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Committee on Professional Ethics

NYSBA

Opinion #547 - 11/29/82 (39-82)

Topic: Witnesses, compensation.

Digest: Guidelines for payment of compensation to non-expert witnesses.

Code: DR 7-109(C)(2).

QUESTION

May an attorney compensate a non-expert witness for the reasonable value of his time spent in preparing for trial as well as in attending or testifying?

OPINION

Under DR 7-109(C)(2), a lawyer is permitted to pay "[r]easonable compensation to a [non-expert] witness for his loss of time in attending or testifying." Notwithstanding, many attorneys regard the payment of money to lay witnesses beyond the nominal statutory fees with extreme caution. This guarded approach is understandable. Attorneys have been disbarred for conduct, especially the payment of money, which "in the slightest degree tends to induce witnesses to testify in favor of their clients" (Matter of Robinson, 151 App. Div. 589, 600 (1912), aff'd, 209 N.Y. 354 (1913); see Matter of Shapiro, 144 App. Div. 1 (1911)). Corbin describes the situation as presenting something of a dilemma: "Bargains for the payment of compensation for the collection of evidence or for testifying in a judicial proceeding may be reasonable and lawful; but it is easy to make such a bargain in a manner that will tend to the production of fraudulent evidence and to the giving of falsely colored testimony as well as to outright perjury. In extreme cases, such a bargain amounts to the crime of subornation of perjury; but many bargains made with no criminal intent are illegal because of their tendency to affect injuriously the administration of justice." (6A Corbin on Contracts, § 1430 (West Publishing Co., 1951)). And Wigmore, while acknowledging the plausibility of arguments favoring witness compensation, takes the view that "the testimonial duty, like other civic duties, is to be performed without pay, the sacrifice being an inherent burden of citizenship . . . . Any other principle would be worthy only of a purely mercenary community." (8 Wigmore, Evidence, § 2202 (McNaughton Rev., 1961)).

What is reasonable, and therefore permitted, should

first be considered in terms of what is expressly forbidden under the DR, namely, "the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case." The prohibition does not reach so far as what some authorities say is a public policy against enforcement of contracts providing for any compensation to a witness in excess of that fixed by statute (see, 65 NY Jur., Witnesses, § 3). Corbin explains the policy in the following terms: "[S]uch extra compensation is almost certain to affect the attitude of the witness and to color his testimony, consciously or unconsciously. This is true even though there is no perjury and no intention to induce perjury. Doubtless such bargains are not very effectively discouraged by merely declaring them to be illegal and unenforceable; but as in many other cases it is better than nothing, especially when the attempt to enforce more drastic penalties would fail." (Corbin on Contracts, supra).

A contract for the payment of compensation above the statutory fees for attending as a witness and testifying may be unenforceable in New York because it is contrary to public policy. That is a question of law on which the Committee will not pass. The Committee will comment, however, that it is aware of only one New York appellate court which has flatly said as much (Clifford v. Hughes, 139 App. Div. 730, 731 (1910), citing Cowles v. Rochester Folding Box Co., 81 App. Div. 414 (1903), aff'd, 179 N.Y. 87, 92 (1904) and Lyon v. Hussey, 82 Hun. 15 (1894)), although in the very same case the contract was held enforceable insofar as the witness sought "fair compensation" for "attending and conferring" with counsel "prior to trial" (Clifford v. Hughes, supra, at 732). Another appellate court has stressed that "[i]t is the element of payment contingent on the success of the litigation in which the evidence is to be produced, or the fact that the agreement is to procure evidence not of facts as they exist, but of particular facts necessary to the success of the party litigant who contracted for their production, which vitiates the contract. It is the contingency on the one hand and the agreement to furnish a given set of facts essential to a successful litigation on the other . . . which has impelled the law, with wisdom, to declare such contracts illegal." (Bergoff Detective Service, Inc. v. Walters, 239 App. Div. 439, 443-44 (1933); accord, Matter of Shapiro, supra; Matter of Robinson, supra.)

Under the express terms of the DR, it is the latter standard which defines the ethical propriety, if not the legal enforceability, of agreements to compensate witnesses. Thus Drinker explains: "A lawyer may not agree to pay a contingent fee to a witness, nor advertise for a witness to testify to a stated fact; although he may advertise for wit-

nesses to a particular event or transaction." (Drinker, Legal Ethics, p.86 (1953)).

What is reasonable should also be considered in terms of what is expressly permitted under the DR, namely, compensation "for loss of time in attending or testifying." The Committee is of the opinion that the word "testifying" introduces a note of ambiguity into the rule -- the one thing that an attorney may not pay for is particular testimony (Matter of Shapiro, supra, at 9-10) -- and would read the phrase thus: "for loss of time in testifying or in otherwise attending court proceedings and preparing therefor." It is the witness's attendance, i.e., his "loss of time," not his "testimony," that is the quid pro quo for payment (see Griffith v. Harris, 17 Wis. 2d 255 (1962), cert. den., 373 U.S. 927 (1963)).

Loss of time must therefore be translated into dollars. Clearly, a witness who earns a salary for his livelihood may be paid an amount equivalent to his lost wages. Problems may arise when the witness is self-employed or is compensated on a commission basis, or when weekends and night-hours are devoted to preparation, and in that event, closer consideration should be given to the matter of assessing the amount to be paid. But even recreation time is susceptible to valuation. Attorneys are frequently called upon to elicit proof of unliquidated damages, and should not feel at a loss in coping with the vagaries of the situation.

For the reasons stated, the question posed is answered in the affirmative.
