To Pay Or Not To Pay Witnesses?

Managing The Risks Of Compensating Witnesses

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"YOU WANT MY testimony? Pay me!" "You want my evidence? Buy it!"

Trial lawyers spend a significant amount of time identifying, collecting, and presenting facts to judges and juries. And these facts are often best told through live witness testimony. But because witnesses are often reluctant to testify, it is not surprising when they request compensation for their time and expenses.

And even less surprising, is when they seek payment for physical evidence they may possess. These demands, in turn, place trial attorneys in challenging ethical and strategic positions.

Although there are few hard and fast rules in this area, one thing is clear and critical: Lawyers may neither pay a witness in exchange for testimony nor base the payment on the outcome of the litigation. So how should one answer the two questions posed above? Carefully.

Compensation for time

Without doubt, an attorney may not "counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law," according to the Colorado Rules of Professional Conduct 3.4(b). Nor may a lawyer improperly influence testimony by paying a witness, according to the the Federal Anti-Gratuity Statute, 18 U.S.C. §201(b)(3).

That said, Colorado attorneys, and those in most other jurisdictions, may provide "reasonable" compensation to a witness for

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time spent preparing to testify and for testifying. So what is "reasonable?"

Generally, "reasonable" compensation must be defensible. For example, compensation at a rate commensurate with a witness' hourly wage is generally "reasonable." But paying a lawyer witness based on the hourly rate she charges clients may result in a windfall as those rates usually includes costs borne by her employer, such as overhead, benefits and profit.

Aside from "reasonableness," lawyers should consider how a paid witness may be perceived. Generally judges will be more tolerant of higher compensation amounts than jurors.

Yet even "reasonable" compensation may suggest an effort to improperly influence testimony and may negatively impact the witness' credibility. Further, witness payments may create that "red-herring" issue on which your opponent will focus.

Therefore, although there is no duty to disclose compensation arrangements, to stay in front of any attack by your opponent (or uncomfortable colloquy with the court) lawyers are well-advised to proactively reveal such arrangements.

In that case, memorialize the arrangement, including an explanation that the payments are not in exchange for testimony or contingent on the outcome; and prepare the witness to answer questions about compensation in an open and non-apologetic manner.

A research word of caution: Although looking at cases where the government paid a testifying informant may be tempting, those cases are generally not instructive to the civil litigator — prosecutors employ the tactic regularly, but are given leeway in light of their unique duty "to seek justice, not merely to convict," as stated in the American Bar Association Criminal Justice Section Standard 3-1.2(c) and the state Rules Of Professional Conduct 3.8.

Compensation for physical evidence

Although there is little guidance in this area, a leading ethics treatise argues that paying for physical evidence does not raise the same types of concerns as compensating a testifying witness because such payments are designed not "to change the content of the testimony but simply to get information that, realistically, would not otherwise normally be given."

Under this rationale, courts routinely allow this conduct and admit such evidence, and allow reimbursements for time spent collecting evidence. Of course, the "purchase" of evidence must be done to further the truth-seeking function of the court, not undermine it.

Colorado Rules of Professional Conduct Rule 3.4 is also helpful: "A lawyer shall not … unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."

Regardless, if the seller is also a testifying witness, payment for physical evidence may be portrayed by your opponent as a disguised payment for testimony, making the "reasonableness" of the assessed value an important consideration.

But reasonableness can vary based on perspective — a hard drive may cost $100, but contain data of far greater value to your client. Accordingly, a lawyer trying to purchase evidence should negotiate the price as if buying a car.

By not paying the asking price, or at least by negotiating, one may avoid the appearance of collusion or pandering with improper compensation. A lawyer is also well advised to take steps to ensure that the seller does not alter the evidence or "oversell" its contents or provenance just to increase its value.

In any event, like all agreements with witnesses, memorialize the details of the agreement in writing and detail the basis for the agreed-upon price. And be sure to include in that writing a statement that the payment was only for evidence and not in exchange for specific testimony or contingent on the outcome of the litigation. •

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