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Is it Okay to Pay Fact Witnesses?

by Keith A. Call

One of my mothers (I claim two of them) is a proud United States Marine and veteran of WWII. Because women were not allowed to be combat Marines, she was assigned to an office job in Washington, D.C. under a 1940s' slogan, "Be a Marine, Free a Marine to Fight."

In addition to being part of the Greatest Generation, she is also a child of the Great Depression. She wastes nothing, lives almost richly on social security, and would consider an \$18 witness fee to represent a sinfully extravagant lunch. To her, the thought of paying a witness anything more might conjure up thoughts of bribery.

To the modern witness, however, an \$18 dollar witness fee and a day off work could present an extreme

financial hardship, or at least an inconvenience. Do the ethical rules allow you to pay fact witnesses more than the standard \$18 witness fee? When would such compensation be unlawful bribery? These questions arise in varying contexts, the most common being a situation where a critical fact witness is a former employee of a corporate litigant. Should such a witness be expected to spend numerous hours assisting with the case without remuneration?

The Rule

The governing rule is 3.4(b) of the Utah Rules of Professional Conduct. It says, "A lawyer shall not...offer an inducement to a witness that is prohibited by law." Utah R. Prof'l Conduct 3.4(b). Comment [3] adds this guidance: "[I]t is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law." *Id.* R. 3.4, cmt. [3].

Interpretation and Application

Utah cases addressing this issue are sparse or non-existent. The Utah Court of Appeals has ruled that payments over and above the standard witness fee are not recoverable as "costs." *Stevensen 3rd E., LC v. Watts*, 2009 UT App 137, ¶¶ 63–64, 210 P.3d 977. Beyond this (at least to this author's knowledge), no other Utah Court has touched upon the ethics of compensating fact witnesses.

Utah's Rule 3.4 is identical to the ABA's Model Rule. Comment

[3] to the Model Rule includes a sentence that was omitted from Comment [3] to Utah's version of the Rule: "The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee

for testifying..." ABA Model R. of Prof'l Conduct 3.4, cmt. [3]. The omission of this sentence from Utah's rule seems to indicate that Utah's drafters did not find anything in Utah's common law that prohibits paying an occurrence witness an appropriate fee.

The ABA Standing Committee on Ethics and Professional Responsibility has opined that a lawyer may compensate a fact witness for time spent attending deposition and trial and for

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time spent preparing to testify. The opinion warns, however, that the payment cannot be conditioned on the content of testimony and the amount of compensation must be reasonable. The opinion wisely advises the lawyer to make it clear to the witness that payment is not being made for the substance or efficacy of the testimony and that truth is expected notwithstanding any payment. ABA Commission on Ethics and Professional Responsibility, Formal Op. 96-402 (1996).

Many jurisdictions allow lawyers to pay fact witnesses for expenses and time according to these principles. The amount that is considered “reasonable” will depend on the facts of the case. A New York court held it was reasonable to pay an orthopedic surgeon \$10,000 for time spent at the courthouse as a fact witness in a personal injury case, although it noted that the jury should have been given specific instructions regarding possibility of bias. *Caldwell v. Cablevision Sys. Corp.*, 925 N.Y.S.2d 103, 109–10 (N.Y. App. Div. 2011), *aff’d*, 984 N.E.2d 909 (N.Y. 2013). A Michigan court allowed payments of \$85 per hour, plus expenses, for a retired “general manager [of] contracts” pursuant to an agreement to assist with regulatory and other litigation. *Consolidated Rail Corp. v. CSX Transp., Inc.*, No. 09-cv-10179, 2012 WL 511572, at **3, 7, 13 (E.D. Mich. Feb. 16, 2012).

On the other hand, a \$1 million “bonus” for a fact witness,

depending on the usefulness of the testimony, is over the line, and resulted in professional sanctions against the lawyer. *Florida Bar v. Wobl*, 842 So.2d 811, 812–15 (Fla. 2003) (per curiam); *see also Comm. on Legal Ethics v. Sheatsley*, 452 S.E.2d 75, 77–80 (W.Va. 1994) (lawyer disciplined for participating in or acquiescing to improper payments by client to fact witness). Cases like *Wobl* demonstrate that contingent fees, bonuses, and excessive fees for fact witnesses are clear “no-nos” and can result in professional sanctions. Other courts have excluded testimony as a sanction for improper witness payments. *See, e.g., Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass’n*, 865 F. Supp. 1516, 1526 (S.D. Fla. 1994), *aff’d in part*, 117 F.3d 1328 (11th Cir. 1997). Practitioners will also want to become familiar with federal and state bribery statutes and steer far clear of those. *See, e.g.*, 18 U.S.C. § 201 (bribery of public officials and witnesses); Utah Code Ann. § 76-8-508 (tampering with witnesses-receiving or soliciting a bribe).

Conclusion

Without binding Utah precedent, these are uncharted waters. But it appears that some forms of fact witness compensation are allowed, provided you make it clear the payment is to compensate for time (not testimony) and provided you use some measure of Mom’s frugality.



Even minds we don't understand grow beautiful things.

Let's rethink mental illness.

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