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## ATTORNEYS' FEES

### **Paying a Witness's Attorneys' Fees: The ABCs of an Ethical Inducement Are ETHICS**



BY TIMOTHY M. BROAS & ADAM S. NADELHAFT

In both civil and criminal litigation, attorneys seek to interview third-party witnesses. In civil litigation, a witness interview gives an attorney a chance to speak to a witness without the other side being present. And in a criminal proceeding, in most jurisdictions, attorneys have no right to depose a witness. Many witnesses, however, may not want to speak to an attorney in the absence of their own lawyer, and only if their attorneys' fees are covered. But is paying a witness's attorneys' fees an ethical violation?

The American Bar Association Model Rules of Professional Conduct state that "it is not improper to pay a witness's expenses . . . [but] the common law rule in

most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying."<sup>1</sup> This creates more questions than answers.

Under the ethical rules, is it appropriate to pay the legal fees of a lawyer who represents a witness during an interview? Clearly attorneys' fees are a witness's expense, but do the rules contemplate such fees or are they focused on smaller expenses like gas mileage or parking fees? Further, does such a payment constitute offering a "fee for testifying" as outlined in Model Rule 3.4 and the rules of 49 states and the District of Colum-

<sup>1</sup> Model Rules of Professional Conduct ¶ Rule 3.4 (Comment 3).

bia bar associations that have adopted it—with the exception of California?<sup>2</sup>

This article will closely examine ABA guidance and decisions by various state bar associations that have taken up the question or similar questions, focusing on the ethical rules without considering whether state or other laws would prohibit such payments.

The ABA has not taken up the question of paying a witness's attorneys' fees, but it has provided guidance regarding the appropriateness of paying a witness's expenses. It has interpreted Rule 3.4 to allow for the compensation of a nonexpert witness's loss of time, on the basis of two considerations: (1) compensation cannot be conditioned on the content of a witness's testimony; and (2) compensation must be reasonable.<sup>3</sup> This decision, while not specifically discussing the payment of attorneys' fees, provides the same rationale that state bar associations have used for allowing the payment of those fees.

The ABA considered whether it is an ethical violation for an attorney to compensate a witness for her loss of time in attending either a deposition, a trial, or a meeting to prepare for her testimony. It held that the precursor to Rule 3.4, DR7-109 of the Model Code of Professional Responsibility, expressly permitted reasonable compensation to a witness for her loss of time. "There is nothing in the history of Rule 3.4 to indicate that the drafters of the Model Rules intended to negate this concept," the ABA said.<sup>4</sup> In fact, a witness may also be compensated "for time spent in reviewing and researching records that are germane to his or her testimony, provided, of course, that such compensation is not barred by local law."<sup>5</sup>

The ABA held that such a payment must be reasonable, "so as to avoid affecting, even unintentionally, the content of a witness's testimony."<sup>6</sup> Reasonableness is determined on a case-by-case basis:

What is a reasonable amount 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, loss of hourly

<sup>2</sup> See [http://www.abanet.org/cpr/mrpc/chron\\_states.html](http://www.abanet.org/cpr/mrpc/chron_states.html) (last visited July 6, 2010). California's rule is much like Rule 3.4 and very similar to its precursor, DR7-109 of the ABA Model Code of Professional Responsibility. See California Rules of Professional Conduct Rule 5-310(B).

<sup>3</sup> See ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 96-402 (1996).

<sup>4</sup> *Id.* at 2

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 3.

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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.<sup>7</sup>

While the ABA has not dealt with the question, several state bar associations have considered the propriety of paying a witness's attorneys' fees. These states have held that paying such fees is permissible under Rule 3.4 so long as they are limited to the witness's participation in the proceeding and were not an inducement for particular testimony.

The most recent decision was from South Carolina in 2008, where the Ethics Advisory Committee found no ethical prohibition in paying the attorneys' fees for a witness interview prior to a criminal trial where the witness was expected to testify for the government.<sup>8</sup> The Ethics Advisory Committee held that as long as it was made clear to the witness that the payment of the attorneys' fees was not being made for the substance of the witness's testimony, and such a payment was otherwise legally permissible, there was no ethical violation.<sup>9</sup>

In 2002 the Florida Bar Association dealt with the same question in the civil context.<sup>10</sup> A law firm represented a company that sold several businesses to another company that were later sold to a third company. Pursuant to an indemnity agreement, the first company became involved in a lawsuit arising from the sale of its businesses. A number of former employees of the businesses were necessary and vital witnesses, and one of these former employees retained counsel to advise him of possible liability. His counsel sought reimbursement for fees and costs related to the interview before the law firm representing the company could speak to him. The Professional Ethics Committee determined that the law firm could pay the witness's reasonable attorneys' fees, as long as they were limited to those incurred for the witnesses attending or testifying in a proceeding. "The payment or provision of counsel to a third-party witness should not be viewed as a payment to influence the content of a witness' testimony," it said.<sup>11</sup>

This question has also been reviewed in instances where a witness would not testify at a deposition unless his attorneys' fees were paid.<sup>12</sup> In Delaware, a plaintiff in a civil action noticed the deposition of a former employee of a defendant corporation. The former employee expressed a reluctance to testify at the deposition without counsel representing his interests and requested that the plaintiff pay his expenses in retaining counsel. The plaintiff's counsel sought an ethics opinion as to whether it would be appropriate for the plaintiff to pay these legal expenses. The Committee on Professional Ethics stated that such a payment was permitted so long as it "would not be in any way contingent upon the outcome of the Former Employee's testimony or the Litigation and [the] Attorney neither knows or has any reason to believe that the content of the Former

<sup>7</sup> *Id.*

<sup>8</sup> See South Carolina Ethics Advisory Opinion 08-05 (July 28, 2008).

<sup>9</sup> *Id.* at 2

<sup>10</sup> See Florida Bar Staff Opinion 23940 (July 3, 2002).

<sup>11</sup> *Id.* at 3 (quoting New York County Opinion 729 (2000)).

<sup>12</sup> See Delaware State Bar Association Committee on Professional Ethics Opinion 1994-1 (Feb. 14, 1994); Alabama State Bar Ass'n Opinion, 82-699 (Jan. 5, 1983).

Employee's testimony is in any way contingent upon the payment and retention of such fees and expenses."<sup>13</sup>

The Committee on Professional Ethics further held that "whether or not a payment to a witness is 'contingent' is essentially a question of fact," and that based on the facts before it, the payment of attorneys' fees would not induce the witness to testify in a particular way.<sup>14</sup> It was important, in this instance, that the plaintiff invited the defendant to share in the costs of the attorneys' fees because it "further reduces any risk to the integrity of the testimony sought that might otherwise arise by reason of the proposed payments."<sup>15</sup>

The Alabama State Bar Association also considered the same question under Rule 7-109, the predecessor to Rule 3.4.<sup>16</sup> It stated that there would be no ethical impropriety in paying a "lawyer's fee" to a witness whose deposition the attorney proposed to take so long as (1) the attorney neither knew nor had reason to believe that the content of the witness's testimony was contingent on the payment of the fee, (2) the payment and retention of the fee was not contingent on the outcome of the lawsuit, and (3) the attorney obtained an affidavit from the witness and/or his lawyer setting forth his actual expenses, the amount claimed by his lawyer, and the nature of the lawyer's services rendered.<sup>17</sup>

### Six ETHICS Steps to Remember Before Agreeing to Pay A Witness's Attorneys' Fees

Our research suggests it is permissible for an attorney to pay a witness's attorneys' fees for an interview, deposition, and for advance trial preparation in most states. Such payment, however, must be "reasonable" and only for attorney expenses that are directly related to the witness's testimony. We've devised six issues to consider before offering to pay a witness's attorneys' fees. To remember these steps, simply think **ETHICS**.

**E - Explain** to the witness and her lawyer that the lawyer's fees are being paid *only* to cover a witness's expenses and are not an inducement for her testimony. The witness must understand that the payment of her attorneys' fees is not being offered to secure any particular testimony favorable to your client. She must understand that you are simply covering her legal expenses and that, at all times, she must be truthful. You will likely have this conversation through the witness's lawyer, so it is important to make sure the witness's lawyer understands what you are offering and that she explains it thoroughly to her client.

**T - Type** an agreement between you, the witness, and her attorney. To be certain that a witness under-

stands why her attorneys' fees are being paid by you, the safest course would be to memorialize the explanation in a written agreement with the witness and her lawyer. The agreement would state that the party is paying only for a witness's reasonable attorneys' fees, and that the witness understands it is neither an inducement nor a payment for her testimony. Obviously, there may be tactical reasons why memorializing such an agreement would not be the best strategy. And a written agreement does not appear to be required. In terms of demonstrating that there was no ethical violation, however, a written agreement would be reliable evidence of your intentions.

**H - Help** from your state bar association. If your state bar association does not have a published opinion on point, seek an advisory opinion from your state bar on the particular facts of your case. The state bar decisions discussed in this article were products of lawyers who asked their state bar associations for advice.

**I - Identify** your intentions to your adversary. This does not appear to be a necessary step, although the Delaware Bar identified it as an important factor under the specific facts before it<sup>18</sup> and it could go a long way toward demonstrating that the payment of legal fees was not an inducement for particular testimony. When considering whether to take this step, you should weigh whether informing the other side of your intentions may actually open you up to greater scrutiny. Ask your state bar association if this step is necessary.

**C - Carefully** review the witness's attorneys' fees. After making an agreement to pay a witness's attorneys' fees, review the attorney's invoices meticulously. Make sure that *all* the fees were directly related to the witness's testimony. Any items that appear to be outside the scope of a witness's testimony should be rejected.

**S - State statutes** and other applicable laws. Rule 3.4 states that a lawyer shall not "offer an inducement to a witness that is prohibited by law." Thus, it is important to determine that paying a witness's attorneys' fees is permissible under your jurisdiction's laws. Remember that all the guidance discussed in this article addresses only an attorney's ethical obligations and assumes that no laws were being violated.

In sum, paying the attorneys' fees for a third-party witness may be your only recourse to gain access to an essential witness. But before doing so, following these six ETHICS steps can help assure that you are following your bar's ethical obligations. These measures will demonstrate that you have taken precautionary steps in good faith and that your payment of a witness's attorneys' fees was not used to influence the witness's testimony.

Simply remember ETHICS.

<sup>13</sup> Delaware State Bar Association Committee on Professional Ethics Opinion 1994-1 at 2.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.* at 6.

<sup>16</sup> Alabama State Bar Ass'n Opinion, 82-699 (Jan. 5, 1983).

<sup>17</sup> *Id.*

<sup>18</sup> See Delaware State Bar Association Committee on Professional Ethics Opinion 1994-1, at 6.