The number is obscene expressed in Lira much less dollars. You have paid sums in seven figures to a horde of accounting experts at $500 per hour to pour over the complex and detailed financial information that supports their opinions. It is expensive, but necessary work. And having shelled out these sums, you are neither surprised nor fiscally concerned that the former controller of your client, now retired and living in Europe, wants to be compensated to bring herself up to speed on the same documents to prepare for the deposition testimony you need to support the expert report and prove your case at trial.

A Witness Wants $400 an Hour And You Say Yes; Think Again

She is retired, but she did not fall off a radish truck. She knows that it will be more efficient for her to come back to the US rather than force you to travel to Europe for her deposition. She knows you don’t want to wade through Letters Rogatory. And she knows that her testimony is worthless to you if she does not first refresh her memory with a time-consuming review of the documents, a review you cannot expect her to make unless she volunteers the time. She knows the going rate for the time of professionals of her seniority. So she asks for $400 an hour plus expenses. Measured against the rates charged by your retained experts, factoring in the value of her full cooperation, her terms are so reasonable you give it not a second thought. Think again. Paying a witness to cooperate and make your life easier makes perfect sense. But it may also subject you to personal sanction. Can a witness require that she be paid for her cooperation? The answer is an unqualified “no.” But you want meaningful cooperation. Can you, even though she can’t make you do it, voluntarily give compensation? The answer is a resounding “uh, maybe.”

In 1961, the government began criminal and civil antitrust actions against General Motors charging monopolization of the diesel locomotive industry. Harold Hamilton, who retired in 1955 as the manager of that business, became a critical witness for GM. Hamilton “came out of his retirement and . . . devoted substantially all of his time and effort in assisting GM officials and its counsel . . . .” Hamilton v. General Motors Corp., 490 F.2d 223, 225 (7th Cir. 1973). Hamilton was compensated for out of pocket expenses, but when his widow learned he had not been paid for his time, she sued for reasonable compensation. The court found that Hamilton’s services were valuable to GM. The court found that it might be unfair that a non-expert witness such as Hamilton was asked to spend so much time without compensation. Unfair perhaps, but that’s the way it is. The cases are legion that a citizen has an absolute duty “to testify . . . for the compensation allowed by law,” and thus “a bargain to pay . . . a further sum for his attendance as a witness is invalid both on grounds of public policy and for lack of consideration.” Id. at 228.

Witnesses Cannot Demand, But You Can Pay Voluntarily

Hamilton addressed an attempt by the witness to require compensation; he could not, because no such agreement can be enforced. But does that mean you cannot voluntarily make such arrangements? Nope. When Goldstein sued Exxon for age discrimination and wrongful discharge, his former supervisor, Dr. Effron — now retired — became the critical witness. After two full days of deposition testimony, Dr. Effron requested compensation for the demands on his time before submitting to a third day. Exxon readily agreed and gave him a “consulting” agreement, which spelled out that the agreed upon compensation was in no way conditioned upon the outcome of his testimony. The court held that the compensation agreement was indeed unenforceable. Goldstein v. Exxon Research & Eng. Co., 1997 WL 580599 (D.N.J. 1997). But Goldstein’s victory was pyrrhic — the agreement might have been unenforceable, but it was not
improper. Goldstein’s remedy was limited to a ruling that the compensation agreement could be introduced in evidence to impeach Effron.

Most courts appear to draw the same distinction. A witness cannot require compensation but a court will not bar a voluntary agreement to compensate. See, e.g., Baker v. Taco Bell Corp., 163 F.R.D. 348 (D. Colo. 1995). Well, usually. In Fisher v. Ford Motor Co., 178 F.R.D. 195 (N.D. Ohio 1998), Ford was perfectly willing to pay compensation to three testifying physicians for their preparation and deposition time; the doctors, however demanded rates ranging from $450 to $1200 per hour, so Ford filed a motion asking to court to order a more reasonable rate of $250. Pigs get fed, hogs get slaughtered. The court ordered the doctors to appear for the statutory $40 subpoena fee. Likewise, in Haslett v. Texas Industries, Inc., 1999 U.S. Dist. LEXIS 9358 (N.D. Tex. 1999), the doctor-witness advised that he would be happy to testify — for $10,000 a day. The court noted that it is common practice in Texas to compensate non-party doctors for deposition time. But the court gave the doctor his choice of a reasonable rate or a measly subpoena fee. In fairness, we don’t know whether these doctors were greedy or merely trying to discourage the parties from taking them away from their patients. But it must have looked like greed to the court, and courts do not tend to reward avarice.

But wait. You cannot assume that you can agree to compensation until you have carefully checked the ethical rules of your jurisdiction. In Wisconsin, “inducements to witnesses that exceed their actual out-of-pocket losses would support findings of [ethical] violations.” State Bar of Wisconsin, Wisconsin Ethics Opinions E-88-9 (1990). In Wisconsin, and in similarly inclined jurisdictions, you could reimburse your controller for her travel expenses from Europe, but you could not pay any further compensation beyond the $40 statutory subpoena fee.

But other jurisdictions are more liberal. The modern, and apparently the prevailing trend, is that it is permissible to compensate a non-expert witness for expenses and the reasonable value of time expended in the preparation and attendance at a deposition or trial, so long as the payment is not made for the substance of the witness’ testimony or as an inducement “to tell the truth.” ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 96-402 (8/2/96). The Philadelphia Bar Association Professional Guidance Committee has ruled that “the most that can be paid to fact witnesses . . . is the witness’ reasonable expenses incurred in attending the . . . proceeding, such as parking and travel expenses, as well as reasonable compensation for his time, i.e., lost wages occasioned by the attendance.” Philadelphia Bar Association Professional Guidance Committee Opinion 94-27 (December 1994).

What constitutes reasonable compensation for lost time? Reimbursing a salaried worker who is docked for missing time is an easy case. But what of our retired controller? She is retired; her time is free. Can you pay her for lost time when she lost no actual income? Probably. In Goldstein, supra, Dr. Effron was retired; the court was not offended by the consulting agreement which contemplating payments at roughly his pre-retirement salary. But let’s mix it up a bit. Your controller made $80,000 her last year prior to retirement. At that salary, her hourly rate was $40-50. Yet she knows you are paying anyone with a B.S. in accounting $400 an hour and up. That’s what she wants to “cooperate.” Can you pay her ten times what she used to make? Maybe; maybe not.

**Payment For Lost Time Must Be Reasonable**

There are no hard and fast standards. But if the court feels that the compensation has crossed the line between reasonable compensation and improper inducement, it will find an ethical violation and exclude the improperly induced testimony. In Golden Door Jewelry Creations, Inc. V. Lloyds Underwrighters, 865 F.Supp 1516 (S.D. Fla. 1994), Lloyds paid more than $600,000 to two individuals in the wake of a $9,000,000 theft, in part as a reward for information that helped to solve the crime, and in part to obtain the individuals’ cooperation for testimony. Golden Door did not object to the reward payments, but it asked the court to find that the witness payments were in violation of 18 U.S.C. § 201, which forbids payments to affect a witness’ testimony. The court declined to find a criminal violation, because it did not find any indication that the witness payments had resulted in false testimony, a necessary element under § 201. But it did find that the magnitude of the payments was just too great to be reasonable and was therefore a violation of Florida ethics rules, which prohibit payment of “money or other rewards to witnesses in return for their testimony, be it truthful or not, because it violates the integrity of the justice system . . . .” Id. at 1526. The appropriate sanction, the Golden Door court found, was exclusion of the tainted testimony. Lloyds had paid $600,000 for an empty witness chair.

**Paid Testimony May Lead To Disciplinary Sanction**

But when you offer payments to witness, you don’t merely risk having the testimony excluded; you put your personal
neck on the line. Look — you know it is wrong to pay a witness to commit perjury. But make no mistake. It is equally wrong to pay a witness to tell the truth. And if you pay, you may pay with your license. Consider *In re Kien*, 69 Ill. 2d 355, 361-62, 372 N.E.2d 376, 379 (1977). Defense counsel interviewed the arresting officer prior to a suppression hearing. The officer said the truth was that he had found the weapon under the car seat rather than in plain view; but, said the cop, “You got to pay for the truth.” The lawyer paid. Boy, did he. He paid the officer $50. He paid the State by the suspension of his license for 18 months. The Illinois Supreme Court was unequivocal: “we will not tolerate payments of any sum of money by an attorney to witnesses . . . to secure or influence testimony, whether it be for the purpose of securing truthful testimony or otherwise.”

Improper compensation may not always be measured simply in dollars. In *State of New York v. Solvent Chemical Co.*, 166 F.R.D. 284 (W.D.N.Y. 1996), Solvent paid an important witness, Mr. Beu, $100 an hour for his time and reimbursed his travel expenses. No problem. But the court did have trouble with the side agreement under which Solvent settled other litigation involving Beu and indemnified him against third-party claims. The court ordered production of the consulting agreement so that it could be used for impeachment.

**Try To Avoid Paying Compensation For Testimony**

The simple fact is that you should avoid providing compensation beyond mileage and subpoena fees to fact witnesses if at all possible. If you pay more than the statutory minimum, your witness will be subject to impeachment at best; at worst, the testimony will be excluded and you will be sanctioned. Many witnesses will ask for compensation, but fewer will actually require it. Once they understand the practical, legal and ethical problems with compensation, many witnesses will simply withdraw the request. Most witnesses, even if they approach their testimony with reluctance, will want to do their best. The very reason that your controller can legitimately ask for compensation — that she is a professional — will make her act professionally even without compensation. When you must, provide compensation. But try to limit it to genuine out of pocket expenditure or loss; and where you pay for lost time, be sure that the rate of compensation is rational and reasonable. To be on the safe side, you may even wish to alert opposing counsel in advance or seek guidance from the court. Adhering to ethical rules is always your duty as a lawyer; but following these rules is not merely the right thing to do, it is the best way to help you present and win your case. Just be sure that if you must pay for testimony, it is a price you can afford.

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Contacts:

**JEROLD S. SOLOVY**  
Chairman of the Firm  
Office: (312) 923-2671  
Fax: (312) 840-7671  
Email: jsolovy@jenner.com

**ROBERT L. BYMAN**  
Partner  
Office: (312) 923-2679  
Fax: (312) 840-7679  
Email: rbyman@jenner.com

This article first appeared in the November 8, 1999, edition of *The National Law Journal*. 

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