] Even if payments to a fact witness are reasonable, additional inducements, such as a party's promise to indemnify the witness in

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23. *See, e.g.*, Slayton v. Weinberger, 194 S.E.2d 703, 706 (Va. 1973) (calling it a "well known fact that agreements to pay witnesses for lost time and expenses incurred, in excess of the statutory fees, are not unusual, extraordinary or improper").

24. *See* Kinsler & Colton, *supra* note 22, at 427-28.

25. Rocheux Int'l of N.J., Inc. v. U.S. Merch. Fin. Grp., Inc., Civ. No. 06-6147, 2009 WL 3246837, at *4 (D.N.J. Oct. 5, 2009); Ward v. Nierlich, No. 99-14227-CIV, 2006 WL 5412626, at *4 (S.D. Fla. Sept. 20, 2006); *In re* Telcar Grp., Inc., 363 B.R. 345, 353-54 (Bankr. E.D.N.Y. 2007); *In re* Kien, 372 N.E.2d 376, 379 (Ill. 1977).

26. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117 cmt. b (2000).

27. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2013) (prohibiting lawyers from unlawfully obstructing parties' access to evidence); *id.* R. 3.4(f) (providing that lawyers generally cannot "request a person other than a client to refrain from voluntarily giving relevant information to another party").

28. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 962 (2013); N.Y. Cnty. Lawyers' Ass'n Comm. on Prof'l Ethics, Formal Op., 729 (2000); S.C. Bar Ethics Advisory Comm., Op. 08-05 (2008).

29. Villa, *supra* note 12, at 114 (stating that calculating reasonable payments is "necessarily a case-by-case determination, based on the witness's direct loss of income. In the absence of a direct loss, counsel must determine reasonable value based on all of the relevant circumstances"). *Compare Rocheux Int'l of N.J., Inc.*, 2009 WL 3246837, at *2-5, *with* Slayton v. Weinberger, 194 S.E.2d 703, 706 (Va. 1973).

connection with the litigation, may prove to be too much.[30] Lawyers' and litigants' failures to disclose fact witnesses' compensation, or their failure to do so timely, as well as fact witnesses' failure to reveal their compensation when called upon to do so, can also affect the calculus.[31]

If a lawyer's or a litigant's compensation of a fact witness is held to be improper, there are a number of possible consequences. For example, the court may order a new trial;[32] the lawyer or litigant or both may be sanctioned;[33] the lawyer may be disqualified from further participation in the litigation;[34] the lawyer may face professional discipline;[35] and the lawyer, party, and witness all may tempt criminal prosecution.[36] Courts generally are reluctant to exclude a witness's testimony on the sole basis that the witness has been paid, preferring to leave it to the jury to weigh the witness's credibility or, in court-tried cases, to weigh the testimony themselves.[37] Nonetheless, courts have discretion to exclude or strike improperly or unreasonably compensated fact witnesses' testimony as a sanction.[38]

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30. *See, e.g.*, New York v. Solvent Chem. Co., 166 F.R.D. 284, 289-90 & n.4 (W.D.N.Y. 1996) (finding nothing improper in parties paying a fact witness a reasonable hourly fee for his time and in reimbursing his expenses, but concluding that the parties "went too far" in promising to indemnify the witness in two cases, including the pending case).

31. *See, e.g.*, Thomas v. City of N.Y., 293 F.R.D. 498, 504-07 (S.D.N.Y. 2013) (granting a new trial where the plaintiff did not timely reveal a compensation arrangement with a key fact witness); ESN, LLC v. Cisco Sys., Inc., 685 F. Supp. 2d 631, 651 (E.D. Tex. 2009) (sanctioning the defendants for their "deliberate, willful failure" to disclose an employment agreement with a witness), *aff'd*, 397 F. App'x 630 (Fed. Cir. 2010); United States v. Cinergy Corp., No. 1:99-cv-1693, 2008 WL 7679914, at *10-15 (S.D. Ind. Dec. 18, 2008) (ordering a new trial where defense counsel did not reveal fact witness's compensation and allegedly misled jury about witness's compensation, and witness did not reveal employment or compensation when testifying).

32. *See, e.g.*, *Solvent Chem. Co.*, 166 F.R.D at 289-90.

33. *See, e.g.*, *ESN, LLC*, 685 F. Supp. 2d at 651.

34. *See, e.g.*, McIntosh v. State Farm Fire & Cas. Co., Civ. Action No. 1:06CV1080, 2008 WL 941640, at *1-2 (S.D. Miss. Apr. 4, 2008) (disqualifying affiliated law firms for lead law firm's improper witness payments and other improprieties). *But see* Nissan N. Am., Inc. v. Johnson Elec. N. Am., Inc., No. 09-11783, 2011 WL 1812505, at *6-7 (E.D. Mich. May 12, 2011) (declining to disqualify a law firm that compensated a fact witness in alleged violation of Model Rule 3.4(b)); Dyll v. Adams, No. CIV.A. 3:94-CV-2734-D, 1997 WL 222918, at *3 (N.D. Tex. Apr. 29, 1997) (explaining that disqualification is not an appropriate remedy for a Model Rule 3.4(b) violation because "[t]he ethical breach is discrete and can be cured, if necessary, by less drastic means").

35. *See, e.g.*, Rocheux Int'l of N.J., Inc. v. U.S. Merch. Fin. Grp., Inc., Civ. No. 06-6147, 2009 WL 3246837, at *4 (D.N.J. Oct. 5, 2009) (reserving judgment on the need for disciplinary action for plaintiff's counsel pending further application).

36. *See, e.g.*, *In re* Kien, 372 N.E.2d 376, 379 (Ill. 1977) (suspending an attorney from the practice of law for eighteen months for paying a fact witness).

37. United States v. Davis, 261 F.3d 1, 37-38 & n.31, 39 (1st Cir. 2001) (quoting United States v. Cresta, 825 F.2d 538, 547 (1st Cir. 1987)); *see, e.g.*, Platypus Wear, Inc. v. Horizonte Fabricacao Distribuicao Importacao Exportacao Ltda, No. 08-20738-CV, 2010 WL 625356, at *5 (S.D. Fla. Feb. 17, 2010); TBC Corp. v. Wall, 955 S.W.2d 838, 843 (Tenn. Ct. App. 1997).

38. *See* Just in Case Bus. Lighthouse, LLC v. Murray, No. 12CA1261, 2013 WL 3778184, at

This Article examines lawyers' and litigants' compensation of fact witnesses, with a primary focus on lawyers' conduct. Although this Article refers to *fact witnesses*, it should be understood that these are *third-party fact witnesses*—fact witnesses who are not employed by a party to the litigation in which they are expected to testify. Most fact witness compensation controversies involve third-party fact witnesses; parties' ordinary compensation of current employees for time spent testifying or preparing to testify is not controversial.[39] Courts and jurors well understand that fact witnesses who are currently employed by parties are being paid for their time devoted to a case and any potential bias on the part of such witnesses attributable to their employment is open for evaluation by the fact finder.[40] Part II analyzes applicable rules of professional conduct and the operation of the federal anti-bribery or anti-gratuity statute, 18 U.S.C. § 201.[41] States may have bribery or witness tampering statutes similar to the federal anti-gratuity statute and lawyers must be sensitive to those,[42] but the case law on fact witness payments has mostly developed around the federal statute, making it the logical subject of discussion here.[43] Part III discusses illustrative cases, some in which the courts held that payments to fact witnesses were proper and others in which the courts rejected the compensation arrangements.[44] Finally, Part IV offers practical guidance to lawyers weighing whether and how to compensate fact witnesses.[45]

II. GOVERNING RULES AND STATUTES

Lawyers who are considering compensating third-party fact witnesses for their time spent testifying or preparing to testify must comply with rules of professional conduct in the process.[46] In addition, both lawyers and litigants who compensate fact witnesses must ensure that their conduct is permissible under the federal anti-bribery or anti-gratuity statute.[47]

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*15 (Colo. Ct. App. July 18, 2013) (outlining trial court's options on remand).

39. *See infra* Part II.

40. *See infra* Part II.A.

41. 18 U.S.C. § 201 (2006); *see infra* Part II.

42. *See, e.g.*, OHIO REV. CODE ANN. § 2921.02(C)–(D) (West 2006) (criminalizing the bribery of witnesses).

43. *See infra* Parts II.C, III.

44. *See infra* Part III.

45. *See infra* Part IV.

46. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (2013).

47. 18 U.S.C. § 201(c)(2) (2006). Again, lawyers must also be sensitive to particular state statutes criminalizing the bribery of witnesses and witness tampering. *See, e.g.*, OHIO § 2921.02(C)–(D) (West 2006); WASH. REV. CODE ANN. § 9A.72.090 (West 2009).

A. Model Rule of Professional Conduct 3.4(b)

The most widely applicable ethics rule is Model Rule of Professional Conduct ("Model Rule") 3.4(b), which provides that a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely, *or offer an inducement to a witness that is prohibited by law.*"[48] Although "inducements" to witnesses commonly take the form of monetary payments, the term is not so limited.[49] Various other benefits promised to witnesses or advantages conferred on them may qualify as inducements for Model Rule 3.4(b) purposes.[50]

Model Rule 3.4(b) reflects the concern that some financial arrangements with witnesses may encourage witnesses to exaggerate, shade, or even falsify their testimony, thereby undermining the integrity of the judicial process, which depends on truthful testimony by witnesses.[51] Recognizing that fact witnesses should not have to go out-of-pocket to fulfill their civic responsibilities, however, Comment 3 to Model Rule 3.4 notes that "it is not improper to pay a witness's expenses," while cautioning lawyers that "[t]he common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying."[52]

The Model Rule 3.4(b) prohibition on offers of unlawful inducements to witnesses extends beyond bribery.[53] Consistent with the language of the Comment to the Rule, lawyers cannot compensate fact witnesses for testifying.[54] Lawyers may not pay fact witnesses for their testimony even if the testimony is truthful.[55] Perhaps more obviously, lawyers cannot condition fact witnesses' compensation on the content, substance, or perceived usefulness of their testimony,[56] nor may lawyers offer to pay fact witnesses fees that are contingent upon the outcome of the matter.[57]

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48. MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (2013) (emphasis added).

49. *See, e.g.*, Biocore Med. Techs., Inc. v. Khosrowshahi, 181 F.R.D. 660, 670 (D. Kan. 1998) (discussing the employment of witnesses as a pretext for paying for their testimony and offering free legal services as an inducement to testify).

50. *See id.* ("Counsel can provide an inducement by providing free legal service.").

51. Accrued Fin. Servs., Inc. v. Prime Retail, Inc., No. CIV-99-2573, 2000 WL 976800, at *2-3 (D. Md. June 19, 2000).

52. MODEL RULES OF PROF'L CONDUCT R. 3.4 cmt. 3 (2013).

53. Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 865 F. Supp. 1516, 1524-26 (S.D. Fla. 1994).

54. *Id.* at 1526.

55. *Id.*; *see also, e.g.*, Ward v. Nierlich, No. 99-14227-CIV, 2006 WL 5412626, at *4 (S.D. Fla. Sept. 20, 2006); *In re* Telcar Grp., Inc., 363 B.R. 345, 354 (Bankr. E.D.N.Y. 2007); *In re* Kien, 372 N.E.2d 376, 379 (Ill. 1977).

56. Fla. Bar v. Wohl, 842 So. 2d 811, 814-16 (Fla. 2003).

57. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117(2) (2000); *see, e.g.*,

The practical problem when looking at the plain language of Model Rule 3.4(b) and Comment 3 is that neither appears to permit lawyers to pay fact witnesses for time spent testifying at a deposition, hearing, trial, or other proceeding, or preparing to testify.[58] The Rule and Comment by their terms leave a substantial gap: compensating fact witnesses for their time spent testifying or preparing to testify is not the same as paying them for their testimony, which the common law prohibits, nor is it the same as paying their expenses, which is permissible.[59] At the same time, solid practical and policy reasons support compensating fact witnesses for their time and effort:

> Some witnesses need to reacquaint themselves with voluminous paperwork. Matters that need revisiting may be both complex and far removed in time. Effective, organized testimony (the type useful to the parties and the court) often requires extensive and time-consuming preparation. There is no statutory or ethical requirement that a lawyer must be content with only a cursory, surface investigation of the facts. Nor must a lawyer limit him or herself to finding witnesses who have an abundance of time and money and can thus afford to cooperate fully. It would be unrealistic to expect all potential witnesses to be willing (or even able) to devote the tremendous amount of time necessary to make their testimony meaningful without compensating them for their lost time. Thus, payments to fact witnesses may be necessary to provide those witnesses with the proper incentive to prepare for their testimony in a thorough manner.
>
> Payments to fact witnesses are also justifiable on fairness grounds. A conscientious witness may devote a large amount of time preparing to testify. Wholly separate from the question of giving the witness the incentive to prepare properly, there is also the question of what is the fair and equitable thing to do. Our court system is an instrument of justice; to compel people to provide testimony that will enable others to be compensated for their wrongs while denying those witnesses compensation seems unjust.[60]

Accrued Fin. Servs., Inc. v. Prime Retail, Inc., No. CIV-99-2573, 2000 WL 976800, at *2-3 & n.3 (D. Md. June 19, 2000) (discussing California and Maryland law); Wagner v. Lehman Bros. Kuhn Loeb Inc., 646 F. Supp. 643, 656, 659-60 (N.D. Ill. 1986) (disqualifying a lawyer who participated in his client's scheme to offer a witness a contingent fee); Commonwealth v. Miranda, 934 N.E.2d 222, 231-32 (Mass. 2010) (announcing that prosecutors may not offer monetary rewards to witnesses contingent on defendants' convictions); Caldwell v. Cablevision Sys. Corp., 984 N.E.2d 909, 912 (N.Y. 2013); Comm. on Legal Ethics of the W. Va. State Bar v. Sheatsley, 452 S.E.2d 75, 80 (W. Va. 1994) (applying DR 7-109(C), a predecessor to Model Rule 3.4(b)).

58. MODEL RULES OF PROF'L CONDUCT R. 3.4(b) & cmt. 3 (2013).

59. *Id.*

60. Kinsler & Colton, *supra* note 22, at 429.

The American Bar Association's Standing Committee on Ethics and Professional Responsibility ("Standing Committee") filled the Model Rule 3.4(b) gap in August 1996, when it issued Formal Opinion 96-402.[61] In Formal Opinion 96-402, the Standing Committee was asked whether, under Model Rule 3.4(b), it was "proper for a lawyer to compensate a non-expert witness for the reasonable value of time expended by the witness while preparing for or giving testimony at a deposition or at a trial."[62] In answering this question affirmatively, the Standing Committee observed that the precursor to Model Rule 3.4, DR 7-109 of the Model Code of Professional Responsibility,[63] expressly permitted the payment of "[r]easonable compensation to a witness for his loss of time in attending or testifying," and there was nothing in the history of Model Rule 3.4(b) that indicated that the drafters of the Model Rules intended to eliminate this principle.[64] In addition, the Standing Committee noted that compensating witnesses for time spent attending trials, hearings, and other proceedings was authorized by some statutes and cases.[65] The Standing Committee therefore concluded that Model Rule 3.4(b) does not prohibit lawyers from paying fact witnesses for lost time.[66]

Having determined that it was permissible for lawyers to compensate fact witnesses for time spent attending depositions and trials, the Standing Committee saw no reason to distinguish a lawyer:

> compensating a witness for time spent in pretrial interviews with the lawyer in preparation for testifying, as long as the lawyer makes it clear to the witness that the payment is not being made for the substance (or efficacy) of the witness's testimony or as an inducement to the witness to "tell the truth."[67]

The Standing Committee further concluded that fact witnesses may be compensated for time spent reading and researching records that are germane to their testimony, provided such compensation is not barred by the law of the jurisdiction.[68]

Formal Opinion 96-402 does not, however, grant lawyers carte blanche to pay fact witnesses for time spent testifying or preparing to do

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61. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-402 (1996) [hereinafter ABA Formal Op. 96-402].

62. *Id.*

63. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-109 (1969).

64. ABA Formal Op. 96-402, *supra* note 61, n.1 (quoting DR 7-109(C)(2)).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

so.[69] Rather, a witness's compensation "must be reasonable, so as to avoid affecting, even unintentionally, the content of the witness's testimony."[70] Weighing reasonableness may or may not be an easy task:

> What is a reasonable amount [of compensation] is relatively easy to determine in situations where the witness can demonstrate to the lawyer that he has sustained a direct loss of income because of his time away from work—as, for example, [the] loss of hourly wages or professional fees. In situations, however, where the witness has not sustained any direct loss of income in connection with giving, or preparing to give, testimony—as, for example, where the witness is retired or unemployed—the lawyer must determine the reasonable value of the witness's time based on all relevant circumstances.[71]

Once that determination has been made, however, nothing in the Model Rules prevents lawyers from compensating fact witnesses for their time spent testifying or preparing to testify.[72]

The positions outlined in Formal Opinion 96-402 represent the majority rule.[73] Some courts and professional authorities, however, have declined to allow lawyers to compensate fact witnesses for preparation time, instead limiting payment for lost time to actual attendance at a deposition, hearing, or trial.[74] The Pennsylvania Bar Association has observed that the Pennsylvania version of Model Rule 3.4(b)(2), which expressly permits a lawyer to pay "reasonable compensation to a witness

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *See, e.g.*, Chicago Ins. Co. v. Capwill, No. 1:01cv2588, 2011 WL 6181337, at *2 (N.D. Ohio Dec. 13, 2011); Prasad v. MML Inv. Servs., Inc., No. 04 Civ. 380, 2004 WL 1151735, at *6 (S.D.N.Y. May 24, 2004) (citing ABA Formal Op. 96-402, among other authorities); Curley v. N. Am. Man Boy Love Ass'n, No. Civ.A. 00-10956, 2003 WL 21696550, at *5 (D. Mass. Mar. 31, 2003) (quoting ABA Formal Op. 96-402); Mich. First Credit Union v. Al Long Ford, Inc., Docket No. 291146, 2010 WL 5129890, at *3 (Mich. Ct. App. Dec. 16, 2010); Alaska Bar Ass'n Ethics Comm., Op. 93-2 (1993) [hereinafter Alaska Eth. Op. 93-2]; Ariz. State Bar Comm. on the Rules on Ethics, Op. 97-07 (1997) [hereinafter Ariz. Op. 97-07]; Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1997-149 (1997) [hereinafter Cal. Op. 1997-149]; Colo. Bar Ass'n, Ethics Comm., Formal Op. 103 (1998); Conn. Bar Ass'n, Comm. on Prof'l Ethics, Informal Op. 92-30 (1992); Del. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 2003-3 (2003) [hereinafter Del. Op. 2003-3]; Ill. State Bar Ass'n Standing Comm. on Prof'l Conduct, Op. 87-5 (1988); Ky. Bar Ass'n, Ethics Op. KBA E-400 (1997); Mass. Bar Ass'n, Comm. on Prof'l Ethics, Op. 91-3 (1991); N.Y. Op. 668, *supra* note 21.

74. *See, e.g.*, Rocheux Int'l of N.J., Inc. v. U.S. Merch. Fin. Grp., Inc., Civ. No. 06-6147, 2009 WL 3246837, at *4 (D.N.J. Oct. 5, 2009) (describing this approach as the common law rule); McIntosh v. State Farm Fire & Cas. Co., Civ. Action No. 1:06CV1080, 2008 WL 941640, at *2 (S.D. Miss. Apr. 4, 2008) (citing Miss. Bar, Ethics Op. No. 145 (1988)); Phila. Bar Ass'n Prof'l Guidance Comm., Ethics Op. 94-27 (1994).

for the witness' loss of time in attending or testifying,"[75] can be read to disfavor compensation to non-expert witnesses for the time invested in preparing for testimony, but has neither approved nor disapproved of the practice.[76] In other words, while Formal Opinion 96-402 represents the majority position, that approach is not unanimous.

The challenge for lawyers and courts in most cases is evaluating the reasonableness of witnesses' compensation and expenses. Judging the reasonableness of expenses is fairly easy: what was the actual cost incurred by the witness? The fact that a more frugal witness might have incurred expenses lower than those that a particular witness actually incurred does not make the latter's expenses unreasonable. Nor does providing a witness with some level of comfort or convenience in connection with her service necessarily transform an expense reimbursement into an improper inducement. For example, paying for a witness to fly first class from Los Angeles to New York rather than making the witness fly coach should be considered perfectly reasonable.[77] Lodging a fact witness in a nice hotel rather than housing the witness in a lower-cost hotel is similarly reasonable.[78] For that matter, it will be a rare case in which a witness's expense reimbursement will be so generous or unusual that it will constitute an impermissible inducement.

With respect to witness compensation, reasonableness requires a logical relationship between the amount paid to the witness and the time the witness spent preparing to testify and appearing.[79] The closer a witness's compensation comes to approximating her direct loss of income, the more likely it is to be found reasonable.[80] In contrast, compensation that is disproportionate to the time on the case spent by the witness is potentially troubling, as a recent New York case, *Caldwell v. Cablevision Systems Corp.*,[81] somewhat awkwardly illustrates.[82]

Plaintiff Bessie Caldwell tripped and injured herself while walking her dog.[83] She sued Communications Specialists, Inc. ("CSI"), which

75. PA. RULES OF PROF'L CONDUCT R. 3.4(b)(2) (2008) (internal quotation marks omitted).

76. Pa. Bar Ass'n, Op. 95-126 A–B (1996).

77. ROY D. SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 892 (2013) ("Whether a lawyer flies a witness first class or coach, or puts the witness up in a five-star hotel or a Motel 6, should not be the determinant of whether the related expenses are 'reasonable.'").

78. *Id.*

79. Curley v. N. Am. Man Boy Love Ass'n, No. Civ.A. 00-10956, 2003 WL 21696550, at *5 (D. Mass. Mar. 31, 2003).

80. ABA Formal Op. 96-402, *supra* note 61.

81. 984 N.E.2d 909 (N.Y. 2013).

82. *Id.* at 911-12.

83. *Id.* at 911.

had been working on the street in the area where she fell.[84] In its defense, CSI subpoenaed the physician who had treated Caldwell in the hospital emergency room and who, when recording her medical history, had noted that she had tripped over her dog.[85] The doctor testified consistently with his note on direct examination.[86] On cross examination by Caldwell's lawyer, the doctor testified that CSI had paid him $10,000 for appearing and testifying.[87] This dwarfed the statutory witness fee of $15 per day and $0.23 per mile to which the doctor was entitled.[88] The doctor denied that the payment influenced his testimony; he testified only to his note in the emergency room record and he offered no medical opinions.[89] Caldwell asked the court to strike the doctor's testimony or issue a curative instruction or a jury charge regarding monetary influence.[90] CSI argued that there was nothing wrong with paying a fact witness for time missed from work.[91] The court opted to allow the parties to argue the doctor's compensation in their summations as long as they did not specifically refer to the witness fee statute.[92] The court also gave a general bias instruction.[93]

The jury returned a verdict for CSI and Caldwell appealed.[94] The Appellate Division affirmed, holding that the trial court did not err in allowing the doctor's testimony, and that, while the trial court should have better instructed the jury on bias, that error was harmless.[95] Caldwell then appealed to the New York Court of Appeals.[96]

Although the Court of Appeals ultimately affirmed the Appellate Division on the basis that any trial court error was harmless, the court was disturbed by the fact that CSI paid the doctor $10,000 for *one hour* of testimony.[97] It probably did not help that CSI did not attempt to justify the amount of the payment in the Court of Appeals.[98]

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84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 911-12.
95. *Id.* at 912.
96. *See id.*
97. *Id.* at 913.
98. *Id.*

The *Caldwell* court observed that the doctor had received a substantial payment for minimal testimony.[99] This was deeply troubling because payments to fact witnesses that are "exorbitant as compared to the amount of time the witness spends away from work or business, create an unflattering intimation that the testimony is being bought or, at the very least, has been unconsciously influenced by the compensation provided."[100] Although statutory witness fees are merely compensatory minimums, such that Caldwell could not win her argument that the doctor was entitled to nothing more than $15 plus mileage, the doctor's grossly disproportionate witness fee was hard for the court to swallow.[101] The court specifically noted that "the distinction between paying a fact witness for testimony and paying a fact witness for time and reasonable expenses can easily become blurred."[102]

CSI was almost certainly spared a new trial by the limitation of the doctor's testimony to what he wrote in Caldwell's medical record.[103] There was no opportunity for the doctor to tailor his testimony to benefit CSI.[104] It is a stretch even to think that might have been necessary, since, in a trip-and-fall case, the plaintiff's admission that she stumbled over her own dog is about as good as it gets from a defense perspective.[105]

It appears from the Appellate Division opinion that CSI paid the doctor a fee close to that which he would charge if he appeared as an expert witness.[106] The problem with that approach is that the doctor did not testify as an expert witness; he appeared at trial in order to regurgitate his note in the plaintiff's medical record.[107] Furthermore,

99. *Id.* at 912.

100. *Id.*

101. *Id.* at 912-13.

102. *Id.* at 913.

103. *See id.* at 912.

104. *Id.*

105. *See id.* at 911. It is easy to craft a hypothetical problem with what would likely be a very different outcome simply by changing a few facts. Assume that the doctor did not record Caldwell's admission about tripping over her dog in the medical history he took from her. Instead, he is called as a witness at trial and testifies that Caldwell admitted stumbling over her dog but he did not record it in his notes. Caldwell's statement about stumbling over her dog comes into evidence as an admission against interest or as a statement made for medical diagnosis or treatment. *See* FED. R. EVID. 801(d)(2), 803(4) (demarking statements that are covered by the hearsay rule, and listing the exceptions to that rule). In our hypothetical case, the $10,000 payment to the doctor arguably takes on the appearance of an improper inducement to a witness or, to put it slightly differently, the $10,000 at least superficially appears to be payment for the content or substance of the doctor's testimony rather than compensation for his lost time. The question would then become the remedy to be afforded Caldwell, if any, with potential consequences for the defense lawyers and doctor to follow.

106. Caldwell v. Cablevision Sys. Corp., 925 N.Y.S.2d 103, 108 (N.Y. App. Div. 2011), *aff'd*, 984 N.E.2d 909 (N.Y. 2013).

107. *Caldwell*, 984 N.E.2d at 911.

courts generally view treating physicians as fact witnesses, rather than as expert witnesses.[108] A better argument for CSI might have been that it was compensating the doctor for his time away from his practice. This theory at least has legs; the doctor testified on cross examination that when he testified as an expert in other cases his fees were a substitute for the fees he would have earned if he was instead seeing patients or performing surgery.[109] By extension, then, although he was a fact witness in Caldwell's case, paying him a fee commensurate with the fee he would have charged as an expert witness was reasonable because it simply compensated him for his lost time. But even then, the $10,000 witness fee was so disproportionate to the time the doctor spent testifying—testimony that required no preparation—that justifying the amount was effectively impossible.[110]

Finally, for now, there is the question of reasonable compensation for fact witnesses who are retired or unemployed. One ethics body has suggested that compensating a retired former employee of a party for time spent testifying or preparing to testify may be improper because the former employee would not sustain "any direct loss of income" in serving as a fact witness.[111] But a fact witness's retirement or unemployment does not render his or her time valueless.[112] Everyone's time is worth something.[113] For that reason, the better view is that retired and unemployed fact witnesses are entitled to reasonable compensation for time spent testifying or preparing to testify.[114] The amounts to be paid to such witnesses generally do, however, require closer consideration than when, say, a fact witness employed by a non-party is being reimbursed for lost wages.[115] Even so, paying a retired or unemployed witness an hourly rate approximating that which they last earned in their most recent employment should generally pass muster.[116]

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108. Douglas R. Richmond, *Expert Witness Conflicts and Compensation*, 67 TENN. L. REV. 909, 940 (2000).

109. *Caldwell*, 925 N.Y.S.2d at 105.

110. *See Caldwell*, 984 N.E.2d at 913.

111. Del. Op. 2003-3, *supra* note 73.

112. N.Y. Op. 668, *supra* note 21 (stating that "the fact that an individual may perform duties for the attorney on his or her own time or may currently be unemployed does not necessitate a finding that the individual is not entitled to receive compensation").

113. United States v. Davis, 261 F.3d 1, 39 (1st Cir. 2001) (quoting the district court in ruling from the bench).

114. ABA Formal Op. 96-402, *supra* note 61; Cal. Op. 1997-149, *supra* note 73; N.Y. Op. 668, *supra* note 21; *see, e.g.*, *Davis*, 261 F.3d at 39 (approving payment of modest hourly rate to an elderly, unemployed fact witness).

115. N.Y. Op. 668, *supra* note 21.

116. Cal. Op. 1997-149, *supra* note 73; *Compensation of Fact Witnesses: Rule 3.4(b) of the N.H. Rules of Professional Conduct*, N.H. BAR ASS'N ETHICS COMM. (Oct. 18, 1992), http://www.nhbar.org/pdfs/PEA10-92.pdf.

B. *California Rule of Professional Conduct 5-310*

California has not adopted the Model Rules, although it is gradually moving toward doing so.[117] California governs witness compensation under California Rule of Professional Conduct 5-310, which provides:

> A member shall not:
>
> . . . .
>
> (B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case. Except where prohibited by law, a member may advance, guarantee, or acquiesce in the payment of:
>
> (1) Expenses reasonably incurred by a witness in attending or testifying.
>
> (2) Reasonable compensation to a witness for loss of time in attending or testifying.
>
> (3) A reasonable fee for the professional services of an expert witness.[118]

California Rule 5-310(B) is nearly identical to DR 7-109(C) of the Model Code of Professional Responsibility, which was the precursor to Model Rule 3.4(b).[119]

There is a dearth of authority on Rule 5-310(B), most likely due to its overall clarity. To the extent Rule 5-310(B) is uncertain, the California State Bar's Standing Committee on Professional Responsibility and Conduct, known to California lawyers as COPRAC, tried to fill any gaps in formal ethics opinion 1997-149.[120] In that opinion, the committee concluded that it is appropriate:

> to compensate a witness for otherwise uncompensated time necessary for preparation for or testifying at deposition or trial, as long as the compensation is reasonable in conformance with rule 5-310(B), does not violate applicable law, and is not paid to a witness contingent upon the content of the witness' testimony or the outcome of the case.[121]

Those principles apply regardless of whether a witness "is currently employed, unemployed, retired, suspended or in any other employment status."[122]

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117. *See, e.g.*, Marcellus A. McRae & Kim Nortman, *Your Witness*, L.A. LAW., Sept. 2012, at 31, 32 (indicating that California has adopted the ABA's interpretation of Model Rule 3.4(b)).

118. CAL. RULES OF PROF'L CONDUCT R. 5-310(B) (2013).

119. Cal. Op. 1997-149, *supra* note 73.

120. *Id.*

121. *Id.*

122. *Id.*

Reasonableness for Rule 5-310(B) purposes pivots on the circumstances.[123] Possible objective bases for evaluating the reasonableness of a fact witness's compensation under Rule 5-310(B) include the witness's rate of pay if she is currently employed, what the witness last earned if she is unemployed or retired, or what others earn in comparable jobs, activities, occupations, or roles.[124]

C. *The Federal Anti-Bribery or Anti-Gratuity Statute*

The propriety of fact witness compensation is not solely a professional responsibility issue. The Model Rule 3.4(b) reference to inducements to witnesses that are prohibited by law plainly signals that fact.[125] For example, § 201(c)(2) of Title 18 of the U.S. Code,[126] which is commonly referred to as the federal anti-bribery or anti-gratuity statute, provides that:

> [w]hoever . . . directly or indirectly gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee or either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony shall be fined or imprisoned for up to two years, or both.[127]

Notably, "whoever" as used in the statute does not include federal prosecutors functioning within the scope of their office who pay cooperating witnesses, even when the payments are solely for the witnesses' testimony, "so long as the payment is not for or because of any corruption of the truth of testimony."[128] Other lawyers and parties litigating in federal courts, however, are not expressly afforded such leeway.[129]

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123. *See id.*

124. *See id.*

125. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (2013) (stating that a lawyer shall not "offer an inducement to a witness that is prohibited by law").

126. 18 U.S.C. § 201(c)(2) (2006).

127. *Id.*

128. United States v. Anty, 203 F.3d 305, 311 (4th Cir. 2000); *see also* United States v. Ihnatenko, 482 F.3d 1097, 1100 (9th Cir. 2007) (noting that government can pay the fees of a witness, "so long as the payment does not recompense any corruption of the truth of testimony"); United States v. Rodriguez-Aguirre, 30 F. App'x 803, 807-08 (10th Cir. 2002); United States v. Albanese, 195 F.3d 389, 395 (8th Cir. 1999); United States v. Barnett, 197 F.3d 138, 144-45 (5th Cir. 1999).

129. *See* 18 U.S.C. § 201(c)(2) (recognizing that a person can be charged with bribery for providing money to a witness without finding any type of corrupt motivation).

Section 201(c)(2) by its terms does not prohibit payments to fact witnesses made for purposes other than the fact or content of their testimony.[130] Or, stated positively, the statute permits lawyers and parties to compensate fact witnesses for time lost to testifying.[131] This limit on § 201(c)(2)'s otherwise long reach is made manifest in 18 U.S.C. § 201(d), which states that § 201(c)(2) does not "prohibit the payment . . . of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called . . . of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding."[132] Furthermore, and consistent with these positions, nothing in § 201(c)(2) establishes that a person violates the law by paying fact witnesses for time spent in legitimate non-testimonial activities, such as meeting with counsel for a party or reviewing documents in preparation for testifying.[133] Payment for such activities is allowable because it is not extended "for or because of [the] testimony" of the witness.[134] Indeed, the weight of authority holds that witnesses' time spent on legitimate non-testimonial activities is permitted under the anti-gratuity statute, provided the amount of compensation is reasonable.[135]

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130. *See id.* (referring to payments or similar promises "*for or because of* the testimony" of a witness (emphasis added)).

131. Aristocrat Techs. v. Int'l Game Tech., No. C-06-03717, 2010 WL 2595151, at *2 (N.D. Cal. June 28, 2010).

132. 18 U.S.C. § 201(d).

133. Centennial Mgmt. Servs., Inc. v. Axa Re Vie, 193 F.R.D. 671, 682 (D. Kan. 2000).

134. Consol. Rail Corp. v. CSX Transp., Inc., No. 09-cv-10179, 2012 WL 511572, at *13 (E.D. Mich. Feb. 16, 2012) (internal quotation marks omitted); *Centennial Mgmt. Servs., Inc.*, 193 F.R.D. at 681.

135. *See, e.g.*, Armenian Assembly of Am., Inc. v. Cafesjian, 924 F. Supp. 2d 183, 194 (D.D.C. 2013) (allowing compensation of fact witness for "countless hours" spent assisting counsel in discovery and trial preparation); *Consol. Rail Corp.*, 2012 WL 511572, at *8 (citing ABA Formal Op. 95-402); Chicago Ins. Co. v. Capwill, No. 1:01cv2588, 2011 WL 6181337, at *2 (N.D. Ohio Dec. 13, 2011) ("It was unquestionably proper for plaintiff's counsel to provide payment equivalent to [the witness's] salary for his time spent preparing for his deposition, reviewing his testimony and traveling to and from deposition-related appointments. The payment for [the witness's] time being deposed [was] also proper."); United States v. Kobagaya, Crim. Action No. 09-10005-01, 2011 WL 1466475, at *4 (D. Kan. Apr. 18, 2011) (stating that it is "entirely reasonable to compensate a witness for time and expenses in meeting with a government attorney to prepare for trial as long as the amounts paid are reasonable"); Prasad v. MML Inv. Servs., Inc., No. 04 Civ. 380, 2004 WL 1151735, at *6 (S.D.N.Y. May 24, 2004) ("A witness may be compensated for the time spent preparing to testify or otherwise consulting on a litigation matter in addition to the time spent providing testimony in a deposition or at trial."); *Centennial Mgmt. Servs., Inc.*, 193 F.R.D. at 682 (relying on ABA Formal Op. 96-402); *In re* Split Vein Coal Co., No. 1:03-BK-02974, 2013 WL 1934669, at *6 (Bankr. M.D. Pa. May 9, 2013) (quoting *Centennial Mgmt. Servs., Inc.*, 193 F.R.D. at 682). *But see In re* Complaint of PMD Enters., 215 F. Supp. 2d 519, 529-30 (D.N.J. 2002) (limiting fact witness compensation to: (1) time lost in attending trial or testifying, and (2) reasonable expenses incurred in attending trial or testifying).

With § 201(d), as with ethics rules, the essential inquiry often is whether a witness's compensation for litigation-related time is reasonable.[136] To make this determination, a court must examine the circumstances of the particular case.[137] Among the factors a court may consider when evaluating the reasonableness of a witness's compensation are the hourly rate paid to the witness and the number of hours spent by the witness in connection with the litigation.[138] This is always a case-specific inquiry; there is no precise or uniform measure of reasonableness.[139]

Finally, if a court determines that a fact witness's compensation does not violate § 201(c)(2), it necessarily determines in the process that the lawyer who approved, acquiesced in, or orchestrated the payments did not violate the Model Rule 3.4(b) prohibition on offering an inducement to a witness that is prohibited by law.[140]

D. Summary and Synthesis

In summary, the majority rule holds that lawyers may compensate fact witnesses for time spent testifying, preparing to testify, or otherwise assisting in litigation, and may reimburse witnesses' related expenses, provided the amounts paid are reasonable, are not conditioned on the act of testifying or the content or substance of the witness's testimony, and are not contingent upon the outcome of the litigation.[141] Reasonable compensation for time spent testifying, preparing to testify, or otherwise assisting in litigation is not an inducement to a witness that is prohibited by law within the meaning of Model Rule 3.4(b),[142] nor is it a violation of the federal anti-gratuity statute as interpreted by most courts to have considered the issue.[143]

The reasonableness of a witness's compensation is measured objectively,[144] or at least as objectively as possible on the facts presented. Evaluating reasonableness requires case-specific inquiry.[145] The closer a witness's compensation comes to approximating her direct loss of income, the more likely it is to be found reasonable.[146] Fact

136. *Centennial Mgmt. Servs., Inc.*, 193 F.R.D. at 679.
137. *Id.* at 680.
138. *Id.*
139. *See id.*
140. *Id.* at 682.
141. ABA Formal Op. 96-402, *supra* note 61; *see also* Cal. Op. 1997-149, *supra* note 73.
142. United States v. Davis, 261 F.3d 1, 38 n.31 (1st Cir. 2001).
143. *See supra* notes 128-42 and accompanying text.
144. Alaska Eth. Op. 93-2, *supra* note 73, at n.2.
145. Ariz. Op. 97-07, *supra* note 73.
146. ABA Formal Op. 96-402, *supra* note 61.

witnesses whose agreed compensation cannot be shown to be reasonable should not necessarily be denied all payment for their lost time.[147] It may be possible to lower or restructure a witness's compensation to make it reasonable.[148] Alternatively, a court may limit a witness to the recovery of statutory witness fees and expenses.[149]

Courts may consider a number of factors in making reasonableness determinations, including: (1) the time spent by the witness in connection with the litigation; (2) the hourly rate paid to the witness by her employer if the witness is currently employed; (3) the witness's regular fees or regular hourly rates if the witness is self-employed; (4) the witness's most recent wages or earnings, or what others earn for comparable activities, if the witness is unemployed or retired; (5) the witness's special qualifications, such as experience, expertise, or specialized knowledge that cannot practicably be supplied by others; (6) the value of opportunities or alternative employment that a witness must forego to participate in the litigation, whether because of the time commitment required or because of other factors; (7) the inconvenience or hardship experienced by the witness as a result of her involvement in the litigation, which may or may not overlap with the preceding element; (8) the witness's occupation, trade, or profession, which, again, may or may not intersect with some of the prior factors; and (9) practical constraints, such as whether the witness has unique factual knowledge or is beyond the court's subpoena power.[150] This list is not exhaustive and other considerations may be relevant in particular cases.

The reasonableness of witnesses' expenses is seldom an issue. The reimbursement of a person's actual expenses is almost uniformly proper.[151]

III. ILLUSTRATIVE CASES

Lawyers who are contemplating paying fact witnesses for time lost to testifying or to preparation for testifying are challenged by several factors when formulating compensation arrangements. For one thing, the majority rule notwithstanding, there is variation among jurisdictions in terms of what witness compensation is permissible.[152] For another thing,

147. *In re* Split Vein Coal Co., No. 1:03-BK-02974, 2013 WL 1934669, at *6-7 (Bankr. M.D. Pa. May 9, 2013).

148. *Id.*

149. *See id.* (calculating a witness's administrative claim in a bankruptcy case).

150. *See, e.g.*, Ariz. Op. 97-07, *supra* note 73; ABA Formal Op. 96-402, *supra* note 61.

151. SIMON, *supra* note 77, at 892.

152. *See, e.g.*, *In re* Complaint of PMD Enters. Inc., 215 F. Supp. 2d 519, 529-30 (D.N.J. 2002) (limiting fact witness compensation to time lost in attending trial or testifying and reasonable

different courts may have significantly different perspectives on the reasonableness of fact witnesses' compensation even when the amounts at issue or the witnesses' status's or roles are very similar.[153] As one author and veteran trial lawyer has observed, only half-joking, the "reasonable" value of a witness's lost time "means whatever the individual judge who is looking at your individual facts thinks it means."[154] Finally, while some compensation arrangements are clearly improper and should have been so recognized before they were entered into, as where a witness is to be paid for her testimony,[155] in other cases, subtle or unappreciated factual differences may lead to very different results.[156] Nonetheless, it is helpful to examine some cases in which courts either approved or disapproved of witnesses' compensation in an effort to better understand how related controversies play out.

A. Cases Approving Fact Witnesses' Compensation

In *Prasad v. MML Investor Services, Inc.*,[157] the plaintiffs sought to vacate a National Association of Securities Dealers ("NASD") arbitration award in favor of the defendant, MML Investor Services, Inc. ("MMLISI").[158] They alleged in the arbitration case that they were defrauded in a Ponzi scheme operated by a former MMLISI representative, Nagajara Thayagarajan.[159] One of the witnesses who testified for MMLISI in the arbitration was Stanley Farr, a former compliance officer with the firm, who, while still employed by MMLISI, had investigated Thayagarajan's alleged misconduct.[160] At the time he testified, Farr was self-employed as a compliance consultant and charged his clients at a rate of $125 per hour.[161] After Farr's third day of testimony in the arbitration, the plaintiffs complained to the arbitrators that Farr was receiving "illegal compensation" as a fact witness and that the time he "spent in 'witness prep' amounted to witness tampering and

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expenses incurred in attending trial or testifying); Goldstein v. Exxon Research & Eng'g Co., No. Civ. 95-2410, 1997 WL 580599, at *1-2 (D.N.J. Feb. 28, 1997) (taking the same approach).

153. Robert L. Byman, *With Fact Witnesses, Do You Get What You Pay For?*, NAT'L L.J. & LEGAL TIMES, Oct. 29, 2012, at 22, 22.

154. *Id.*

155. *See, e.g.*, Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 865 F. Supp. 1516, 1521, 1526 (S.D. Fla. 1994) (sanctioning insurer for witness payments that "unquestionably violated the very heart of the integrity of the justice system").

156. Byman, *supra* note 153.

157. No. 04 Civ. 380, 2004 WL 1151735 (S.D.N.Y. May 24, 2004).

158. *Id.* at *2-3.

159. *Id.* at *1.

160. *Id.*

161. *Id.* at *2.

constituted subornation of perjury."[162] The arbitration panel allowed the plaintiffs to recall Farr as a witness and question him regarding his compensation by MMLISI.[163]

Farr testified that MMLISI had reimbursed him for his time spent on the arbitration at an hourly rate of $125, the same rate he charged clients as a self-employed consultant.[164] He explained that he was not paid to testify in any particular manner.[165] He also testified that while he did not prepare any witnesses to testify in the arbitration proceeding, he was present when MMLISI's lawyers prepared other witnesses.[166] Finally, Farr's invoices to MMLISI indicated that he was also reimbursed for his travel expenses, including air fare, car rental, hotels, and meals.[167]

At the close of Farr's testimony, the plaintiffs moved to strike the testimony of all of MMLISI's witnesses on the basis that MMLISI had improperly paid Farr for his testimony and time.[168] After due consideration, the arbitrators denied the plaintiffs' motion to strike the witnesses' testimony, and further denied the plaintiffs' claims against MMLISI in their entirety, without explaining the bases for their decisions.[169] The plaintiffs then petitioned a New York federal court to vacate the arbitration award.[170]

In the district court, the plaintiffs asserted that the arbitration panel acted in manifest disregard of the law when it declined to strike the witnesses' testimony.[171] The plaintiffs did not challenge the reasonableness of Farr's expenses, nor did they contend that he was paid for anything other than his time and expenses.[172] Rather, they argued it was improper for MMLISI to have paid Farr to participate in witness preparation.[173] The plaintiffs further complained that MMLISI did not reveal Farr's compensation or services before they were exposed on cross examination, a lapse the plaintiffs characterized as "troubling."[174] Their arguments did not impress the court. As the court explained:

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162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at *3.
172. *Id.* at *5.
173. *Id.*
174. *Id.* (internal quotation marks omitted).

> A witness may be compensated for the time spent preparing to testify or otherwise consulting on a litigation matter in addition to time spent testifying in a deposition or at trial.
>
> That a fact witness has been retained to act as a litigation consultant does not, in and of itself, appear to be improper, absent some indication that the retention was designed as a financial inducement or as a method to secure the cooperation of a hostile witness, or was otherwise improper. Although Farr was retained by MMLISI after he was approached by [the plaintiffs] to testify as a witness, that fact alone is insufficient to establish that MMLISI's retention of his services as a consultant was improper as a matter of law, particularly in view of Farr's testimony that he was initially contacted by MMLISI's counsel regarding [the plaintiffs'] claims . . . long before he was approached by [the plaintiffs].[175]

Therefore, the plaintiffs could not show that Farr's compensation by MMLISI violated any governing legal principles.[176] The amount of Farr's compensation certainly did not concern the court.[177] Indeed, the fact that MMLISI paid Farr the same rate he charged his clients as a self-employed compliance consultant was a compelling display of reasonableness.[178]

Finally, while the court acknowledged that a lawyer's or witness's failure to timely divulge the witness's compensation may sometimes be "troubling,"[179] this was not such a case.[180] Contrary to the plaintiffs' assertion that the nature of Farr's relationship with MMLISI surfaced for the first time on cross examination, Farr testified during his first day of direct examination that he had located and interviewed a number of potential witnesses at the request of MMLISI's counsel.[181] At that time, he and MMLISI's counsel also made clear that he was being paid for his time spent in connection with the arbitration.[182]

To the extent the plaintiffs were upset by Farr being present when MMLISI's counsel met with other witnesses, they could cite no authority for the proposition that lawyers are prohibited from meeting with multiple witnesses at the same time.[183] The plaintiffs offered no evidence to support their allegations of witness tampering.[184]

175. *Id.* at *6 (citations omitted).
176. *Id.* at *7.
177. *See id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*

Accordingly, the court in *Prasad* confirmed the arbitration award in favor of MMLISI.[185]

Prasad illustrates at least two key points for lawyers. First, it shows the importance of linking fact witnesses' compensation to their direct losses of income.[186] The tighter the linkage between a witness's lost income and the payments to the witness, the greater the probability that the court will hold the witness's compensation to be reasonable.[187] Second, the decision highlights the wisdom of disclosing compensation arrangements with witnesses.[188] In fact, the disclosure in *Prasad* might have been made earlier.[189] Many prudent lawyers disclose fact witnesses' compensation in discovery at a time when an opponent can explore the subject if it wishes, but disclosure on direct examination in a proceeding presents a last clear chance to avoid potential problems.[190]

Consolidated Rail Corp. v. CSX Transportation, Inc.[191] was a suit over railroad trackage rights brought by Consolidated Rail Corp. ("Conrail") and another railroad, Norfolk Southern.[192] Paul Carey worked for Conrail until he retired in 1999, at which time he entered into a consulting agreement with Conrail concerning anticipated regulatory actions and litigation in which his experience and knowledge would be valuable.[193] The agreement, which had a one-year term and expired in 2000, provided that Conrail would pay Carey $85 per hour for his services, plus reimburse him for travel and other expenses.[194]

In September 2009, the plaintiffs and their counsel at Pepper Hamilton LLP ("Pepper") asked Carey to assist them in this case.[195] Interestingly, they had identified him in their initial disclosures as a

185. *Id.* at *7-8.

186. *See id.* at *7.

187. *See id.*

188. *Id.*

189. *See* Hardaway, *supra* note 17, at 53 ("Disclose early and often. Specifically, be sure to accurately and timely respond to discovery requests concerning the employment status and compensation of all fact witnesses."); Villa, *supra* note 12, at 114 ("Inform opposing counsel, preferably in writing, of the terms of your agreement with your [fact] witness.").

190. *See, e.g.*, United States v. Cinergy Corp., No. 1:99-cv-1693, 2008 WL 7679914, at *10-15 (S.D. Ind. Dec. 18, 2008) (ordering a new trial where defense counsel did not reveal fact witness's compensation on direct examination and allegedly misled jury about witness's compensation, and witness did not reveal employment or compensation when testifying). *But cf.* Armenian Assembly of Am., Inc. v. Cafesjian, 924 F. Supp. 2d 183, 192-95 (D.D.C. 2013) (finding no basis to hold that witness had to disclose compensation and pointing out that the plaintiff's questioning failed to reveal the compensation, not because the witness was dishonest, but because the questions were not sufficiently specific).

191. No. 09-cv-10179, 2012 WL 511572 (E.D. Mich. Feb. 16, 2012).

192. *Id.* at *1.

193. *Id.* at *3.

194. *Id.*

195. *Id.* at *4.

possible fact witness several months earlier, and the defendant had already indicated its intent to depose him based on his identification in the plaintiffs' disclosures.[196] Carey agreed to assist the plaintiffs and he soon traveled to Detroit to inspect the tracks at issue and to meet with the plaintiffs' counsel.[197] Approximately two weeks later, Laurence Shiekman of Pepper formally retained Carey as a consultant to assist the firm in preparing the plaintiffs' case, with the possibility of his testimony at trial left open.[198] In the letter engaging Carey as a consultant, Shiekman indicated that Conrail would pay Carey for his services directly at the same rate specified in his earlier consulting agreement.[199] Shortly thereafter, a Conrail lawyer, Jonathan Broder, agreed to increase Carey's rate to $125 per hour when Carey reported that he had done some unrelated consulting work at that higher rate.[200] Carey eventually consulted on the matter for just over thirty hours, for which Conrail owed him slightly more than $4000.[201]

The defendant deposed Carey in December 2009.[202] The defendant's lawyer asked Carey if he was being compensated for his deposition appearance.[203] Carey said he was and defense counsel attempted to inquire further.[204] The plaintiffs' lawyer, Matthew Lund, halted further questioning on the basis that Carey's consulting agreement was confidential.[205] After some motion practice in which the details of Carey's consulting arrangement and compensation were revealed, Carey's deposition continued pursuant to court order.[206] Carey testified regarding his consulting arrangement, although he was a little uncertain about who had engaged him (Conrail versus Pepper) and the specific agreement governing his consultancy (the 1999 agreement or Shiekman's letter).[207] When trial finally drew near, the defendant moved to exclude Carey's testimony because he was "an improperly paid fact witness and charged an unreasonable rate of $125 per hour for his time providing factual testimony."[208] Pushing back, the plaintiffs argued that they did not pay Carey for his testimony and that he was reasonably

196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at *7.
201. *Id.*
202. *Id.* at *4.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at *5.
207. *Id.* at *5-7.
208. *Id.* at *8.

compensated for his expenses and time lost while meeting with them, reviewing documents, and being deposed.[209]

The district court began its analysis by noting that public policy forbids lawyers and others from compensating fact witnesses beyond the reasonable value of their time lost and reasonable expenses.[210] Though the federal anti-gratuity statute forbids the compensation of witnesses for their testimony, the court recognized that 18 U.S.C. § 201(d) permits payment for the "reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance" at hearings, trials, or proceedings.[211] The § 201(d) exception extends to time fact witnesses spend reviewing documents and meeting with lawyers.[212] According to the *Consolidated Rail* court, a lawyer acting on a client's behalf may pay a fact witness for time spent preparing for or attending a deposition or trial as long as the lawyer does not condition payment on the content of the witness's testimony.[213]

The district court easily concluded that Carey's consulting arrangement was ethical under Model Rule 3.4(b).[214] The defendant, however, argued that the plaintiffs' initial attempt to conceal the consulting agreement was a strong indicator of improper conduct.[215] The court agreed that the plaintiffs' lawyers "displayed some troubling behavior" in resisting discovery of Carey's consulting arrangements, but noted that: (1) Lund's refusal to permit Carey to be questioned on the subject was based on his misunderstanding of the work product doctrine; and (2) neither Carey nor the plaintiffs' lawyers attempted to hide the fact that Carey was a paid consultant.[216] Those facts distinguished this case from other cases in which courts had sanctioned parties or fact witnesses who had allegedly acted in bad faith in trying to conceal consulting relationships.[217] While Carey had been unclear about the date and some terms of his consulting agreement and who had retained him as a consultant, it was probable that he was innocently confused or mistaken.[218] The court saw no reason to doubt his honesty since he had

209. *Id.*
210. *Id.*
211. *Id.* (quoting 18 U.S.C. § 201(d) (2006)) (internal quotation marks omitted).
212. *Id.* (citing ABA Formal Op. 96-402, *supra* note 61, which the court misidentified as 95-402).
213. *Id.*
214. *Id.* at *10.
215. *Id.* at *11.
216. *Id.*
217. *Id.* (citing New York v. Solvent Chem. Co., 166 F.R.D. 284, 290 (W.D.N.Y. 1996)).
218. *See id.* at *11-12.

revealed his consulting relationship the first time he was asked about it in his deposition.[219]

The defendant argued that the plaintiffs' retention of Carey as a consultant after it had indicated its intention to depose him was further evidence of improper conduct.[220] The court disagreed.[221] The plaintiffs had identified Carey as a possible fact witness in their initial disclosures before the defendant noticed his deposition, and Carey had previously worked with Broder and Shiekman on Conrail matters.[222] Thus, the fact that the plaintiffs retained Carey as a consultant after his deposition was noticed was not enough for the court to infer that his retention was improper.[223]

Of course, even assuming that the plaintiffs properly retained Carey as a consultant, his compensation had to be reasonable "so as to avoid affecting, even unintentionally, the content of [his] testimony."[224] Although there had been some disagreement in discovery about Carey's hourly rate ($85 versus $125), which the defendant asserted was a deceptive smokescreen, the court attributed any confusion to the rate increase granted by Broder after Shiekman retained Carey, and to confusion between Broder and the lawyers at Pepper.[225] Given that the $125 hourly rate that Conrail paid to Carey matched that which he had charged another client for consulting work, it did not appear to be excessive or unreasonable.[226]

In light of all the evidence, the court concluded that the plaintiffs had not paid Carey for or because of his testimony, and thus that they had not violated the federal anti-gratuity statute.[227] To the contrary, they had reimbursed Carey's expenses and reasonably paid him for his lost time.[228] The court therefore declined to exclude Carey's testimony, although it did permit the defendant to cross examine Carey on his consulting agreements at trial.[229]

Consolidated Rail reflects some of the miscommunications, misjudgments, and timing issues that can complicate litigation, such as the plaintiffs identifying Carey as a fact witness before they retained him

219. *Id.* at *12.
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* (citing ABA Formal Op. 96-402, *supra* note 61).
225. *Id.* at *12-13.
226. *Id.* at *13.
227. *See id.* (quoting 18 U.S.C. § 201(c)(2) (2006), but not mentioning the statute).
228. *Id.*
229. *Id.*

as a consultant, Lund mistakenly believing that Carey's consulting relationship was immune from discovery as work product, the confusion between Conrail's in-house counsel and its outside counsel, and Carey's own uncertainty over the contours of his consulting relationship.[230] But none of those stumbles left a mark because the plaintiffs paid Carey for his lost time rather than for his testimony, Carey's compensation was objectively reasonable, and Carey disclosed his consulting relationship with the plaintiffs when he was asked about it at his deposition.[231] Long story short, the plaintiffs, their lawyers, and Carey touched the key points and acted in good faith—even if their actions or judgments were imperfect.[232]

B. Cases Disapproving of Fact Witnesses' Compensation

New York v. Solvent Chemical Co.[233] is regarded as a leading case opposing fact witness compensation, though that is an ambitious interpretation of the decision.[234] In *Solvent*, the State of New York sued a company named ICC Industrial, Inc. ("ICC") and other defendants for environmental pollution at an industrial chemical facility in the town of Niagara Falls, known as the Buffalo Avenue site.[235] The suit was filed in 1983, and in 1986, ICC and Solvent Chemical Company, Inc. ("Solvent") filed a variety of third-party claims.[236] In 1995, discovery finally focused on ICC's potential liability as an operator of the Buffalo Avenue site or as the corporate parent of Solvent, which had run the industrial chemical facility.[237] In turn, a dispute arose over ICC's retention of its former employee Eric Beu, who was an important fact witness, as a litigation consultant.[238]

In the 1970s, Beu was a vice president of both ICC and its wholly-owned subsidiary, Dover Chemical Corp. ("Dover").[239] He left ICC and Dover in 1979.[240] He later brought an arbitration proceeding against ICC related to his departure, which he lost.[241] Beu had not worked in the

230. *Id.* at *11-13.
231. *Id.*
232. *See id.* at *13.
233. 166 F.R.D. 284 (W.D.N.Y. 1996).
234. *See id.* at 291-92.
235. *Id.* at 285.
236. *Id.*
237. *Id.* at 286.
238. *See id.* at 286-87.
239. *Id.* at 286.
240. *Id.*
241. *Id.*

chemical industry since.[242] In 1993, Dover filed a Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")[243] action in an Ohio federal court against several defendants, including Beu as a former owner or operator of Dover's facility in Dover, Ohio ("Dover litigation").[244]

When another defendant, Occidental Chemical Co. ("OCC"), subpoenaed Beu for a deposition in this case in July 1995, ICC realized that Beu possessed critical knowledge of Solvent's operations at the Buffalo Avenue site and of ICC's relationship with Solvent.[245] ICC's internal documents relevant to Solvent's operations included numerous memoranda to or from Beu, many of which bore his indecipherable handwritten notes.[246] ICC, Solvent, and Dover thus approached Beu through his counsel in the Dover litigation and reached several agreements with him.[247] First, Dover settled with Beu in the Dover litigation.[248] Beu paid Dover $4000 and Dover promised to indemnify him with respect to any claims against him by other parties in that case.[249] Second, ICC and Solvent agreed not to sue Beu in the current action.[250] Third, ICC and Beu entered into a written consulting agreement in the current case.[251] Beu agreed to assist ICC and its lawyers by reviewing and discussing with them documents relevant to the litigation at a rate of $100 per hour plus expenses.[252]

Beu was deposed for three days in November 1995.[253] Before his deposition, neither ICC nor Solvent informed any of the other parties about ICC's consulting agreement with Beu or its terms, although they did tell them that lawyers from the firm representing Solvent would represent Beu at his deposition.[254] On the first day of his deposition, Beu denied any relationships with ICC, Dover, or Solvent since leaving ICC and Dover in 1979.[255] Neither his lawyers nor the lawyers appearing for

242. *Id.*
243. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2006).
244. *Solvent*, 166 F.R.D. at 286.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* at 286-87.

ICC and Solvent corrected his testimony.[256] On the third day of the deposition, Beu was asked whether he had any consulting relationships with any of the parties.[257] He answered affirmatively and then explained the terms of his consulting relationship and agreement, testified that he had worked somewhere between twenty and fifty hours on the case, explained that he did all of his work after he had been subpoenaed to give his deposition, and said that he was not being paid for his deposition time.[258] Beu declined to answer questions regarding the exact nature of his consulting work on the advice of his lawyer.[259] Beu also refused to produce a copy of the consulting agreement and the invoices for his time, based on his lawyer's assertion that it constituted work product.[260] A discovery dispute ensued.[261]

The court easily concluded that Beu's consulting agreement and related documents were not immune from discovery as work product.[262] As the court explained, work product protection must yield to conduct by litigants or their lawyers that "erode[s] the integrity of the adversary process," and here the conduct of ICC and Solvent and their lawyers with respect to Beu had "threatened to undermine the integrity of the adversary process."[263] In particular:

> It is clear, first of all, that the agreements entered into by ICC, Solvent, Dover, and Mr. Beu were designed to overcome the hostility between Mr. Beu and ICC resulting from the dispute over the circumstances of Mr. Beu's departure from ICC in 1979, and from the naming of Mr. Beu as a defendant in the Dover litigation. ICC and Solvent purchased Mr. Beu's cooperation in the instant case, by orchestrating the settlement of Dover's claims against him in the Dover litigation, by obtaining Dover's agreement to indemnify him with respect to any claims made against him by other parties in that case, and by undertaking not to sue him in the present action. Those actions were the equivalent of making cash payments to Mr. Beu as a means of making him "sympathetic" and securing his testimony.[264]

The court explained that there was nothing improper in ICC reimbursing Beu for his travel expenses incurred in consulting with ICC,

256. *Id.*
257. *Id.* at 287.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.* at 287-88.
262. *Id.* at 289.
263. *Id.*
264. *Id.*

or in ICC's payment of a reasonable hourly fee for his time.[265] But in indemnifying Beu in connection with the Dover litigation and this case "as a means of obtaining his cooperation as a fact witness, ICC and Solvent went too far."[266] In addition, the circumstances surrounding ICC's retention of Beu as a consultant were suspicious.[267] As the court stated:

> ICC must have been well aware, prior to OCC's serving of a subpoena on Mr. Beu, that Mr. Beu was an extremely important fact witness in this case. The company has been a defendant since the original complaint was filed in 1983. But it was only after service of the subpoena in July 1995—when it became clear that OCC and other parties were intending to obtain both documents and testimony from Mr. Beu—that ICC moved to acquire Mr. Beu's services as a "litigation consultant." The timing of ICC's actions creates, in and of itself, an appearance of impropriety that serves to further undermine the company's claim of work product protection for the consulting agreement and related materials. And ICC's identification of Mr. Beu as a member of its trial team inevitably raises concerns as to whether he can be counted on to testify fully and impartially on a key issue in this case—the extent to which ICC was involved in the operations of Solvent and the Buffalo Avenue site at the time the site was owned and/or operated by Solvent.[268]

The court was also disturbed by the fact that no one among Beu, his lawyers, ICC's lawyers, and Solvent's lawyers took the initiative to disclose Beu's consulting arrangement.[269] When asked on the first day of his deposition whether he had any current relationship with ICC or Solvent, Beu not only wrongly denied the existence of his consulting relationship, but neither his lawyers nor ICC's or Solvent's counsel corrected the record.[270]

Finally, the court shredded ICC for its "perturbing" reliance on the work product doctrine to withhold Beu's consulting agreement.[271] The court stated:

> The basis for its claim of work product protection is that the agreement "contains and reflects ICC's litigation strategy and the thoughts, mental impressions and opinions of ICC's counsel." The court is at a

265. *Id.*
266. *Id.* at 289-90.
267. *Id.* at 290.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*

> loss as to why ICC would incorporate such sensitive information in a written contract with an important fact witness. It must have been obvious at the time the contract was drafted that other parties to the litigation would be disturbed by the existence of the agreement, and would be likely to seek production of the document. It may be that the agreement sets forth the contours, and even some details, of Mr. Beu's responsibilities as a "litigation consultant," and that such provisions might in themselves reveal something of ICC's litigation strategy. But the impropriety of ICC's conduct in relation to Mr. Beu dictates that the company must forfeit any protection that it might otherwise claim to such information.[272]

The court ordered ICC to produce to the other parties copies of all documents that Beu reviewed in his consulting, any documents or notes that he prepared as a consultant, and all notes or other documents reflecting communications with or by Beu.[273] The court also ordered ICC to produce Beu for further deposition at its expense, including paying the fees of the moving parties' lawyers.[274]

At base, the *Solvent* court enforced something close to the common law prohibition on paying fact witnesses for their testimony.[275] ICC and Solvent might have insisted that they had simply paid Beu for his time assisting them in the litigation, but that argument was doomed from the get-go. Its fate was sealed by the settlement of the Dover litigation claims against Beu and the indemnity agreements extended to Beu, which appeared to be inducements to Beu to testify favorably for ICC and Solvent.[276] Those agreements rendered Beu's compensation objectively unreasonable.[277] But even had ICC and Solvent merely paid Beu for his time spent analyzing and explaining musty papers bearing his name or handwriting, they still would have had no good arguments for resisting discovery of his consulting agreement or related documents.

What the *Solvent* court clearly did *not* do was prohibit lawyers or others from paying fact witnesses for their time spent testifying or preparing to testify, or for otherwise assisting in preparing a case for trial.[278] To the contrary, the court emphasized that "there is nothing improper about the payment of a reasonable hourly fee for the services

272. *Id.* (citations omitted).
273. *Id.* at 292.
274. *Id.*
275. *See id.* at 289.
276. *See id.*
277. *See id.*
278. *Id.* (stating that there was "nothing improper in the reimbursement of expenses incurred by Mr. Beu in travelling to New York to provide ICC with factual information, or in the payment of a reasonable hourly fee for Mr. Beu's time").

of a fact witness."[279] Lawyers who rely on *Solvent* in opposing fact witnesses' compensation or seeking remedies for compensation arrangements they consider to be improper should therefore be careful not to overstate the holding.

Rocheux International of New Jersey, Inc. v. U.S. Merchants Financial Group, Inc.[280] involved a contract dispute between Rocheux International of New Jersey, Inc. ("Rocheux"), which was a distributor of plastic materials, and several plastic product-packaging providers.[281] The defendants alleged that a former employee of one of them, Jorge Gutierrez, had approached Rocheux's lawyer, Brian McAlindin, and offered to provide damaging testimony against the defendants in exchange for a fee.[282] McAlindin arranged to pay Gutierrez over $4000 for his testimony.[283] McAlindin originally identified Gutierrez as a fact witness, but, after the deadline for disclosing expert witnesses had passed, he informed defense counsel that he would be eliciting expert testimony from Gutierrez.[284] As part of that expert witness disclosure, McAlindin submitted an affidavit from Gutierrez, stating that the defendant for which he once worked had changed data in its accounting system and had engaged in other unethical business practices at its CEO's direction.[285]

The defendants noticed Gutierrez's deposition.[286] McAlindin then informed them that Gutierrez would charge $1500 for his deposition testimony.[287] The deposition proceeded and Gutierrez testified that McAlindin had paid him more than $4000 to date, but that he understood that fee to be payment for his consulting work, "specifically, his communications with Rocheux's lawyers and reviewing his affidavit" rather than his expert testimony.[288] He testified that he had contacted Rocheux's lawyers to tell them that he had information he thought might be helpful to the lawsuit.[289] He further testified that he first discussed possible compensation with McAlindin when he and McAlindin met for him to sign his affidavit because, until then, it had been uncertain

279. *Id.* at 290 n.4.
280. Civ. No. 06-6147, 2009 WL 3246837 (D.N.J. Oct. 5, 2009).
281. *Id.* at *1.
282. *Id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.* at *2.

whether Rocheux would use his testimony.[290] When questioned on the subjects on which he was designated as an expert, Gutierrez gave equivocal and uninformed answers that did not help Rocheux's case.[291]

The defendants moved to exclude Gutierrez as an improperly paid fact witness and contended that Rocheux designated him as an expert witness to deliberately circumvent the prohibition against paying fact witnesses for testifying.[292] They further sought to invalidate Gutierrez's $1500 deposition fee and requested "appropriate sanctions for the unethical behavior of [the] [p]laintiff's counsel."[293]

After referring to New Jersey Rule of Professional Conduct 3.4(b), the *Rocheux* court asserted that lawyers may: (1) reimburse fact witnesses for reasonable expenses incurred in attending trial; and (2) reasonably pay witnesses for their time lost in appearing to testify.[294] The court further stated that Congress codified this common law principle in the federal anti-gratuity statute.[295] Here, it was crystal clear that Gutierrez was a fact witness and that McAlindin had improperly paid Gutierrez for his testimony.[296] When asked to identify the expert opinions in Gutierrez's affidavit, McAlindin pointed to "factual evidence based on lay observations" that lacked the reliable methodology required by Federal Rule of Evidence 702[297] for the admission of expert testimony.[298] McAlindin could not otherwise explain why Gutierrez should be treated as an expert witness.[299] Furthermore, the fee paid to Gutierrez "most certainly did not compensate [him] for his costs of attending trial or time lost during trial."[300] In summary, McAlindin's payment to Gutierrez violated the longstanding ban on paying fact witnesses for their testimony.[301]

The court reasoned that McAlindin's decision to pay Gutierrez for factual testimony had "cast a cloud over the legitimacy of that testimony," and that it was up to the court "to prevent this suspect evidence from contaminating future proceedings."[302] The court accordingly excluded Gutierrez's testimony, excused the defendants

290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* at *3.
295. *Id.*
296. *Id.*
297. FED. R. EVID. 702.
298. *Rocheux*, 2009 WL 3246837, at *3.
299. *Id.* at *4.
300. *Id.*
301. *Id.*
302. *Id.*

from paying Gutierrez's expert fee for his deposition, and awarded the defendants their reasonable attorneys' fees and costs incurred as a result of McAlindin's misconduct.[303] Somewhat ominously, the court noted that the defendants had not moved to disqualify McAlindin and that such a severe sanction did not currently appear to be necessary, but cautioned that it would "reserve judgment on the need for additional sanctions or disciplinary action pending further application."[304]

McAlindin's reported conduct in *Rocheux* was seriously misguided. Gutierrez clearly was a fact witness—a largely useless one as it turned out, but a fact witness nonetheless—and his compensation was objectively unreasonable.[305] McAlindin plainly paid Gutierrez for his testimony rather than for his time.[306] In the end, though, what distinguishes *Rocheux* is the fact that Gutierrez was a former employee of a defendant rather than a former employee of Rocheux.[307] Paying a fact witness who is a former employee of an adversary, rather than a former employee of the party that the person is assisting, invites accusations of misconduct.[308] That is not to say the practice is always improper, but, from a lawyer's perspective, it will be a rare case in which the potential reward outweighs the associated risk.

IV. RECOMMENDATIONS FOR LAWYERS

Lawyers handling litigation, arbitration, or administrative proceedings will, at some point, either want to compensate fact witnesses for assisting them in matters or will be asked by fact witnesses about the possibility of compensation for their time or services. How should careful lawyers approach these situations?

First, lawyers should attempt to ascertain the law of the jurisdiction on compensating fact witnesses.[309] This may require analysis of applicable rules of professional conduct, case law, and ethics opinions by state or local bar associations, as well as state statutes pertaining to

303. *Id.*

304. *Id.* at *5.

305. *Id.* at *3-4.

306. *Id.* at *3.

307. *Id.* at *4.

308. *See, e.g.*, Nissan N. Am., Inc. v. Johnson Elec. N. Am., Inc., No. 09-11783, 2011 WL 1812505, at *3 (E.D. Mich. May 12, 2011) (discussing a magistrate's findings regarding a party's payment of a fact witness who was formerly employed by an opponent).

309. Villa, *supra* note 12, at 113.

bribery and witness tampering and cases interpreting those statutes. State and federal courts may have local rules bearing on the issue, and, in federal cases, there is the federal anti-gratuity statute to keep in mind.[310] Depending on where a fact witness resides, a case is pending, or a lawyer practices, there may be choice of law considerations to sort through.[311]

Second, lawyers should never pay fact witnesses for their testimony, regardless of whether the payment is for the fact of a witness's testimony, or its content or substance.[312] A fact witness's compensation may never be contingent upon the fact, content, or substance of the witness's testimony, or the outcome of the litigation.[313] A requirement that a witness's testimony be truthful will not cure any of these ills.[314]

Third, but consistent with the prior point, lawyers should compensate fact witnesses only for their time lost to testifying, preparing to testify, or otherwise legitimately assisting in the preparation of a case, plus reimbursement of reasonable expenses incurred in connection with those activities.[315] Any compensation should be objectively reasonable.[316] The closer a fact witness's compensation comes to approximating her direct loss of income, the more likely a court will find

310. *See id.*

311. *See id. See generally* MODEL RULES OF PROF'L CONDUCT R. 8.5 (2013) (establishing disciplinary authority choice of law rules).

312. *See* Villa, *supra* note 12, at 112 (citing MODEL RULES OF PROF'L CONDUCT R. 3.4 cmt. 3).

313. *See, e.g.*, Ward v. Nierlich, No. 99-14227-CIV, 2006 WL 5412626, at *3 (S.D. Fla. Sept. 20, 2006) (recommending sanctions in a case in which the plaintiffs and their lawyers "corrupted the judicial process and committed a fraud on this [c]ourt by paying defense witnesses for their testimony," and explaining that the witnesses "were promised a substantial stake in this litigation based on a favorable judgment or settlement for [p]laintiffs"); *In re* Telcar Grp., Inc., 363 B.R. 345, 355 (Bankr. E.D.N.Y. 2007). In refusing to approve a settlement between a bankruptcy trustee and a former principal of the debtor who was a fact witness in litigation related to the bankruptcy, the court stated:

> [T]he sums that may become due to [the witness] under the settlement, or the credits to which he may become entitled, have no relation to the amount of time expended by [the witness] or the reasonable cost in attending or testifying at any proceedings, but are entirely contingent upon the outcome of the contemplated litigation.

In re Telcar Grp., Inc., 363 B.R. at 355.

314. *See, e.g.*, Rocheux Int'l of N.J., Inc. v. U.S. Merch. Fin. Grp., Inc., Civ. No. 06-6147, 2009 WL 3246837, at *4 (D.N.J. Oct. 5, 2009); *Ward*, 2006 WL 5412626, at *4; *In re Telcar Grp., Inc.*, 363 B.R. at 354; *In re* Kien, 372 N.E.2d 376, 379 (Ill. 1977).

315. ABA Formal Op. 96-402, *supra* note 61.

316. *Id.*

it to be reasonable.[317] In the absence of direct loss, a lawyer should calculate the "reasonable value of the witness's time based on all of the relevant circumstances."[318] At bottom, there must be an explainable and logical connection between the amount of time or effort a fact witness devotes to a matter and the amount of the witness's compensation.[319]

Lawyers should not offer benefits to fact witnesses in addition to reasonable payment for time lost or reimbursement of reasonable expenses that courts or disciplinary authorities may view as influencing, even unintentionally, the witness's testimony.[320] Such benefits might include promises of future employment or business opportunities with the lawyer's client, promises of favorable treatment in transactions or business dealings with the lawyer's client, arrangements or extensions of loans or credit, forgiveness of debts owed to the lawyer's client, or indemnity agreements. Returning for a moment to the *Solvent* case, ICC's and Dover's agreements to indemnify Beu are prime examples of arrangements with witnesses that courts may well regard as improper inducements.[321]

Fourth, lawyers should avoid paying fact witnesses who were formerly employed by another party in the litigation—especially an opposing party.[322] They should be similarly cautious when considering whether to compensate fact witnesses who, while not formerly employed by an adversary, are expected to be key witnesses for that party.[323] To be sure, cases in which lawyers have been sanctioned or reprimanded for compensating former employees of opposing parties or key witnesses for adversaries have involved obviously impermissible payments for

317. *See id.*

318. *Id.*

319. *See, e.g.*, Villa, *supra* note 12, at 115 n.32 (providing examples of objective standards in assessing reasonableness). In the case of professionals who testify as fact witnesses, for example, it generally is reasonable to compensate them for their lost time at their professional rates. *See* Smith v. Pfizer Inc., 714 F. Supp. 2d 845, 852-53 (M.D. Tenn. 2010) (discussing payment of a medical doctor who was a fact witness at her professional rate of $500 per hour).

320. *See* Villa, *supra* note 12, at 112.

321. New York v. Solvent Chem. Co., 166 F.R.D. 284, 289-90 (W.D.N.Y. 1996).

322. *See, e.g.*, Nissan N. Am., Inc. v. Johnson Elec. N. Am., Inc., No. 09-11783, 2011 WL 1812505, at *3 (E.D. Mich. May 12, 2011) (discussing a magistrate's findings regarding a party's payment of a fact witness who was formerly employed by an opponent); Rocheux Int'l of N.J., Inc. v. U.S. Merch. Fin. Grp., Inc., Civ. No. 06-6147, 2009 WL 3246837, at *1, *4 (D.N.J. Oct. 5, 2009) (imposing sanctions where the plaintiff's lawyer compensated a disgruntled former employee of a defendant); Rentclub, Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651, 654-58 (M.D. Fla. 1992) (disqualifying lawyer who employed adversary's former employee, who was a fact witness, as a "trial consultant").

323. *See* Ward v. Nierlich, No. 99-14227-CIV, 2006 WL 5412626, at *5 (S.D. Fla. Sept. 20, 2006) (noting that conduct by plaintiffs and their counsel was especially "egregious" because they "did not simply pay their own witnesses, but paid critical witnesses for the defense").

testimony rather than reasonable compensation for time lost, but it remains true that certain categories of fact witnesses are more likely to invite charges of unethical payment or witness tampering, and these are two of them.[324] None of this is to say that fact witnesses falling into these categories *never* can be properly compensated by a party other than a former employer or expected beneficiary of their testimony, but it is to say that the risks of compensating these witnesses frequently outweigh any possible rewards, and that lawyers should therefore exercise extreme caution in this area.

Fifth, lawyers should not purport to prohibit fact witnesses from speaking with other parties or their lawyers as part of any compensation arrangement.[325] Rules of professional conduct generally prevent lawyers from attempting to so restrict witnesses.[326] For example, Model Rule 3.4(f) establishes that a lawyer cannot "request a person other than a client to refrain from voluntarily giving relevant information to another party" except in very limited circumstances.[327]

Sixth, lawyers should put compensation agreements with fact witnesses in writing.[328] An agreement should clearly state that the witness is being compensated for the reasonable value of her time and being reimbursed for her reasonable expenses rather than being paid for the fact, content, or substance of her testimony.[329] Accuracy and clarity are important here for two reasons. First, witnesses must understand what is expected of them. Second, compensation agreements with fact witnesses will almost certainly have to be produced in discovery, and it is critical that they be drafted in ways that will discourage challenges by opposing parties and withstand scrutiny by reviewing courts.[330] Specifying in writing that witnesses are being compensated solely for the reasonable value of their time and are being reimbursed for the reasonable value of their expenses is essential to discouraging and surviving such challenges and scrutiny.

Finally, lawyers should inform the other parties in a case of the existence and terms of any agreements to compensate fact witnesses.[331] This should be done sufficiently early in a case to permit other parties to

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324. *See id.* at *4.
325. Villa, *supra* note 12, at 114.
326. MODEL RULES OF PROF'L CONDUCT R. 3.4(a), (f) (2013).
327. *Id.* R. 3.4(f).
328. McRae & Nortman, *supra* note 117, at 34; Villa, *supra* note 12, at 114.
329. Villa, *supra* note 12, at 114.
330. *See* McRae & Nortman, *supra* note 117, at 34.
331. Villa, *supra* note 12, at 114.

conduct discovery on the issue if they wish.[332] Certainly, lawyers should accurately and timely respond to written discovery regarding fact witnesses' compensation or employment.[333] If witnesses are directly asked about their compensation in depositions and answer inaccurately, the lawyers producing them for their depositions must correct their testimony.[334] If a witness is not asked about her compensation in a deposition and it has not previously been revealed in some other context or form, the lawyer producing the witness for the deposition may want to consider revealing the compensation arrangement before the deposition is adjourned, so that any party that wants to explore the subject is then able to do so.

Setting aside for a moment the clearly improper practice of paying fact witnesses solely for their testimony, paying a fact witness only for the reasonable value of her time and expenses incurred in testifying at a deposition, trial, or other proceeding is rarely controversial.[335] Most battles arise out of consulting arrangements in which witnesses devote significant time to case preparation, or to otherwise assisting in some fashion, the lawyers for the party paying them.[336] Even so, lawyers may wish to disclose all fact witness compensation agreements, no matter how obviously reasonable or innocuous, simply to avoid accusations of misconduct by aggressive adversaries.

V. CONCLUSION

The ASPCA paid dearly for employing Tom Rider to help it champion the ethical treatment of circus elephants.[337] Most cases in which lawyers or parties pay fact witnesses for their services are much tamer. But the fact remains that compensating fact witnesses is a potentially perilous exercise. The general rule that lawyers and litigants may compensate fact witnesses for time spent testifying or preparing to testify, and may reimburse witnesses' associated expenses, so long as the amounts paid to or on behalf of a witness are reasonable, is not

332. *See* McRae & Nortman, *supra* note 117, at 34.
333. Hardaway, *supra* note 17, at 53.
334. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3), 3.4(b) (2013).
335. Villa, *supra* note 12, at 112.
336. *See* McRae & Nortman, *supra* note 117, at 32.
337. Gresko, *supra* note 1.

uniformly applied or reliably followed.[338] Unfortunately, this general rule, like others, has exceptions, and even in jurisdictions that regularly adhere to it, the reasonableness of fact witnesses' compensation is a recurring point of controversy. The best that can be said is that when it comes to compensating fact witnesses, the price is only sometimes right.

338. *See* McRae & Nortman, *supra* note 117, at 32 (noting that while most jurisdictions follow the ABA interpretations, allowing payment for fact witnesses, other states interpret their laws to disfavor these payments).

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