Compensation of Fact Witnesses: Rule 3.4(b) of The NH Rules of Professional Conduct

By the NHBA Ethics Committee
Practical Ethics Article: October 18, 1992

Upon occasion a lawyer discovers a fact witness who states or implies that he or she will testify at trial only if compensated for so doing. Even if the witness is within the subpoena power of the court, the lawyer may be reluctant to ignore the request. To do so might alienate the witness or make him or her hostile at trial.

This article discusses whether the New Hampshire Rules of Professional Conduct impose any limitation on the type of fee arrangement a lawyer may properly make with a fact witness.

THE GOVERNING RULE

Prior to the adoption of the New Hampshire Rules of Professional Conduct in February 1986, the conduct of lawyers in New Hampshire was governed by the New Hampshire Code of Professional Responsibility. The rule that regulated compensation of fact witnesses was DR 7-109. It provided:

A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of: (1) expenses reasonably incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for his loss of time in attending or testifying . . .

The corresponding ethical consideration, EC 7-28, stated that “witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise.”

DR 7-109 was replaced by rule 3.4(b) of the New Hampshire Rules of Professional Conduct, which in relevant part states:

A lawyer shall not . . . offer an inducement to a witness that is prohibited by law.

Plainly the language of rule 3.4(b) differs from DR 7-109, and its meaning seems straightforward: inducements “prohibited by law” are forbidden. The ABA Model Code Comments to rule 3.4(b), however, introduce ambiguity into the meaning of the rule:

The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against . . . improperly influencing witnesses.

With regard to paragraph (b), it is not improper to pay a witness’ expenses . . . The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fees for testifying . . .

While the touchstone is clear, fee arrangements must not influence a witness to do otherwise than tell the truth, the comment to paragraph (b) seems contradictory: “it is not improper to pay a witness’ expenses, “ but “[t]he common law rule” prohibits the payment of “any fees for testifying.”

Where does this leave the New Hampshire practitioner confronted by a fact witness who wants to be compensated? The Ethics Committee is of the opinion that rule 3.4(b) does not prohibit the reimbursement of fact witnesses for reasonable expenses actually incurred in testifying or for the loss of time.

THE COMMON LAW RULE: “THE PUBLIC HAS A RIGHT TO EVERY MAN’S EVIDENCE”

All citizens have a duty to testify if they have relevant evidence. It is a “public obligation” owed to society “no matter how financially burdensome it may be.” Hurtado v. United States, 410 U.S. 578, 589 (1973). As the Supreme Court explained in Blair v. United States, 250 U.S. 273, 281 (1919):

[It] is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public.

Originally, at common law, citizens were obligated to testify without any right to receive compensation. Indeed, an agreement to compensate a witness who was within the subpoena power of the court violated public
policy and was unenforceable. Annot., 16 A.L.R. 1433, 1437 (1922). The rationale for the common law prohibition was the difficulty of determining the motivation and reason for payment to a fact witness. This gave rise to a broad, prophylactic rule:

If large sums may be paid or promised to an ordinary . . . witness, and that in itself not be condemned, then in every case where it appears that money was so paid or promised the court will be confronted with the difficult, if not impossible, task of probing into the brain of the promisor to determine whether such promise was to induce the witness to testify to the truth or to a falsehood. It is contrary to the presumption of the law that a witness must be hired to speak the truth, and, although there may be cases where a witness refuses to testify to the truth without an inducement, if the rule be established that such inducement be permissible, the floodgates of fraud and bribery will be thrown wide.

In re O’Keefe, 142 P. 638, 641 (Mont. 1914)

Yet the common law rule was never understood to bar reimbursement of fact witnesses for expenses incurred in attending trial. As part of its work in drafting the model rules, the ABA published the Annotated Model rules of Professional Conduct (ABA 1984), the discussion and cases cited in the section on rule 3.4(b) make clear that the ABA intended to carry forward the rule that fact witnesses could be reimbursed for actual expenses and loss of time. cited In Re Robinson, 136 N.Y.S. 54, 556 (Sup. Ct. 1912) for that proposition:

To procure the testimony of witnesses, it is often necessary to pay the actual expenses of a witness in attending court and a reasonable compensation for the time lost . . . And there are many incidental expenses in relation to the prosecution or defense of an action at law which can with propriety be paid by a party to the action.

Id. at 226-227. However, compensation beyond the level of reimbursement would be improper. The Robinson court warned:

But, on the other hand, the payment of a sum of money to a witness to testify in a particular way, the payment of money to prevent a witness’ attendance at trial, the payment of money to a witness to make him “sympathetic” with the party expecting to call him. These are all payment which are absolutely indefensible, and which are really included in the general definition of subornation of perjury. The payment of a sum of money to a witness to “tell the truth” is as clearly subversive of the proper administration of justice as to pay him to testify to what is not true.

Id. Thus, the ABA Model Code comment to rule 3.4(b) should be understood to bar payment to a fact witness for testifying but not reimbursement of expenses incurred or lost time.

NEW HAMPSHIRE LAW

New Hampshire has long permitted fact witnesses to be reimbursed for travel expenses. In Gunnison V. Gunnison, 41 N.H. 121 (1860), the plaintiff sought to recover expenses incurred in traveling from Illinois to New Hampshire to attend trial. He had been subpoenaed while living in the state but thereafter moved. The defendant knew of his move, did not relieve him of the subpoena, and told him he still had to testify. Our court held that those facts gave rise to an implied promise to reimburse the plaintiff for his travel expenses less the statutory mileage fee he had received at the time he was subpoenaed. The plaintiff did not make a claim for lost wages, nor did the court suggest whether that would have been a proper item of reimbursement.

Today, the right of a fact witness to receive compensation for attendance at trial or deposition is established by statute. In Healy v. County. 70 N.H. 588, 589 (1900), the court stated: “Witnesses were compelled to attend court without pay at common law, and the fees given them by statute are not intended as compensation for testifying, but simply to pay their expenses while away from home.” RSA Ch. 516:16 (Supp. 1991) sets forth the compensation a witness is to be paid, including a fixed attendance fee and reimbursement for mileage.

Given the statutory attendance and mileage fees, does rule 3.4(b) bar an additional payment to a fact witness subject to subpoena where he or she incurs expenses in excess of the statutory fees? The court in Gunnison approved additional compensation to reimburse for travel expenses, but it did not consider lost wages or the loss of time.

THE INTERPRETATION OF RULE 3.4(b)

The only opinions interpreting rule 3.4(b) that address this issue are by the Wisconsin state bar ethics committee. It was asked if there was any limitations “placed on lawyers’ compensation of non-expert
After citing to rule 3.4(b), the committee approved the position of one commentator that it generally is permissible to pay reasonable amounts to witnesses to compensate for lost wages incurred in testifying, for travel and similar expenses, and to pay a customary witness fee.” C. Wolfram, Modern Legal Ethics § 12.4.6 (1986). See also Annotated Model Rules of Professional Conduct (ABA 1984) at 226-227. The Wisconsin ethics committee concluded that payments to fact witnesses that “exceed their actual out-of-pocket losses” would violate rule 3.4(b). Wisconsin Opinion E-88-9. Wisconsin thereafter reaffirmed and extended that ruling to retired or unemployed fact witnesses to compensate them for “a substantial, but reasonable and necessary amount of time in preparation, travel, and/or testifying.” The committee concluded:

Although unemployed or retired persons would, by definition, not lose “wages” as a result of being a witness, they obviously are deprived of time that would otherwise be devoted to other endeavors. When the amount of time reasonably required of such a witness is substantial, we believe that it should be proper to reasonably compensate the witness for his or her loss of time, unless, of course, such compensation is prohibited by law. Wisconsin Opinion E-89-17.

The Practicing Law Institute also has interpreted rule 3.4(b) as permitting a witness to be reimbursed for expenses and loss of time. But as to the latter, the Institute cautioned:

A third-party witness will sometimes refuse to cooperate unless he or she is “reimbursed” for his or her trouble. This is sometimes little more than a veiled attempt to extort a payment in return for cooperation, or even in return for favorable testimony. The witness’ cooperation is sometimes necessary because the witness cannot always be compelled to attend . . .

The Model Rules are more vague [than DR 7-109] -- a lawyer is prohibited from offering “an inducement” prohibited by law. Model Rule 3.4(b). The comment to the Model Rules states that it is “not improper to pay a witness’ expenses,” but notes that in most jurisdictions it is improper to pay an occurrence witness any fee for testifying.

Payment of a witness’ expenses is relatively uncontroversial. The tricky area is payment to a witness for his or her “loss of time.” A lawyer is not on safe footing in arbitrarily deciding that a witness’ time is worth some particular amount, e.g., $50 per hour. Rather, a lawyer must set a rate of reimbursement for which there is a solid basis. Further, unless the witness is actually taking time off work without pay, or self-employed and arguably passing up other employment to testify, the payment cannot properly be characterized as reimbursement for “loss of time.” See, e.g., Code EC 7/28 (payments should not exceed “financial loss incident to his being a witness”).

Practicing Law Institute, Litigation for the Non-Litigator: Role of the Corporate Lawyer in the Litigation Process 70-71 (1987)

CONCLUSION

The Ethics Committee concludes that the purpose of the common law rule is to bar payments to fact witnesses for their testimony, that is, payments to tell the truth, as distinguished from payments to reimburse for expenses incurred in giving testimony. RSA Ch. 516:16 (Supp. 1991) is consistent with and implements the common law rule by authorizing reimbursement for travel expenses, and by establishing a flat per diem fee to be paid in recognition that a witness probably will have other expenses. In situations, however where witnesses incur expenses greater than the statutory fee, including loss of time for which they are not compensated, the committee believes rule 3.4(b) permits a lawyer to reimburse such witnesses a reasonable amount for those additional expenses. It follows that where witnesses are beyond the subpoena power of the court, they too may be reimbursed for such expenses.

What is a reasonable amount, of course, cannot be stated by any single hard and fast rule. The lawyer should inquire into the particular facts and circumstances of the witness’ situation and apply a common sense analysis to the question. The difficult case will arise when the witness is not employed, spends substantial time to prepare for and give testimony, and wants to be compensated for his or her loss of time. How should that loss be valued? One approach is to determine what the witness most recently earned, or what people in the same occupation are being paid, and to adjust that amount for any special or unusual circumstances. If the lawyer makes the determination in good faith, keeping in mind the prohibition against improperly influencing a witness, the lawyer should avoid any problem under rule 3.4(b).