



J. Anthony McLain

## An Attorney May Pay an Expert Witness a Reasonable and Customary Fee for Preparing and Providing Expert Testimony, but the Expert's Fee May Not Be Contingent on the Outcome of the Proceeding

### QUESTION:

Under what circumstances can an attorney pay a witness who offers testimony at trial or by deposition for an attorney's client?

### ANSWER:

Witnesses who offer testimony at trial fall generally into two categories, expert witnesses and lay or fact witnesses. An attorney may pay an expert witness a reasonable and customary fee for preparing and providing expert testimony, but the expert's fee may not be contingent on the outcome of the proceeding. An attorney may not pay a fact or lay witness anything of value in exchange for the testimony of the witness, but may reimburse the lay witness for actual expenses, including loss of time or income.

### DISCUSSION:

The prohibitions against paying fact witnesses and against paying experts contingency fees are found in Rule 3.4(b) of the *Rules of Professional Conduct* of the Alabama State Bar, which provides that a lawyer shall not "offer an inducement to a witness that is prohibited by law." However, the Comment to this rule recognizes that the prohibition does not preclude payment of a fact witness's legitimate expenses as long as such payment does not constitute an inducement to testify in a certain way. This Comment is consistent with DR 7-109 of the old *Model Code of Professional Responsibility* which specifically authorized a lawyer to pay "expenses reasonably incurred by a witness in attending or testifying" and "reasonable compensation to a witness for his loss of time in attending or testifying."

Furthermore, payment to a fact witness for his actual expenses and loss of time would constitute "expenses of litigation" within the meaning of Rule 1.8(e). Subparagraph (1) of that section authorizes an attorney to "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."

The situation may arise when an expert witness would also be in a position to provide factual testimony in addition to his paid expert testimony. Under these circumstances, the attorney would not be ethically precluded from paying the witness, in his role as expert, his usual and customary fee. However, caution should be exercised that the attorney does not pay the expert more than his usual and customary fee or pay him for more time than he

actually expended in preparing and providing his expert testimony, since any excess or unusual fee could be construed as payment for his testimony as a fact witness.

In summary, it is the opinion of the Disciplinary Commission of the Alabama State Bar that an attorney may pay a fact witness for actual expenses and actual loss of income or wages as long as such payment is not made as an inducement to the witness to testify in a certain way.

An expert witness may be paid his reasonable, usual and customary fee for preparing and providing expert testimony, provided such fee is not contingent. This opinion is consistent with previous opinions of the Disciplinary Commission on similar or related issues in RO 81-549, 82-699 and 88-42. [RO-1997-02] ■

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