

So, You Want to Pay a Fact Witness?

A Decision Likely Needed Sooner Rather than Later

Can you pay a fact witness? It's a question that every lawyer confronts at some point. On its face, the question seems problematic because the payment is in exchange for favorable testimony. Plus, under Pennsylvania Rule of Professional Conduct 3.4, it appears that paying fact witnesses is prohibited.

In reality, however, there are circumstances when payments to fact witnesses are permissible. Let's consider the situation and recent guidance from the Pennsylvania Bar Association (PBA) and other ethics committees.

The analysis begins at RPC 3.4(b), which says that a lawyer shall not "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." The Rule permits a lawyer to "pay, cause to be paid, guarantee or acquiesce in the payment of (1) expenses reasonably incurred by a [fact] witness in attending or testifying; [and] (2) reasonable compensation to a [fact] witness for the witness's loss of time in attending or testifying."

In Formal Opinion 2019-100 (December 3, 2019), the PBA Committee on Legal Ethics and Professional Responsibility concluded the Rules do not prohibit a lawyer from paying reasonable compensation to a fact witness for the time devoted to preparing to testify and for compensating the witness for expenses incurred in connection with the testimony. The Opinion notes, however, "What is 'reasonable' compensation or reimbursement will vary depending upon the unique circumstances of each case, subject, however, to RPC 3.4(b)'s express prohibition against payment of compensation that is 'contingent upon the content of the witness' testimony or the outcome of the case.'"

So, what is reasonable? According to the PBA Opinion, "The compensation and reimbursement arrangement must



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necessarily be transparent, as it will potentially be subject to disclosure, either during the discovery process or during cross-examination." In concluding that the Rule permits compensation for time devoted in preparing and presenting testimony, the Opinion explains that providing competent representation under RPC 1.1 includes the time spent preparing a witness, as well as time spent by the witness reviewing documents and other materials, as well as pre-testimony preparation.

Formal Opinion 2019-100 affirms Philadelphia Bar Association Professional Guidance Committee Opinion 2014-2 (June 2014), in which the Committee concluded that RPC 3.4(b) permits reasonable, transparent compensation for witness preparation. The PBA Opinion also builds upon the American Bar Association Standing Committee on Ethics and Professional Responsibility's Formal Opinion 96-402, in which the ABA Committee declined to create a distinction between compensating a witness for

time spent attending trial or deposition and time spent during pretrial interviews and preparation: "As long as it is made clear to the witness that the payment is not being made for the substance or efficacy of the witness's testimony, and is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony in litigation in which the witness is not a party, the Committee is of the view that such payments do not violate the Model Rules."

Each opinion emphasizes that a lawyer must make it clear that compensation is for time spent, not the substance of the testimony. In other words, lawyers must inform witnesses to "tell the truth."

One remaining twist, however, remains the question of whether a lawyer may compensate professional fact witnesses—that is, attorneys and others whose professional rates are high. Only Florida, Georgia, Hawaii, Massachusetts, New York, Oregon, Pennsylvania, Tennessee, Texas, and Virginia have

clarified or revised the language of Model Rule of Professional Conduct 3.4(b) to include compensation for professional fact witnesses. Under the Model Rules, Rule 3.4(b) merely prohibits an attorney shall not “falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.” New Jersey has adopted this version of the Rule, for example.

Although Pennsylvania courts have not confronted the issue of witness compensation, the Florida Supreme Court addressed the issue in the context of attorney fact witnesses in *Trial Practices, Inc. v. Hahn Loeser & Parks, LLP*, 260 So. 3d 167 (Fla. 2018). In this case, which involved a breach of a litigation consulting agreement, the fact witnesses at trial included attorneys previously involved in the lawsuit, an accountant, and other attorneys. The Florida Supreme Court approved the compensation, noting that Florida’s version of Rule 3.4 “permits a party to pay a fact witness for

the witness’s assistance with case and discovery preparation that is directly related to the witness preparing for, attending, or testifying at proceedings.”

In short, the consensus is that attorneys may compensate fact witnesses, including professional fact witnesses, for the reasonable time devoted to their testimony, as well as their reasonable expenses. Attorneys who do should document the nature of the expenses, confirm that the compensation is for time and actual expenses, and not the substance of the testimony. ■

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