by MARCELLUS A. McRAE and KIM NORTMAN

YOUR WITNESS

The issue of **paying fact witnesses** most commonly concerns former or current employees of a party in litigation

THE QUESTION OF WHETHER A PARTY may pay a third-party fact witness for testifying routinely vexes litigants in complex litigation. The answer—at least in California and most other states—is that fact witnesses may be reimbursed for expenses incurred and time lost in connection with the litigation but may not be paid a fee for the fact of testifying (or not testifying) or for the substance of the testimony. Substantial caution should be exercised, however, in deciding whether and how much to pay a third-party witness.

The issue of witness payments arises in many situations, but often concerns former employees who know valuable information relevant to a lawsuit involving the former employer. When determining whether the payment of third parties may be prohibited, counsel should consider the following governing authorities: 1) Rule 3.4 of the ABA Model Rules of Professional Conduct and ABA Formal Ethics Opinion 96-402, 2) the laws and ethical rules in the forum jurisdiction, 3) the federal antigratuity statute, 18 USC Section 201, and 4) federal and state case law. In consulting relevant authority, counsel should attempt to gain a clear understanding of what types of payments generally fall under the prohibition against paying a fee for testifying. Counsel should also take into account 1) what constitutes reasonable compensation, 2) whether to put the agreement in writing and disclose it, 3) whether it may be proper to pay the witness pursuant to a "consulting" agreement, and 4) whether the payment of the witness's attorney's fees is permissible in the forum jurisdiction. Finally, counsel should be familiar with the possible sanctions for an inappropriate payment to a third-party witness.

A traditional common law rule prohibited any manner of compensation to fact witnesses. This rule was based on the rationale that payment could lead to obtaining perjured testimony, created an appearance of impropriety, and was inconsistent with a witness's public duty.[1] However, the Model Rules of Professional Conduct, federal law, and the laws and ethical rules of most states have

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modified this traditional common law rule to allow for payment of reasonable compensation to fact witnesses—with certain caveats and under certain circumstances.

Rule 3.4(b) of the Model Rules of Professional Conduct, which has been largely adopted in most jurisdictions, and ABA Formal Ethics Opinion 96-402 provide guidance regarding what types of payment to fact witnesses are permissible. Rule 3.4(b) states that a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."[2] Comment 3 to Rule 3.4 advises that it is not improper to pay a witness's expenses, but "the common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying...."[3]

The ABA has construed Rule 3.4 and Comment 3 to allow compensation to fact witnesses for time lost preparing to testify and testifying on the basis that such compensation is not equivalent to paying a "fee for testifying."[4] The ABA found:

> [There is] 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." 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.[5]

Thus, under the ABA's interpretation of Rule 3.4, a party may compensate a third-party fact witness for time lost attending a deposition or trial, meeting with a lawyer to prepare such testimony, or reviewing or researching documents relevant to such testimony, so long as the payment is reasonable, not conditioned on the fact of testifying or the content of the testimony, and does not violate the law of the jurisdiction.

Forum Jurisdiction

As Rule 3.4 makes clear, counsel contemplating paying a third-party witness must next examine whether any such payment is permissible under the laws and ethical rules of the forum in which the litigation occurs.[6] Most jurisdictions, including California, follow the ABA's interpretation of Rule 3.4(b) and allow for payment to fact witnesses for time lost for testifying and preparing to testify as well as for reasonable expenses. Rule 5-310(B) of the California Rules of Professional Conduct states that a member of the bar shall not provide "payment of compensation to a witness contingent upon the content of the witness' testimony or the outcome of the case," but can, except where prohibited by law, provide payment of expenses reasonably incurred by a witness in attending or testifying and reasonable compensation to a witness for loss of time in attending or testifying.[7] The State Bar of California Standing Committee on Professional Responsibility and Conduct (COPRAC) has interpreted Rule 5-310(B) to include "time necessary for preparation for or testifying at deposition or trial, as long as the compensation is reasonable..., does not violate applicable law, and is not paid to a witness contingent upon the content of the witness' testimony, or the outcome of the case."[8]

The Federal Antigratuity Statute

However, other states interpret state laws and ethical rules to disfavor payment of fact witnesses for time spent preparing to testify.[9] In addition to complying with the law of the forum jurisdiction, a party must ensure that any payment to a fact witness does not run afoul of the federal antigratuity law, which makes it a crime to "corruptly give[], offer[], or promise[] anything of value to any person...with intent to influence [that person's] testimony under oath...[in] a trial, hearing, or other proceeding."[10] On the other hand, the statute makes clear that Sections 201(b) and (c) do not prohibit "the payment...of witness fees provided by law" or "the payment...of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing or proceeding...."[11]

To comply with Section 201(c), a party contemplating paying a witness must ensure that any contemplated payment to a fact witness is not "because of" that person's testimony.[12] In other words, any payment must be unrelated to the fact or content of the witness's testimony. In *Centennial Management Services, Inc. v. AXA Re Vie*,[13] the District of Kansas held that a defendant insurance company did not violate Section 201 when the company paid nearly $70,000, including an up-front payment of $20,000, to a former employee for a number of nontestifying activities he performed while preparing for his deposition, including reviewing deposition transcripts of other witnesses and documents produced in the litigation and meeting with lawyers in preparation for the deposition. According to the court, the company did not run afoul of the federal antigratuity statute when there was no evidence that the payment to this fact witness was "for" or "because of" his testimony and no cited authority supported the argument that "a person violates the anti-gratuity statute by paying a fact witness reasonable compensation for time spent in connection with legitimate, non-testifying activities."[14]

Federal and State Case Law

Finally, lawyers should look to federal and state case law interpreting applicable federal and state laws and ethical rules and interpreting the common law to determine the boundaries of permissible payments in a particular jurisdiction.

For example, in interpreting the federal antigratuity statute and Rule 5–310(B), the Northern District of California recently held that a defendant's challenge to a plaintiff's payment of a $100,000 lump sum for the time of a litigation consultant, who was also being paid under a separate contract for "general cooperation and testimony as a fact witness," failed because the party challenging the payment did not "allege facts demonstrating that [the consultant] was improperly paid for his testimony rather than being compensated as a litigation consultant."[15] Accordingly, in evaluating whether a payment is covered by the prohibition on paying for testimony, certain courts appear to require a party challenging a payment to prove that the payee is in fact being compensated for his or her services as a fact witness rather than as a consultant.

Likewise, the Southern District of New York permitted a payment to a fact witness not only for time and expenses spent preparing for his own testimony but also for time spent "participating in the preparation of other witnesses."[16] According to the court, "federal courts...are generally in agreement that a witness may properly receive payment related to the witness' expenses and reimbursement for time lost associated with the litigation."[17] Regarding the burden that a party challenging payment to a fact witness must fulfill, the court held:

> Petitioners have failed to present any caselaw or authority in this Circuit or elsewhere that suggests that counsel is prohibited from meeting with multiple witnesses at the same time. They have similarly failed to establish any facts to support allegations of witness tampering....In light of the foregoing, Petitioners have failed to sustain their burden of establishing that the Panel's decision with regard to Farr's compensation was in manifest disregard of the law.[18]

Although most jurisdictions allow for payment to fact witnesses for time lost for testifying and preparing to testify, a few courts

have followed the traditional common law rule and prohibited payment of fact witnesses for time spent preparing to testify. In *Goldstein v. Exxon Research & Engineering Company*,[19] the District of New Jersey held that that a corporate defendant could not pay a retired employee for "time spent preparing to testify on facts within [his] personal knowledge." Thus, it is important for counsel considering paying a fact witness to determine whether his or her jurisdiction follows the traditional common law approach, which is significantly more restrictive with respect to what constitutes proper payment to fact witnesses.

In all jurisdictions, the prohibition against paying third-party witnesses a "fee for testifying" generally means that counsel cannot attach any conditions to the payment that may be viewed as influencing the testimony. For example, payment to a witness will be considered unethical if it is 1) conditioned on the giving of testimony in a certain way, 2) made to prevent the witness's attendance at trial, or 3) contingent on the outcome of the case.[20] Likewise, courts have found that counsel may not provide protection to a third party from ongoing or future litigation in exchange for securing that party's cooperation as a fact witness, nor may counsel seek exclusive access to a third-party witness in exchange for payment.[21]

After determining that paying a third-party witness is permissible in the forum jurisdiction, counsel should consider the amount and manner of payment. Factors include 1) what constitutes reasonable compensation, 2) whether to put it in writing and disclose it, and 3) whether it may be proper to pay the witness pursuant to a consulting agreement.

Reasonable Compensation

Virtually every jurisdiction that permits paying fact witnesses follows the ABA's interpretation of Rule 3.4(b) that compensation "must be reasonable, so as to avoid affecting, even unintentionally, the content of a witness's testimony."[22] Although reasonableness must be assessed "based on all relevant circumstances," the ABA has pointed to certain objective factors to consider in determining reasonableness, including whether the witness "has sustained any direct loss of income," and, if not, "the reasonable value of the witness's time."[23] The California Standing Committee on Professional Responsibility and Conduct has suggested similar objective factors to consider in determining the reasonableness of any payment to a fact witness, including: "the witness' normal rate of pay if currently employed, what the witness last earned if currently unemployed, or what others earn for comparable activity."[24] Courts have often found payment to a third-party witness to be unreasonable when the hourly rate paid to the witness is significantly above the witness's current or recent rate of pay on the fair market.[25]

Written Agreement

Once counsel has decided on reasonable payment for a witness, it is advisable to memorialize the agreement in writing, making clear that the payment is for lost time and reasonable expenses and not for the testimony itself.[26] A number of courts have found that payment to a third-party witness should be considered by the trier of fact in assessing the witness's credibility, so counsel should be prepared to disclose the agreement to the court and opposing counsel.[27]

Particularly in the cases in which a company pays a former employee for lost time in connection with testifying, courts have often endorsed the use of "consulting" agreements to compensate fact witnesses.[28] However, some courts have looked upon such agreements with skepticism.[29] Therefore, it is important to understand the law on the propriety of paying nonexpert litigation consultants in the jurisdiction in which the litigation is taking place. As with all agreements to pay a third-party witness, counsel contemplating the use of consulting agreements should assume the agreement will be produced in discovery and not be protected from disclosure by any privilege. Counsel should also execute the agreement as early as possible and be clear in the agreement that reasonable compensation is for time and expenses and not for the testimony itself.[30]

The ABA and COPRAC have not specifically addressed the question of whether it is permissible to pay a third-party witness's attorney's fees in connection with litigation. However, several state bar associations have considered the topic.[31] Generally, these states have held that paying a third-party fact witness's attorney's fees is permissible provided that the payment is limited to the witness's participation in the proceeding and is not an inducement for particular testimony. Given California's permissive approach to payments—such as explicitly allowing payment for preparation time—it is likely that California would follow the lead of these states that have permitted the payment of attorneys's fees under certain circumstances. However, given the lack of guidance, the issue of attorney's fees remains unsettled in California and many other jurisdictions.

Sanctions

Parties and their counsel may be subject to civil and criminal sanctions for running afoul of the laws regulating the payment of fees to fact witnesses. Possible civil sanctions for paying a witness a fee for testifying or paying a witness an unreasonable amount span the full range available for discovery violations, including 1) the exclusion of the testimony of the witness who received improper payments, 2) an award of attorney's fees and costs to the opposing party, 3) mistrial, and 4) disciplinary action by the state bar.[32] In addition, federal and state law set out criminal sanctions.

Section 201(b)(3) of the federal antigratuity statute makes it a crime to corruptly give, offer, or promise anything of value to any person with intent to influence that person's testimony under oath in a trial, hearing, or other proceeding.[33] A person who violates this statute may be fined, imprisoned, or both, and may be "disqualified from holding any office of honor, trust, or profit under the United

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States."[34] In addition, Section 201(c)(2) makes it a crime to give, offer, or promise anything of value to any person, for testimony under oath.[35] A person who violates Section 201(c)(2) "shall be fined under this title or imprisoned for not more than two years, or both."[36]

To violate Section 201(b)(3), one must act with a "corrupt mind," but one can violate Section 201(c)(2) without acting with a "corrupt mind."[37] The Eleventh Circuit—acknowledging that the distinction does not appear in the plain language of the statute—has distinguished between truthful and nontruthful testimony and held that the payments for truthful testimony were not a crime under Section 201(c)(2), even though they violated the applicable state rules of professional conduct.[38]

California law makes it a felony for any person to give or promise to give to any potential witness any bribe upon any understanding that 1) the testimony of the witness shall be thereby influenced or 2) the person shall not attend the trial or judicial proceeding.[39] California courts have interpreted Penal Code Section 137 to govern when there is a "sense…that testimony will be given, but the perpetrator will attempt to *influence* the testimony given" and Section 138 to govern when "the perpetrator will prevent or dissuade a prospective witness from *giving* testimony, or will attempt to do so."[40] California courts have generally found that "a bilateral agreement is not a necessary element of the crime of offering a bribe to a witness," but rather "bribery must be proposed by the person offering to give or to receive the bribe…with the criminal intent that a corrupt act will be committed by the one accepting the bribe."[41]

Most jurisdictions have modified the traditional common law rule prohibiting any payment to third-party witnesses, recognizing the fact that civic duty alone may not compel a knowledgeable witness who values his or her time to donate that time to providing testimony that is crucial to the truth-finding function of litigation.[42] However, counsel contemplating payment to a third-party witness should be careful not to run afoul of the federal and state laws and ethical rules governing such payments. Further, counsel should follow a number of basic steps. These include setting the third-party witness's compensation at a reasonable rate that reflects the fair market value of the witness's time, entering into a written agreement making clear that payment is for time lost and reasonable expenses incurred and not for the fact or substance of the testimony, and disclosing that agreement to the court and opposing counsel when required to do so. Careful attention to and diligence in handling these issues is critical because the potential civil and criminal exposure for violations, as well as damage to the witness's credibility, the client's case, and counsel's reputation are broad and significant. ■

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[1] *See* John K. Villa, Paying Fact Witnesses, ACCA Docket 19, no. 9, 112-15 (2001) (citing Compensating Fact Witnesses, 184 F.R.D. 425, 427)). See also, e.g., Hamilton v. General Motors Corp., 490 F. 2d 223, 228 (7th Cir. 1973); Alexander v. Watson, 128 F. 2d 627, 631 (4th Cir. 1942); In re Howard, 372 N.E. 2d 371, 374 (Ill. 1977).

[2] Model Rules of Prof'l Conduct R. 3.4(b).

[3] Model Rules of Prof'l Conduct R. 3.4(b) cmt. 3.

[4] *See* ABA Comm. on Ethics and Prof'l Responsibility, Op. No. 96-402 (interpreting Rule 3.4(b), Comment 3, *and* DR 7-109(C), the predecessor to Rule 3.4).

[5] *Id.*

[6] *See* Model Rules of Prof'l Conduct R. 8.5(b) (The rules of law of the forum jurisdiction will generally govern when question arises regarding choice of law.).

[7] Cal. R. Prof'l Conduct R. 5-310(B). Rule 5-310(B) is identical except for nonsubstantive matters to DR 7-109(C), the Model Code predecessor to Rule 3.4. *See* State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC), Op. No. 1997-149.

[8] State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC), Op. No. 1997-149.

[9] *See* Pa. Bar Ass'n Comm. Leg. Eth. Prof'l Resp., Informal Op. No. 95-126A (interpreting Pennsylvania ethical rule and witness compensation statute to "disfavor" payment of fact witnesses for time spent preparing to testify).

[10] 18 U.S.C. §§201(b)(3); *see also* 18 U.S.C. §§201(c)(2) (prohibiting a party from demanding, seeking, receiving, accepting, or agreeing to receive or accept anything of value "because of the testimony" or to ensure the absence of a witness).

[11] 18 U.S.C. §§201(d).

[12] 18 U.S.C. §§201(c)(2).

[13] Centennial Mgmt. Servs., Inc. v. AXA Re Vie, 193 F.R.D. 671, 681 (D. Kan. 2000).

[14] *Id.* at 682.

[15] Aristocrat Tech. v. International Game Tech., No. C–06–03717, 2010 WL 2595151, at *2 (June 28, 2010).

[16] Prasad v. MML Investors Servs., Inc., No. 04 Civ. 380, 2004 WL 1151735, at *5 (S.D. N.Y. May 24, 2004).

[17] *Id.*

[18] *Id.* at *7.

[19] Goldstein v. Exxon Research & Eng'g, Co., No. CV 95–2410, 1997 WL 580599, at *3 (D. N.J. Feb. 28, 1997).

[20] John K. Villa, *Paying Fact Witnesses*, ACCA Docket 19, no. 9, 112-15 (2001). *See also, e.g.,* New York v. Solvent Chem. Co., 166 F.R.D. 284, 289 (W.D. N.Y. 1996); Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 865 F. Supp. 1516, 1526 (S.D. Fla. 1994), *aff'd in part*, 117 F. 3d 1328 (11th Cir. 1997); Ojeda v. Sharp Cabrillo Hosp., 8 Cal. App. 4th 1, 10, 10 Cal. Rptr. 2d 230, 236 (1992) ("[A] contingent fee cannot be paid for the testimony of a witness").

[21] *See, e.g.,* Solvent Chem., 166 F.R.D. at 289-90 ("[T]he court finds nothing improper in the reimbursement of expenses incurred by [the witness] in travelling to New York to provide [the defendant] with factual information, or in the payment of a reasonable hourly fee for [the witness's] time. But in providing [the witness] with protection from liability in [another] litigation, and in this action, as a means of obtaining his cooperation as a fact witness, [the defendants] went too far.").

[22] ABA Comm. on Ethics and Prof'l Responsibility, Op. No. 96-402.

[23] *Id.*

[24] State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC), Op. No. 1997-149. *See also, e.g.,* Centennial Mgmt. Servs., Inc. v. AXA Re Vie, 193 F.R.D. 671, 680-81 (D. Kan. 2000). (The defendants' compensation of a fact witness at rates ranging from $125 to $200 per hour was not unreasonably high or disproportionate to time spent on litigation matters, particularly in light of the witness's years of experience in the insurance industry, his first-hand experience with reinsurance agreements that were the subject of the lawsuit, and the complex nature of the litigation.).

[25] *See, e.g.,* United States v. Cinergy Corp., No. 99 CV 1693, 2008 WL7679914, at *12 (S.D. Ind. Dec. 18, 2008) (Payment of $200 an hour to a witness was beyond "the reasonable value of time lost" for a person who was retired and had made $88 per hour for his services at the time of his retirement three years earlier.).

[26] *See* John K. Villa, Pa*ying Fact Witnesses*, ACCA Docket 19, no. 9, 112-15 (2001).

[27] *See, e.g.,* Jamaica Time Petroleum, Inc. v. Federal Ins. Co., 366 F. 2d 156, 158 (10th Cir. 1966), *cert. denied,* 385 U.S. 1024 (1967); Fund of Funds Ltd. v. Arthur Andersen & Co., 545 F. Supp. 1314, 1370 (S.D. N.Y. 1982) ("[I]t is permissible, indeed desirable, to bring any such payments to the attention of the jury and for counsel to comment upon [their] possible effect…upon a witness' credibility.").

[28] *See, e.g.,* New York v. Solvent Chem. Co., 166 F.R.D. 284, 289 (W.D. N.Y. 1996) (consulting agreement). *See also* Prasad v. MML Investors Servs., Inc., No. 04 Civ. 380, 2004 WL 1151735, at *5 (S.D. N.Y. May 24, 2004).

[29] *See, e.g.,* Goldstein v. Exxon Research & Eng'g, Co., No. CV 95–2410, 1997 WL 580599, at *7 (D. N.J. Feb. 28, 1997) (ordering the disclosure of a "consulting agreement").

[30] *See* Tainna Hill Raby, *Paying Fact Witnesses: Can Do? No Can Do?*, Trial.com (May 2, 2011), *available at* http://www.trial.com/cle/materials/2011-fl/raby.pdf. *See also* Solvent Chem., 166 F.R.D. at 289 (consulting agreement not protected from disclosure under attorney work product doctrine or any other privilege).

[31] *See, e.g.,* S.C. Ethics Advisory Op. 08-05 (July 28, 2008); Fl. Bar Staff Op. 23940 (July 3, 2002); Del. State Bar Ass'n Comm. on Prof'l Ethics Op. 1994-1 (Feb. 14, 1994); Ala. State Bar Ass'n Op. 82-699 (Jan. 5, 1983).

[32] *See* Tainna Hill Raby, *Paying Fact Witnesses: Can Do? No Can Do?*, Trial.com (May 2, 2011) (citing cases), *available at* http://www.trial.com/cle/materials/2011-fl/raby.pdf.

[33] 18 U.S.C. §§201(b)(3).

[34] *Id.*

[35] 18 U.S.C. §§201(c)(2).

[36] *Id.*

[37] *See* Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 865 F. Supp. 1516, 1523 (S.D. Fla. 1994), *aff'd in part*, 117 F. 3d 1328 (11th Cir. 1997)

[38] *Id.* at 1523-24 (citing United States v. Moody, 977 F. 2d 1425 (11th Cir. 1992), *cert. denied,* 507 U.S. 1052 (1993)).

[39] Penal Code §§137(a), 138(a). *See also* Penal Code §138(b).

[40] People v. Womack, 40 Cal. App. 4th 926, 931 (1995) (emphasis in original).

[41] People v. Pic'l, 31 Cal. 3d 731, 738-39 (1982).

[42] *See* Elizabeth J. Sher & Ronald D. Coleman, *Court Nixes Fees for Fact Witnesses*, 20 Nat'l L. J. 4 (Sept. 22, 1997).