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PAYING FACT WITNESSES

A former employee is central to the defense of a mass tort case involving your company. As in-house counsel for the company, you contact the employee in order to secure his testimony. In response, the employee demands to be paid for the following undertakings: (a) reviewing the documents and familiarizing himself with the situation, (b) meeting with your outside counsel in preparation for the deposition, and (c) appearing for the deposition and for the trial. Is payment for these activities permissible? What if the former employee states that he will throw in exclusive access—that is, he will refuse to talk to the other side? What are the complications and the risks?

By John K. Villa

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Those of us schooled in the common law remember dimly that the traditional common law rule flatly prohibited compensation to fact witnesses.¹ Times change, however, and modern ethical principles have, in most jurisdictions, now reached an opposite conclusion.

The prohibition against the payment of lay witnesses was based on several grounds, including concerns that the payment could lead to the procurement of perjured testimony,² that the payments tended to create an appearance of impropriety and thereby hindered the administration of justice,³ and that the payments were inconsistent with the preexisting duty that a witness has to testify truthfully.⁴



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Although the common law rule survives in some jurisdictions,⁵ most states have now modified the rule to permit fact witnesses to be reimbursed for expenses incurred and compensated for time lost with respect to litigation.⁶ This standard is best illustrated by ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-402 (Aug. 2, 1996).

The starting point for our ethical analysis is Rule 3.4(b) of the *Model Rules of Professional Conduct*, which provides 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" (emphasis supplied). Comment [3] to this rule explains that, although "it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law," the common law rule in most jurisdictions holds that "it is improper to pay an occurrence witness any fee for testifying" (emphasis added). As construed by the ABA,⁷ however, Comment [3] does not prohibit compensation for lost time to fact witnesses because such compensation is

not the payment of a "fee for testifying." Citing DR 7-109(c), the Model Code predecessor to Rule 3.4, which expressly permitted "reasonable compensation to a witness for his loss of time in attending or testifying,"⁸ the ABA found in Formal Opinion 96-402 that nothing in the history of the present rule indicates an intent "to negate this concept."⁹ The ABA has further held that there was no reason to distinguish between compensating a witness for time spent in attending a deposition or trial or for time spent in preparing for the deposition or trial.¹⁰ Rather, as long as the lawyer makes clear to the witness "that the payment is not made for the substance or efficacy of the witness's testimony," but instead is made solely to compensate the witness for the time lost in order to give testimony, the ABA has concluded that reasonable¹¹ payments do not violate the Model Rules.¹² State bar associations that have faced this question generally—but not universally—concur with the ABA's view.¹³

Now that we understand the general rule, what are the exceptions and risks?

The caveat in Rule 3.4 that the payment to the lay witness “does not violate the law of the jurisdiction” covers two situations. First, the laws of some states still prohibit paying fact witnesses for testifying or for preparing to testify.¹⁴ Second, and more importantly, there are criminal laws, illustrated by the federal bribery statute, that prohibit payments to fact witnesses “because of the testimony under oath given by such person.”¹⁵ One key question in the application of the federal criminal bribery statute is whether a payment to compensate a witness for his time is “because of the testimony under oath by such person.” If the payment is not dependent on the substance of the testimony, the key element of § 201(c) is not met. In *Centennial Management Services, Inc. v. AXA Re Vie*, 193 F.R.D. 671, 681 (D. Kan. 2000), the court refused to impose sanctions or declare illegal under 18 U.S.C. § 201 payments of nearly \$70,000 to a former employee/witness for reviewing documents and for preparation and testimony. The court also discussed the statutory exception in 18 U.S.C. § 201(d) for “payment for the reasonable value of time lost in attendance at any such trial . . . ,” a salvation when the payments are made for time for testifying but probably inapplicable to document review and preparation time. Nonetheless, the *Centennial* court rejected arguments that large payments for document review to a testifying fact witness violated 201(c).¹⁶

Jurisdictional issues involving payments may present knotty problems. For example, may a lawyer pay a fact witness who lives in Pennsylvania (where it may be unethical) to prepare for and testify in a case in Alabama (where it may be permitted)? This question presents a choice-of-law problem that is governed by Model Rule 8.5. In these circumstances, the law (and ethics

rules) of the forum will govern under Rule 8.5(b)(1), so the payment will probably be permissible.¹⁷ What is a company to do when it knows of potential litigation but does not know where it will be filed? Although it is easier said than done, counsel must first determine whether and/or to what extent the law of the jurisdiction in which the case is most likely to be filed permits such compensation before entering into an agreement to pay a former employee for his or her time spent in connection with testifying as a fact witness.¹⁸ In multidistrict mass tort litigation, such a determination may pose unique problems because discovery may be centered in a court in which such payments are permitted but transferred for trial back to one or more states where they are prohibited.¹⁹

Even when legally authorized, payments to former employees who serve as fact witnesses are limited to the purpose of reimbursing the employee for expenses incurred and time lost in preparing for and testifying at the deposition or trial. Any condition attached to the payments that may be viewed as influencing the testimony of the witness is suspect. For

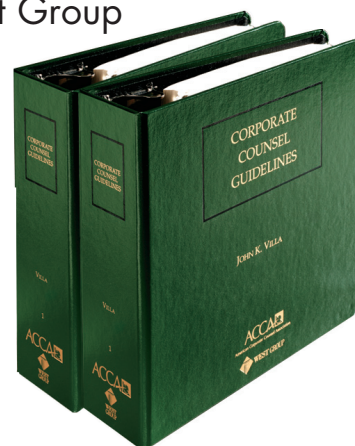
example, in a case in which payment is (1) conditioned on the giving of testimony in a certain way, even if conditioned on “truthful testimony,” (2) is made to prevent the witness’s attendance at trial,²⁰ or (3) is contingent to any extent on the outcome of the case,²¹ the payment will be deemed unethical. Agreements to protect the former employee from liability, which are made to secure the employee’s cooperation as a fact witness, may also be found to constitute “the equivalent of making cash payments to [the witness] as a means of making him sympathetic and securing his testimony.”²²

Once the decision is made to compensate a former employee for his or her time in connection with testifying as a fact witness, counsel should inform the court and opposing counsel of this decision, as well as the basis for the payment. Even though permissible, some jurisdictions permit the fact of such a payment to be considered by the trier of fact in assessing the credibility of the witness and the weight to be accorded his or her testimony.²³ The court may order production of the compensation agreement, as well as the

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production of any documents related to it and any documents reviewed or prepared by the witness.²⁴ It may also permit the opposing party to treat the witness as a hostile witness for purposes of cross-examination.²⁵

Finally, what are the sanctions if the lawyer steps over the line? Exclusion of the testimony altogether is a possible consequence.²⁶ Counsel is also subject to disciplinary sanctions.²⁷

Thus, any agreement with a potential fact witness must involve only reasonable compensation to the witness for lost time and should avoid any additional provision, such as exclusive access, that could be regarded as influencing the witness's testimony (and would probably be viewed as violating the ethical proscription against obstructing a party's access to evidence).²⁸ Because an unreasonable payment creates the inference that the payment was made to influence the substance or the efficacy of the witness's testimony,²⁹ what constitutes reasonable payment? Reasonable payment is necessarily a case-by-case determination,³⁰ based on the witness's direct loss of income.³¹ In the absence of a direct loss, counsel must determine reasonable value based on all of the relevant circumstances.³²

What are the lessons to take away from this discussion?

- If you are considering paying a witness, first determine where the case will be tried, and then find the pertinent ethical rules or opinions of the state or states involved.
- Examine the pertinent state or federal law prohibition on witness payments.
- Make certain that the payment for time is "reasonable," typically by reference to the employee's lost or forgone salary.
- Inform opposing counsel, preferably in writing, of the terms of your agreement with your witness.
- Make clear to the witness what the payment is and is *not* for—that is,

that the payment is compensation for time expended by the witness and is not for the substance of the testimony and that the witness is not prohibited from talking to the other side.

- Put the agreement in writing to avoid arguments about its terms. 

NOTES

1. See *Compensating Fact Witnesses*, 184 F.R.D. 425, 427 (1999).
2. See *Hamilton v. General Motors Corp.*, 490 F.2d 223 (7th Cir. 1973); *Alexander v. Watson*, 128 F.2d 627 (4th Cir. 1942).
3. See *In re Howard*, 69 Ill.2d 343, 372 N.E.2d 371 (1977).
4. See *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 865 F. Supp. 1516 (S.D. Fla. 1994), *aff'd in part*, 117 F.3d 1328 (11th Cir. 1997).
5. See *Goldstein v. Exxon Research and Engineering Co.*, No. Civ. 95-2410, 1997 WL 580599 (D.N.J. Feb. 28, 1997); *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*.
6. See *Centennial Management Services, Inc. v. AXA Re Vie*, 193 F.R.D. 671 (D. Kan. 2000); *New York v. Solvent Chemical Co.*, 166 F.R.D. 284 (W.D.N.Y. 1996); see generally *Compensating Fact Witnesses*, *supra*, 184 F.R.D. at 427-428.
7. ABA Comm. on Ethics and Professional Responsibility Formal Op. 96-402 (Aug. 2, 1996).
8. *Model Code of Professional Responsibility* DR 7-109(C).
9. ABA Comm. on Eth. and Prof. Respon. Formal Op. 96-402 (Aug. 2, 1996).
10. *Id.*, disagreeing with an opinion of the Pennsylvania Bar Association that interpreted Pennsylvania ethical rule and state witness compensation statute as disfavoring the provision of reasonable compensation for a fact witness's time in preparing to testify. See Pa. Bar Ass'n Comm. Leg. Eth. Prof. Resp. Op. 95-126A.
11. See *infra*.
12. ABA Comm. on Eth. and Prof. Respon. Formal Op. 96-402, *supra* n. 7.
13. Although some state bar associations have found it proper to pay fact witnesses for expenses and lost time incurred for testifying, see Ala. Eth. Op. RO-97-02 (undated); Conn. Informal Op. 92-30 (Dec. 22, 1992); State Bar of N.M. Adv. Op. Comm., Op. 1984-1 (Oct. 22, 1984); Wis. State Bar Ass'n. Comm. on Prof. Eth. Op. Nos. E-88-9 (1988) and E-89-17 (1989), other state bar associations have also found it proper to pay fact witnesses for expenses and lost time incurred in preparing to testify. See Ariz. Op. No. 97-07 (Oct. 31, 1997); Calif. Comm. on Prof. Respons. and Conduct For. Op. 1997-149; Ill. Eth. Op. 87-05 (1988) (decided under DR 7-109); Ky. Bar Ass'n Adv. Eth. Op. E-400; Mass. State Bar Ass'n Comm. on Prof. Ethics Op. No. 1991-3; NY Eth. Op. 668 (1994); S.C. Adv. Op. 97-42; Va. State Bar Ass'n. Standing Comm. on Legal Eth. Op. No. 587 (1984); see also Alaska Eth. Op. 93-2 (nonexpert witness may be reimbursed "for expenses and financial loss incident to his being a witness"); but see Pa. Bar Ass'n Comm. Leg. Eth. Prof. Resp. Op. 95-126A (improper to compensate fact witness for lost time in preparing to testify).
14. See *id.*
15. 18 U.S.C. § 201(c)(2) (bribery of witnesses).
16. *Centennial Management Services, Inc. v. AXA Re Vie*, 193 F.R.D. 671, 681-82 (D. Kan. 2000).
17. Although likely permissible, prudence would dictate, however, *not* having a member of the Pennsylvania Bar negotiate the payment.
18. The offer to pay should come from counsel because courts may not be willing to enforce a compensation agreement demanded by the witness as a prerequisite to his or her testimony. See *Baker v. Taco Bell Corp.*, 163 F.R.D. 348, 351 (D. Colo. 1995); see also *Hamilton v. General Motors Corp.*, 490 F.2d 223 (7th Cir. 1973).
19. In multidistrict litigation, the case may be transferred to one jurisdiction for discovery and then transferred back to the originating jurisdiction for trial. Because the trial court generally applies the law of the forum state with respect to discovery issues, a holding in the discovery jurisdiction that such payments are valid may not necessarily be upheld in the jurisdiction in which the trial is pending. Although risky, one solution may be to obtain an order from the judge having control over the multidistrict litigation that such payments are permissible.
20. *New York v. Solvent Chemical Co.*, 166 F.R.D. at 289 (these types of payments are "absolutely indefensible" and fall under

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- “the general definition of subornation of perjury”).
21. *See* Reffet v. Commissioner, 39 T.C. 869, 1963 WL 1475 (1963).
22. *New York v. Solvent Chemical Co.*, 166 F.R.D. at 289 (denying motion for protective order sought to preclude state from asking former employee, hired as fact witness and “litigation consultant,” about the consulting agreement; while recognizing propriety of reimbursing witness for travel expenses and a reasonable hourly fee for his time, court found that agreement that also purported to settle ongoing litigation with witness and to forbear from joining witness as party in action asserted against former employer “went too far” and was not protected by work product doctrine).
23. *See* 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).
24. *See* *Goldstein v. Exxon Research and Engineering Co.*, No. Civ. 95-2410, 1997 WL 580599 (D.N.J. Feb. 28, 1997); *New York v. Solvent Chemical Co.*, 166 F.R.D. 284 (W.D.N.Y. 1996).
25. *See* *Goldstein v. Exxon Research and Engineering Co.*
26. *See* *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass’n.*
27. *See* Wis. State Bar Ass’n. Comm. on Prof. Eth. Op. Nos. E-88-9 (1988) (noting that payments exceeding the witness’s out-of-pocket expenses could be regarded as unlawful inducements so as to support a finding of an ethical violation); *Florida Bar v. Jackson*, 490 So. 2d 935, 936 (Fla. 1986) (respondent’s action “in attempting to obtain compensation for the testimony of his clients...violates the disciplinary rule and code of professional responsibility, the integration rules of the Florida Bar and the oath of his office”); *but see* *Florida Bar v. Cillo*, 606 So. 2d 1161 (Fla. 1992) (inducing witness to tell the truth by offering money or some other valuable consideration did not constitute professional misconduct).
28. *See* *Model Rules of Professional Conduct*, Rule 3.4(a) (prohibiting a lawyer from unlawfully obstructing another party’s access to evidence and from counseling or assisting another person to do so).
29. *Centennial Management Services, Inc. v. AXA Re Vie*, 193 F.R.D. 671 (D. Kan. 2000); *see* ABA Comm. on Eth. and Prof. Respons., Formal Op. 96-402 (Aug. 2, 1996) (amount of compensation must be reasonable to avoid affecting, even unintentionally, the content of the witness’s testimony).
30. *Ariz. Op. No. 97-07* (Oct. 31, 1997).
31. ABA Comm. on Eth. and Prof. Respons., Formal Op. 96-402, *supra*.
32. *Id.* Objective standards to use in assessing reasonableness in this situation include what the witness last earned or what other persons earn for comparable activity. *See* Calif. Comm. on Prof. Respons. and Conduct For. Op. 1997-149.
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