



Payments to Witnesses Require Care

We know that it's appropriate

and accepted that expert witnesses be paid for the time they take to prepare for and testify in court. But how about witnesses who aren't "experts"?

It's stressful enough to be a witness in a lawsuit. Sometimes it also can be expensive, like when the witness loses income because of time off from work while testifying or when travel is necessary. Let's say that you represent a corporate client who has a friendly former employee who now lives in Ohio and whom you really want to have present in court to testify. Is it ethical for you to pay her travel expenses, with the client's money, to come to Arizona? How about compensating her for any income she loses because of the time it takes to testify? How about for her time and expenses in traveling to Arizona for a deposition? Does preparation time count?

This specific situation was the basis for an ethics opinion published by Arizona's Committee on the Rules of Professional Conduct.¹ The Committee, following the lead of a formal ABA ethics opinion,² concluded that the ethical rules do not prohibit the payment of expenses to fact witnesses, as long as they are not based on the outcome of the litigation or prohibited by the law of the jurisdiction.

The committee pointed first to ER 3.4(b),³ which states that a lawyer may not offer an inducement to a witness that is prohibited by law. In the comment to that rule, it is stated that it is not improper to pay a witness's expenses, but it is improper to pay a fee for the testimony itself.⁴

The committee cautioned that the compensation for a fact witness should never be so high that it tends to appear as an improper, unethical inducement for favorable testimony. It pointed out that although there is no Arizona law prohibiting payments to witnesses, it is illegal to offer a monetary inducement in exchange for testimony with the intent to influence that testimony.⁵ This is important, because attempting to influence the testimony of a witness is a class 5 felony in Arizona.⁶ To be safe, the committee suggests that the compensation paid to a witness should simply make the witness whole, and not leave him better off than he would have been if everybody had just stayed home.

An additional issue was addressed by the committee that has been affected by the new rules of professional conduct, which became effective on Dec. 1, 2003: May a lawyer, as



opposed to his client, advance the payment of the fee for the witness?

Here, we must turn to the provisions of new E.R. 1.8(e), which states that a lawyer may advance expenses of litigation with repayment by the client conditioned on the outcome of the matter and may also pay expenses of litigation on behalf of an indigent client. Understanding that there may be some latitude in the definition of the word "indigent," the safest practice would be to have the client agree to repay the lawyer for the expenses advanced to the witness from whatever recovery is made in the matter. [EY](#)

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endnotes

1. See Op. No. 97-07 (Oct. 31, 1997), Committee on the Rules of Professional Conduct.
2. See ABA Formal Op. No. 96-402.
3. Rule 42, ARIZ.R.S.CT.
4. Comment 3 to ER 3.4.
5. A.R.S. § 13-2802. See A.R.S. §§ 13-2803 and 13-2804 prohibiting bribes to witnesses and tampering with witnesses, respectively.
6. A.R.S. § 13-2802(B).