

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 714 – 2/5/99 (49-98)

Topic: Compensation of lawyer as witness.

Digest: Lawyer as witness may accept reasonable compensation for lost time.

Code: DR 2-106; 5-101(B); 7-109(C)(2).

QUESTION

When a client (or former client) seeks to call a lawyer to testify concerning the prior representation, may the lawyer agree to receive compensation for the lawyer's time spent in preparing to testify and testifying as a witness in the case?

OPINION

A lawyer anticipates being called as a witness by the lawyer's client (or former client) in litigation between the lawyer's client and another party. The subject of the proposed testimony relates to the former representation. The lawyer inquires whether it would be permissible to agree to be paid by the client at the lawyer's customary hourly fee for time spent in preparing to testify and testifying as a witness. The lawyer will not represent any party in the litigated matter and thus DR 5-101(B), prohibiting a lawyer from acting as an advocate if the lawyer knows or it is obvious that the lawyer ought to be called as a witness, is inapplicable.

Whether the lawyer may be compensated for the lawyer's time preparing to give testimony and testifying as a witness in a case involving a client is a question of both law and ethics. Whether a lawyer may lawfully accept compensation is a question beyond this Committee's jurisdiction. Although we therefore express no opinion on whether such compensation is legal,¹ we note that if it is illegal, it follows that it is

¹ Some judicial opinions prior to the adoption of the Code suggested that an agreement to compensate a fact witness above the statutory fee was void as against public policy and therefore unenforceable. *See, e.g., Farbman and Sons, Inc. v. Continental Cas. Co.*, 308 N.Y.S.2d 493, 494 (N.Y. Civ. Ct. 1970) (where a witness is subject to subpoena and is testifying only as to facts within his knowledge, an agreement to compensate him in excess of the fees provided by statute is void as against public policy). At least one early opinion noted that this restriction would apply to a lawyer appearing as a fact witness. *See Alexander v. Watson*, 128 F.2d 627,630 (4th Cir. 1942) (where a lawyer and an accountant who had previously provided services in a tax suit were later called as witnesses in will contest, the court opined that "[a]ny agreement to pay them additional compensation for such testimony would have been void as lacking in consideration and also as contrary to public policy"). (Cont'd)

unethical. N.Y. State 572 (1985). However, even if such compensation is legal, it is not necessarily ethical. *Id.* Assuming that a lawyer may legally agree to accept a payment for time serving as a witness, we proceed with the discussion of the ethical considerations involved.

Statutory provisions in the Civil Practice Law and Rules (“CPLR”) provide for witness compensation. For example, CPLR 8001 provides that:

Any person whose attendance is compelled by a subpoena, whether or not active testimony is taken, shall receive for each day’s attendance fifteen dollars for attendance fees and twenty-three cents as travel expenses for each mile to the place of attendance from the place where he or she was served, and return. There shall be no mileage fee for travel wholly within a city.

However, if the client-party calling the lawyer as a witness with full knowledge of his statutory rights nevertheless agrees to pay the lawyer in excess of the statutory fees, then DR 7-109(C)(2) will govern. DR 7-109(C)(2) limits non-expert witness fees to “reasonable compensation . . . for the loss of time in attending and testifying.” N.Y. State 547 (1982) explains that:

What is reasonable, and therefore permitted, should first be considered in terms of what is expressly forbidden under the DR, namely, the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case.

Since reasonable compensation equates to “loss of time,” a witness who works for a living may be paid an amount equivalent to his or her lost wages. *Id.* Likewise, a witness who is unemployed or works on commission is entitled to compensation because even “recreation is susceptible to valuation.” *Id.*

Since the adoption of DR 7-109(C), which expressly allows a lawyer to participate in “the payment of ... [e]xpenses reasonably incurred by a witness in attending or testifying,” it has generally been understood that “[i]t is permissible ... to pay reasonable amounts to witnesses to compensate for lost wages incurred in testifying” Charles W. Wolfram, *Modern Legal Ethics* 651 (1986). *Accord* Norman Redlich, “Compensating Fact Witnesses,” *Litigation Ethics*, Fall/Winter 1997, pp.1-5; *cf.* ABA Formal Op. 96-402 (1996) (“A lawyer, acting on her client’s behalf, may compensate a non-expert witness for time spent in attending a deposition or trial or in meeting with the lawyer preparatory to such testimony ...”). However, it has also been noted that there is no consensus on how fact witnesses should be compensated “for the value of their time attending, preparing for, or testifying at, trial or depositions,” that the questions of whether and how to compensate “salaried or hourly-rate professionals for loss of time” may be particularly challenging because of the difficulty of their “actually demonstrat[ing] lost income,” and that there is a dearth of judicial decisions shedding light on these questions. Redlich, *supra*, at 2, 5. We are unaware of any judicial opinions addressing whether, and if so, how lawyers in particular are to be compensated for their time spent in connection with their testimony as fact witnesses.

In N.Y. State 668 (1994), this Committee held that if the client agrees, a witness may be paid \$150 an hour for pre-trial preparation and trial time, if the compensation is reasonable under the circumstances. Thus, if the party calling the lawyer as a witness agrees to pay the lawyer in excess of the statutory fee, the amount must be reasonable. Reasonable compensation is “not merely out-of-pocket expenses or lost wages,” it includes loss of free time. It is “the market value of the testifying witness” that determines what is reasonable compensation. *Id.*

If the lawyer’s earlier fee agreement with the client compensated the lawyer for any subsequent testimony,² then it would not be reasonable for the lawyer later to agree to receive additional compensation. However, absent a prior agreement to the contrary, we conclude that, like other witnesses, lawyers may receive reasonable compensation for time spent preparing and testifying as a witness, as long as the party calling the lawyer as a witness understands or is made aware that there is no obligation to provide more than the statutory fee for the lawyer’s time in court. If the party nevertheless agrees to compensate the lawyer for his or her time, it would ordinarily be reasonable, and therefore permissible, for the lawyer to receive an amount equal to the lawyer’s customary hourly fee (or, where the lawyer charges several different hourly fees, an amount equal to the average of those fees).

Although DR 2-106 forbids a lawyer from charging illegal or excessive *legal* fees, that provision is inapplicable here because the question is whether a witness is entitled to compensation as a witness, not as a lawyer. In any event, if the lawyer’s compensation is limited to what is “reasonable” as discussed in N.Y. State 668, *supra*, it would not be excessive. Whether the compensation is illegal or not is a question of law that we do not address.

CONCLUSION

Assuming that the compensation to be paid to a lawyer as a witness is not illegal, a fully informed client (or former client) may agree to pay the lawyer reasonable compensation in the amount of the lawyer’s customary hourly rate.

² For example, it is conceivable that a lawyer would receive a fee for work in connection with a transaction, which the parties agree would serve as compensation for any necessary time spent by the lawyer for services relating to the transaction after it was concluded, which might include time spent in discussing the transaction with successor counsel and in serving, if necessary, as a witness with regard to the transaction.