AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 96-402 **August 2, 1996**

Propriety of Payments to Occurrence Witnesses

A lawyer, acting on her client's behalf, may 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.

The Committee has been asked whether, under the Model Rules of Professional Conduct (1983, as amended), it is proper for a lawyer to compensate a non-expert witness for the reasonable value of the time expended by the witness while preparing for or giving testimony at a deposition or at a trial.

Model Rule 3.4 (Fairness to Opposing Party and Counsel) states that a lawyer shall not "(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law." Comment [3] to this Rule explains that "it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law," but that the "common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying."

Reading Comment [3] literally, compensating a witness for loss of time which he could have devoted to other pursuits does not constitute payment of an "expense" incurred by the witness. Nor, on the other hand, does compensating a witness for his loss of time amount to paying him a "fee for testifying." Indeed, the precursor of Model Rule 3.4, DR7-109 of the Model Code of Professional Responsibility, expressly permitted "[r]eason-

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This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the *predecessor Model Code of Professional Responsibility of the American Bar Association*. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

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able compensation to a witness for his loss of time in attending or testifying,"[1] and there is nothing in the history of Rule 3.4 to indicate that the drafters of the Model Rules intended to negate this concept by using the language that they did. In addition, such compensation is implicitly authorized by certain statutes and court decisions. See, for example, 18 U.S.C. Section 201(j), which provides that payments to lay witnesses for "the reasonable value of time lost in attendance at any such trial, hearing or proceeding" do not violate federal bribery statutes. The Committee therefore concludes that payment for loss of time is not prohibited by Model Rule 3.4.

The Committee also sees no reason to draw a distinction between (a) compensating a witness for time spent in actually attending a deposition or a trial and (b) compensating the witness for time spent in pretrial interviews with the lawyer in preparation for testifying, as long as the lawyer makes it clear to the witness that the payment is not being made for the substance (or efficacy) of the witness's testimony or as an inducement to "tell the truth."[2] The Committee is further of the view that the witness may also be compensated for time spent in reviewing and researching records that are germane to his or her testimony, provided, of course, that such compensation is not barred by local law.

The Committee notes that this particular question was raised in Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Opinion 95-126 (1995). Pennsylvania Rule 3.4(b) is based on DR 7-109(C) and permits both the payment of expenses

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1. DR 7-109(C) of the Model Code of Professional Responsibility stated:

> A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of:
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> (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.
>
> (3) A reasonable fee for the professional services of an expert witness.

2. Compare, in this regard, Prosecution Function, Standard 3-3.2 of the ABA Criminal Justice Standards, which states in relevant part:

> (a) A prosecutor should not compensate a witness, other than an expert, for giving testimony, but it is not improper to reimburse an ordinary witness for the reasonable expenses of attendance upon court, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interview. Payments to a witness may be for transportation and loss of income provided there is no attempt to conceal the fact of reimbursement.

"reasonably incurred by a witness in attending or testifying" and "reasonable compensation to a witness for the witness' loss of time in attending or testifying." The Pennsylvania Committee concluded that, while the Pennsylvania rule does not expressly forbid payments to fact witnesses for preparatory work such as reviewing documents before testimony, that rule "can be read to disfavor compensation to non-expert witnesses for time invested in preparing for testimony."

The Committee does not construe Model Rule 3.4 that narrowly. As 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 in litigation in which the witness is not a party, the Committee is of the view that such payments do not violate the Model Rules.[3]

Nevertheless, the amount of such compensation must be reasonable, so as to avoid affecting, even unintentionally, the content of a witness's testimony. What is a reasonable amount is relatively easy to determine in situations where the witness can demonstrate to the lawyer that he has sustained a direct loss of income because of his time away from work—as, for example, loss of hourly wages or professional fees. In situations, however, where the witness has not sustained any direct loss of income in connection with giving, or preparing to give, testimony—as, for example, where the witness is retired or unemployed—the lawyer must determine the reasonable value of the witness's time based on all relevant circumstances. Once that determination has been made, nothing in the Model Rules prohibits a lawyer from making payments to an occurrence witness as discussed herein.

3. In addition, the witness is entitled to be reimbursed for his or her travel expenses, including lodging when an overnight stay is required. *Compare* 28 U.S.C. §1821, which permits a prevailing party to tax such costs for witnesses appearing in federal courts.