



**New York State Bar Association
Committee on Professional Ethics**

Opinion 997 (1/24/14)

Topic: Payment for evidence

Digest: A lawyer may in general pay for physical evidence in connection with contemplated or pending litigation, and such payment may be contingent on the outcome of the matter. There are limitations, however, such as when the transaction involves witness payments or the prospect of false evidence.

Rules: 1.1(c), 1.8(e), 3.4(b), 8.4(d)

FACTS

1. A lawyer represents a plaintiff in a personal injury action arising out of an automobile accident.
2. A store surveillance camera recorded the events at issue, apparently showing that the defendant's actions caused the accident. The storeowner has contacted the lawyer and has offered to provide the surveillance tape for a payment.

QUESTIONS

3. May a lawyer purchase video surveillance evidence from a third party on behalf of a client?
4. If a lawyer purchases such evidence, may the amount of the payment be contingent upon the outcome of the matter?

OPINION

5. This inquiry raises a narrow question regarding the propriety, under the Rules of Professional Conduct (the "Rules"), of purchasing physical evidence for use in contemplated or pending litigation. We therefore do not address various related but different questions about the acquisition or use of physical evidence.¹

¹ For example, we do not address the admissibility of the purchased evidence. Nor do we address factors bearing on a lawyer's choice between seeking to obtain evidence by purchase or subpoena. *See* CPLR 3122(d) ("reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery"). Moreover, this

6. Nothing in the Rules explicitly prohibits paying for evidence, nor do we perceive any implied prohibition. Such payment may, depending on the circumstances, be an appropriate means of advancing a client's interests. *See* Rule 1.1(c)(1) (lawyer shall not intentionally "fail to seek the objectives of the client through reasonably available means permitted by law and these Rules"); Rule 1.8(e), Cmts. [9B] & [10] (discussing rule that lawyer may not advance or guarantee financial assistance to client, subject to exceptions for court costs and litigation expenses, including "the costs of obtaining and presenting evidence").

7. However, while it is permissible in general for a lawyer to pay for evidence, particular circumstances may give rise to important limitations on that practice.

8. First is the prohibition of knowingly offering or using false evidence. *See* Rule 3.3(a)(3). A lawyer who knows that a surveillance videotape has been fraudulently altered may not offer or use that videotape. Nor may the lawyer evade that Rule by remaining willfully blind to the falsity of the videotape. *See* N.Y. State 993 ¶9 n.4 (2013) (addressing conscious-avoidance doctrine applied to ethics context).

9. Second, to offer the surveillance tape in evidence, the lawyer may need to offer foundation testimony by the person who has offered the tape for sale. When it is foreseeable that the lawyer will have occasion to call that person as a witness, either to authenticate the tape or for any other reason, then the lawyer will be subject to ethical limitations on witness payments:

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 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
...

Rule 3.4(b); *see* N.Y. State 962 (2013) (discussing "reasonable related expenses" permitted by Rule 3.4(b)(1)); N.Y. State 668 (1994) (discussing "reasonable compensation" as permitted by predecessor rule and also current Rule 3.4(b)(1)).

10. Of course a lawyer may not circumvent the restrictions of Rule 3.4(b) by disguising witness payments in whole or part as payments for physical evidence. On the other hand, the restrictions do not apply except to the extent that there is actual or proposed compensation to a witness. By the terms of the Rule, the limitations – including the prohibition of payment contingent on the matter's outcome – do not apply to purely physical as opposed to testimonial evidence.

11. Third, particular circumstances of payment for evidence could give rise to concerns about

opinion presumes that the evidence in question is acquired legally, and we do not address circumstances in which evidence is acquired in violation of another's rights, or acquired for purposes of alteration, suppression or other obstruction, which would require a separate analysis of the facts and circumstances under Rules 4.4 and 8.4, respectively.

the reliability of that evidence. Such concerns may be heightened when, for example, the evidence in question is readily susceptible to alteration that is difficult to detect; when the payment for the evidence seems disproportionately large; and when a person involved in the transaction otherwise acts in ways raising suspicion about the integrity of the evidence. On sufficiently extreme facts, the purchase in such a case could amount to an ethical violation. *See* Rule 8.4(d) (lawyer shall not “engage in conduct that is prejudicial to the administration of justice”). While we cannot specify in the abstract all the circumstances that could rise to the level of a violation, a trial court would be positioned to assess the facts of a particular case and fashion appropriate remedies. *Cf. Caldwell v. Cablevision Systems Corp.*, 20 N.Y.3d 365 (2013) (citing Rule 3.4(b), noting concern about “what appears to be a substantial payment to a fact witness in exchange for minimal testimony” and “such a disproportionate fee for a short amount of time at trial,” and concluding that trial court should have given a special jury instruction as to potential bias of the paid witness).

12. However, when these limitations are not triggered by particular circumstances, a lawyer may purchase surveillance video from a third party for use as evidence in contemplated or pending litigation. There is no requirement that the cost of purchasing evidence be charged to the client immediately, or in some cases, even ultimately. *See* Rule 1.8(e)(1)-(3) and Cmts. [9B] & [10] (providing that lawyer may “advance” expenses of litigation such as costs of obtaining evidence, “the repayment of which may be contingent on the outcome of the matter,” and may “pay” such costs for indigent or pro bono clients and in contingent fee matters).

CONCLUSION

13. A lawyer may in general purchase video surveillance evidence on behalf of a client for use in connection with contemplated or pending litigation. There is no per se rule against such payments being contingent on case outcome. The lawyer’s conduct may be subject to limitations, however, such as when the conduct also involves witness payments or the prospect of false evidence.