

Advisory Opinion 1984-1

(Substitute)

Several attorneys have presented objections and comments to the Committee regarding Advisory opinion 1984-1. The Committee has reviewed the opinion and herewith submits the following opinion.

FACTUAL SITUATION

The attorney's firm represents a surety company which issued numerous surety bonds to a construction highway contractor. The surety company has filed a lawsuit against the certified public accounting firm that audited the financial statements of the contractor. The litigation is based primarily on accounting malpractice.

The firm wishes to interview several ex-employees of the contractor. They were employed by the contractor as in-house certified accountants at the time the CPA firm conducted one or more of their audits. The ex-employees have requested that plaintiff compensate them for the time lost from their present jobs while being interviewed by the firm.

ANALYSIS

Rule 7-109(C) of the New Mexico Code of Professional Responsibility says:

"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. A lawyer may advance, 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 his loss of time in attending or testifying;
- (3) A reasonable fee for the professional services of an expert witness."

QUESTION NO. 1:

Would it be a violation of Disciplinary Rule 7-109(C) of the New Mexico Code of Professional Responsibility for plaintiff's attorney to pay reasonable compensation to a witness for his loss of time while being interviewed regarding his first hand knowledge of facts with respect to work done by defendant?

The purpose of the rule against compensation of lay witnesses is to prevent the buying of testimony by an attorney which is uniformly condemned by courts. Interests in the outcome of a suit bears upon a witness's veracity and is material to the proceeding. *State v. Roberts*, 18 N.M. 480 (1914). Payment of a witness to insure his giving truthful testimony to the benefit of an attorney's client has been found to be "inconsistent with the most fundamental principles of the legal profession." *In re Kier*, 69 Ill. 2d 355, 372 N.E.2d 376, 379 (1977). An attempt to purchase favorable testimony was held to show an attorney's unfitness to practice law. *People v. Belfor*, 591 P.2d 585 (Colo. 1979).

The request of the ex-employees is limited to compensation for loss of time from their present jobs and not compensation for their testimony or services. Rule 7-109(C)(2) expressly states that an attorney may compensate a witness for time lost in attending or testifying presumably either in a deposition or at trial. It logically follows that compensation for time spent in giving an interview is not improper or unethical.

New Mexico statutory law is not to the contrary. According to statute, non-expert witnesses are allowed no fees for services, but do receive per them expense and mileage for the time in which attendance is required. N.M. Stat. Ann. § 38-6-4 (Supp. 1983); see N.M. Stat. Ann. § 10-8-4 (Supp. 1984). The statute does not preclude compensation to witnesses for loss of time away from that witness's current job.

Finally, EC 7-28 recognizes that an attorney may compensate witnesses for their expenses and "financial loss" incident to his being a witness. The Committee concludes that compensating lay and expert witnesses alike for expenses, including lost time away from their employment, incurred in interviewing is permissible and in keeping with the purpose and spirit of Rule 7-109(C).

QUESTION NO. 2:

May a reasonable fee for the professional services of an expert witness under Rule 7-109(C)(3) be paid to a witness who is both an expert as well as a witness with first hand knowledge of the events leading up to the commencement of the lawsuit?

In analyzing the second question, it is important to distinguish among lay witnesses, expert witnesses with no first hand knowledge of the facts and those witnesses with first hand knowledge of the facts and with expertise in that particular field.

A. Lay Witnesses.

The Committee believes that under New Mexico law it is clear that an attorney may not compensate lay witnesses for testifying, preparing to testify, or any other service provided to a party. Rule 7-109(c); N.M. Stat. Ann. § 38-6-4 (Supp. 1983); *In re Kier, supra*; *People v. Belfor, supra*.

B. Expert Witnesses With No First-Hand Knowledge.

The Committee believes that New Mexico law is also clear regarding compensation for witnesses falling in this category. An attorney may compensate expert witnesses for their professional services. Rule 7-109(C)(3); N.M. Stat. Ann. § 38-6-4 (Supp. 1983).

C. C. Expert Witnesses With First-Hand Knowledge.

Witnesses falling into this category are unique in that they can tell you both what the facts are and what the facts mean. *In Burnett v. Freeman*, 103 S.W. 121 (Mo. Ct. App. 1907) the court said:

There is a distinction between the case of a man who sees a fact and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion on a matter with which he is peculiar conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his knowledge--without such testimony, the course of justice must be stopped. The latter is under no such obligation. There is no such necessity for his evidence, and the party who selects him must pay him.

A recent federal court of appeals case addressed the issue of whether a witness in this category should be paid as an expert or merely compensated for cost, and stated that it was against public policy to compensate a witness to testify in court when it is his duty as a citizen to do so. *Hamilton v. General Motors Corp.*, 490 F.2d 223 (7th Cir. 1973). In that case the court stated that the witness was not an expert witness, that he was testifying solely to matters of his own personal knowledge, that he could not have been qualified as a disinterested, independent or impartial expert and therefore could not be compensated for his services.

The Committee believes that to the extent that a witness is asked by an attorney to state what actions he took and the results therefrom (i.e. matters of first-hand knowledge), the witness may not be compensated as an expert because the witness is testifying about facts upon which he or she has a duty to provide by having witnessed them. To the extent that the witness is asked an opinion or to explain the significance of facts based on special professional training regarding such matters as causation or future ramifications of certain facts, the witness must go beyond the call of duty of an ordinary witness and through investigation and analysis exercise the special knowledge he or she possesses, and which he or she spent time and money in acquiring. The Committee feels the witness may be compensated for investigating, preparing and providing that information. While it is acknowledged that the distinction between these two types of testimony may be difficult to make in certain situations, as well as calculating the percentage of time attributable to being an "expert witness" as opposed to an "ordinary witness," nevertheless the attorney should attempt to make the distinction. One consideration may be whether the attorney anticipates using the witness as an expert at trial. Obviously the witness will require compensation for providing expert testimony, which is quite proper. If the witness is to be used only as a fact witness, then compensation for services is improper. In any event, the witness may be compensated for lost time away from work as discussed in Question I above.

The variations which may arise with this category of witness go beyond the scope of this opinion, as do the alternative, and proper courses of action which an attorney might choose to follow. In deciding whether compensation is appropriate, the attorney should keep in mind that it is improper to compensate a witness to influence his or her testimony or encourage the witness to color or manufacture evidence. See *In re Kier, supra*.