Compensation of unemployed or retired nonexpert witnesses for testifying

Question

Under circumstances in which a retired or unemployed nonexpert witness must spend a substantial, but reasonable and necessary, amount of time in preparation, travel and/or testifying, may a lawyer compensate the witness for his or her time at a rate that would approximate the hourly wage that the witness would be earning if he or she had not been unemployed or retired?

Opinion

Reaffirming our opinion as stated in Formal Opinion E-88-9 [61 Wis. B. Bull. 18 (Nov. 1988)], "(generally) it is permissible . . . to pay reasonable amounts to witnesses to compensate for lost wages incurred in testifying, and for travel and similar expenses, and to pay [any lawful] witness fee.’ C. Wolfram, Modern Legal Ethics (1986) at 651.

Although unemployed or retired persons would, by definition, not lose "wages" as a result of being a witness, they obviously are deprived of time that would otherwise be devoted to other endeavors. When the amount of time reasonably required of such a witness is substantial, we believe that it should be proper to reasonably compensate the witness for his or her loss of time, unless, of course, such compensation is prohibited by law. SCR 20:3.4(b).

Whether such compensation would be "reasonable" if based upon an unemployed or retired person’s usual wage when working, however, is not a question that this committee can definitively answer. We believe that this determination would have to be made on a case-by-case basis. See Formal Opinion E-88-9.