

THE PHILADELPHIA BAR ASSOCIATION  
PROFESSIONAL GUIDANCE COMMITTEE  
Opinion 2014-2  
(June 2014)

A former employee (A), now retired, of the inquirer's client is the individual with the best knowledge of areas of inquiry sought by opposing counsel. A has requested that he be compensated for the time he spends--first in reviewing a significant volume of documents produced in discovery, and needed to refresh his recollection, and second at deposition and or trial. The inquirer believes that A's testimony, without having reviewed the documents, will likely be far less complete and accurate than if he has reviewed the documents. Without review, many of A's responses to opposing counsel's questions would be "I don't remember."

The inquirer asks whether the Pennsylvania Rules of Professional Conduct (the "Rules") prohibit or limit payment of "reasonable compensation" to such a fact witness. The Committee concludes that the Rules permit transparent payment of "reasonable compensation" for the "loss of time" by a fact witness, including time spent in preparing to testify, in reviewing documents, in addition to time spent attending or testifying at trial or deposition.

**Rule 1.1. Competence**, provides that,

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

**Rule 1.3. Diligence**, provides in part that,

"A lawyer shall act with reasonable diligence and promptness in representing a client.

(1) A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf...."

**Rule 3.4. Fairness to Opposing Party and Counsel** provides in part that:

A lawyer shall not:

...

(b) falsify evidence, counsel or assist a witness to testify falsely, pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case; but a lawyer may pay, cause to be paid, 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 the witness' loss of time in attending or testifying, and
- (3) a reasonable fee for the professional services of an expert witness.

In the Committee's opinion, the obligations of competence and diligence imposed by Rules 1.1 and 1.3 are such that acting as a proper advocate for a client includes locating the appropriate witnesses and having them prepared to testify accurately at trial. Thus, taking those steps necessary to do so, including document review, are ethically required. The Committee finds that Rules 3.4b(1) and (2) allow reasonable compensation for the witness' time subject to the limitations under 3.4b forbidding contingent or unreasonable compensation.

A narrower interpretation of the Rule has been construed to "disfavor" payment for time lost other than while actually waiting to testify, or testifying. See Pa. Bar Informal Opinion 95-126A.

The perceived problem was that for fact witnesses, Rule 3.4b2 specifically allows 'reasonable compensation' only for loss of time in attending or testifying. In contrast, an expert can be paid for services. Thus, so the argument goes, any payment for loss of time in 'preparing to testify' (in this instance reviewing documents) is not mentioned, and by implication, is forbidden. However, the fact witness cannot testify accurately without spending time reviewing the documents, or otherwise preparing.

Pa. Bar Informal Opinion 95-126A noted that "there is no express prohibition" to such compensation in the text of the Rule, or text of the Witness Compensation Statute. Yet, it then opined that both "can be read to disfavor compensation for non-expert witnesses...." The opinion then suggests that if counsel does decide to pay such compensation, it must be "transparent."<sup>1</sup>

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<sup>1</sup> In the early 20<sup>th</sup> century, the Pennsylvania Superior Court disallowed payment of "compensation" to a "witness." In Ramschasel's Estate, 24 Pa. Super. 262 (1904), the Court held that an agreement to pay a witness any amount beyond the statutory figure was "void for want of consideration and as being against public policy." Id. at 265. The Court held that since the administration of justice was a mutual benefit to everyone--including a witness--no payment would be proper. The loss of time by the witness "is claimed by the public as a tax paid by him to that system of law which protects his rights as well as those of others." Id.

However, in Formal Opinion 96-402, the American Bar Association Standing Committee on Ethics and Professional Responsibility subsequently rejected such a constrained reading of the Rule :

“...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, so 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.’ 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... Nevertheless, the amount of such compensation must be reasonable, so as to avoid affecting, even unintentionally, the content of a witness' 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.”

The Committee, therefore concurs that the text of Rule 3.4 is not to be read to disfavor transparent, reasonable compensation to a witness for loss of time.<sup>2</sup> However, this Committee also agrees with the caution that such payments be transparent. The compensation arrangement is subject to discovery and cross-examination; if the compensation paid seems excessive to the fact finder, the credibility of the witness would become an issue in deciding the merits of the controversy.

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The driving force was the Court's concerns about “purchasing” favorable testimony from a witness. The Court did not address the plight of a competent diligent advocate fortuitously confronted with a witness who considered he owed no such “tax” and wanted to be compensated for loss of time. In light of Ramschasel, it is understandable that Pa. Bar Informal Opinion 95-120A was as cautious as it was.

Subsequently, it has been acknowledged that the strictures in Ramschasel “have been eroded by later practice.” Merva v. Workers' Compensation Appeal Board, 784 A.2d 222, 230 (Commw. Ct., 2001).

Other Bar Associations have also issued ethics opinions which support the premise that fact witnesses may ethically be compensated for their time. See Cal. Bar Op. 1997-149; South Carolina Bar Op. 02-10; Illinois Bar Op. 87-5.

<sup>2</sup> The Restatement Third of the Law Governing Lawyers, Section 117 also permits such payments.

**CAVEAT:** The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.