



New York State Bar Association
Committee on Professional Ethics

Opinion 962 (3/18/13)

Topic: Payments to a witness for travel expenses and attorney's fees

Digest: A lawyer may arrange a client's payment of reasonable travel expenses and legal fees of a witness if such payment is not prohibited by law and is not contingent on the witness's testimony or the outcome of the case.

Rule: 3.4(b)

FACTS

1. The inquirer represents the proponent of a will who seeks the testimony of a witness to authenticate that will. Although the witness lives within the state, the witness resides several hours from the courthouse of the county where the probate proceeding is pending. In addition, the witness has requested that her counsel be present during the testimony.

QUESTIONS

2. May the lawyer for the proponent of a will ethically arrange the client's payment of travel expenses (air fare and hotel accommodations) for an in-state witness who has been asked to testify on behalf of the proponent?

3. May the lawyer for the proponent of a will ethically arrange for the client's payment of the legal fees of the in-state witness who has requested that her attorney be present for the examination?

OPINION

A. Payment of travel expenses

4. The Surrogate's Court Procedure Act §1404(5) states that the testator's estate shall ordinarily pay for the costs of the initial production and examination of the first two attesting witnesses within the state and, if necessary, a witness without the state who is closest to the county in which the probate proceeding is pending.

5. The Civil Practice Law and Rules ("CPLR") contains provisions on witness compensation. CPLR §8001(a) ("Any person whose attendance is compelled by a subpoena, whether or not actual testimony is taken, shall receive for each day's attendance fifteen dollars for attendance fees and twenty-three cents as travel expenses for each mile to the place of

attendance from the place where he or she was served, and return. There shall be no mileage fee for travel wholly within a city.”); CPLR §8001(b), (c) (additional fees in certain circumstances); CPLR §2303 (“Any person subpoenaed shall be paid or tendered in advance authorized traveling expenses and one day’s witness fee.”).

6. Rule 3.4 of the New York Rules of Professional Conduct (the “Rules”) is instructive in this matter. It states in part as follows:

“A lawyer shall not: ...

“(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the witness’s testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

“(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or

“(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses.”

7. Comment [3] to Rule 3.4 states that the above-quoted proscription “applies generally to any inducement to a witness that is prohibited by law. It is not improper to pay a witness’s reasonable expenses or to compensate an expert witness on terms permitted by law. However, any fee contingent upon the content of a witness’ testimony or the outcome of the case is prohibited.”

8. Prior opinions set forth the rationale underlying the predecessor to Rule 3.4(b), which was “to prevent compensation that would have a tendency to lead to the ‘production of fraudulent evidence and to the giving of falsely colored testimony as well as to [the prevention of] outright perjury.” N.Y. State 668 (1994) (citing N.Y. State 547 (1982)), *cited in Caldwell v. Cablevision Sys. Corp.*, __ N.Y.3d __, 2013 WL 451322 (2013). “We must attempt to draw the line between compensation that enhances the truth seeking process by easing the burden of testifying witnesses, and compensation that serves to hinder the truth seeking process because it tends to ‘influence’ witnesses to ‘remember’ things in a way favorable to the side paying them.” N.Y. State 668 (1994).

9. Rule 3.4 proscribes witness inducements that are “prohibited by law.” While we do not opine on legal questions, we note case law indicating that “the fee set forth in CPLR 8001(a) is a minimum fee,” *Caldwell v. Cablevision Sys. Corp.*, __ N.Y.3d __, 2013 WL 451322 (2013) (citing commentary that “payment of more than the \$15 daily fee is not precluded under either the law or code of ethics,” but holding that in some circumstances high fees may warrant a jury charge); *In re Feinberg*, 2012 WL 4748323 (Sur. Ct. Queens Co. 2012) (“Although a witness need not be paid more than the statutory attendance fee and mileage, there is nothing that expressly prohibits voluntary payments in excess thereof”).

10. The only other prohibition in Rule 3.4(b) applies to payments contingent upon testimony or outcome. *See* N.Y. State 714 (1999) (“What is reasonable, and therefore permitted, should first be considered in terms of what is expressly forbidden under the [predecessor rule], namely, the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case.”). No such contingency is intended or explicit under the terms of the inquiry made to us, nor do we think that any implicit contingency may be inferred from the terms of that inquiry.

11. The ABA ethics committee concluded that under Model Rule 3.4, a lawyer is permitted to “compensate a non-expert witness for time spent in attending a deposition or trial or in meeting with the lawyer preparatory to such testimony, provided that the payment is not conditioned on the content of the testimony and provided further that the payment does not violate the law of the jurisdiction.” ABA 96-402. The opinion also indicates that the lawyer should explain the basis of compensation, stating that such compensation would not violate the Model Rules “[a]s 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,” *id.*, or to reimburse “travel expenses, including lodging when an overnight stay is required,” *id.* n.3. Finally, the “amount of such compensation must be reasonable, so as to avoid affecting, even unintentionally, the content of a witness’s testimony.” *Id.*; *see Caldwell v. Cablevision Sys. Corp.*, __ N.Y.3d __, 2013 WL 451322 (2013) (although statutory fee “is only the minimum that must be paid to a subpoenaed fact witness, that does not mean that an attorney may pay a witness whatever fee is demanded, however exorbitant it might be”).

12. We agree with the implication of ABA 96-402 that reasonable payment for travel expenses can, consistently with the policy of the rule, ease the burden of testifying witnesses without tending to influence their testimony. Such amounts should be considered “reasonable related expenses” within the meaning of Rule 3.4(b)(1). Accordingly, a lawyer’s payment of such expenses on behalf of a client, though in excess of statutory fees, is not improper.

13. Although we cannot provide a bright line amount that on its face would be deemed to be an unreasonable payment to the witness, we can find some guidance: “As long as the reimbursement does not exceed the witness’s actual out-of-pocket expenses and does not fall outside the standard types of expenses (*e.g.*, travel, lodging, meals), it should generally be considered reasonable.” Roy Simon, *Simon’s New York Rules of Professional Conduct Annotated* 892 (2013 ed.); *cf. Caldwell v. Cablevision Sys. Corp.*, 86 A.D.3d at 52 (as to distinction between paying for lost time and paying for testimony, noting that payments that “are unreasonably high or disproportionate to the value of the time actually spent testifying can give rise to an inference that the payment was actually a fee for testifying, which carries with it the possibility that the witness will be unconsciously inclined to give testimony favorable to the party who has paid him or her”), *aff’d*, *Caldwell v. Cablevision Sys. Corp.*, __ N.Y.3d __, 2013 WL 451322 (2013).

B. Payment of legal fees

14. The witness has requested that her counsel be present during her examination. In order to determine whether the inquirer may arrange payment of the witness's legal fees, we again must consider whether, under Rule 3.4(b) and its policies, such payment should be considered compensation for reasonable expenses related to attending, testifying, preparing to testify or otherwise assisting counsel.

15. Another ethics committee, interpreting the predecessor to Rule 3.4, has addressed the question whether a lawyer could advance legal fees to a witness for purposes of an informal interview of that witness. The opinion pointed out that there are "a number of reasons why a witness may wish to be represented by counsel in an interview or in formal discovery proceedings," and saw "little risk that the presence of counsel to a witness will interfere with or hinder the truth seeking process." N.Y. County 729 (2000). In particular, the committee opined that the payment of counsel fees could not reasonably be expected to influence the witness's testimony, because such a payment "is of no use to the witness outside of the litigation." The opinion concluded that the legal fees were (in the words of the predecessor rule) "[e]xpenses reasonably incurred in attending or testifying," and that the lawyer could properly advance such expenses. *Id.*

16. We believe that although N.Y. County 729 was interpreting a predecessor rule, its reasoning and result are equally applicable to the very similar text and policies of Rule 3.4(b). Reasonable payment for legal fees should, like payment of travel expenses, ease the burden of testifying witnesses without tending to influence their testimony. Accordingly, reasonable legal fees may be "reasonable related expenses," payment of which is permitted by Rule 3.4(b)(1).

CONCLUSION

It is ethically permissible for an attorney, on behalf of the proponent of a will, to pay a witness's reasonable expenses related to testimony, including reasonable travel expenses such as air fare and accommodations, and also the witness's reasonable legal fees, as long as such payments are not contingent upon the witness's testimony or the outcome of the matter.

(70-12)