

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-400
Issued: June 1997

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: Is it ethical for [a] lawyer, acting on her client's behalf, to compensate a non-expert witness for time spent in attending a deposition or trial or in a meeting with the lawyer preparatory to such testimony, provided that the payment is not conditioned on the content of the testimony and provided further that the payment does not violate the law of the jurisdiction.

Answer: Qualified yes.

References: KRPC 3.4(b); CPR DR 7-109(C)(1) & (2); ABA Formal Op. 96-402 (1996) (Propriety of payments to occurrence witnesses); Charles Wolfram, Modern Legal Ethics 651 (1986); George Warvelle, Essays In Legal Ethics (1902).

OPINION

Ethics Standards

The traditional view, expressed prior to the adoption of the 1969 Code or the 1990 Rules, was that expressed in George Warvelle's Essays In Legal Ethics (1902), para. 190:

The statutory witness fee is very small. Attendance in court not infrequently entails pecuniary hardship on the person testifying. The exigencies of his business or the circumstances that surround him may be such that to spend a day or several days in court will seriously embarrass him because of these things it has become common to pay or to promise to witnesses the actual value of their time consumed in the trial, and it does not seem that such practice is repugnant to any rule or law or precept or morals.

Charles Wolfram's Modern Legal Ethics takes essentially the same position:

Payments to Nonexpert Witnesses - Lawyers are generally prohibited from paying or offering to pay money or other rewards to witnesses in return for their testimony. It is permissible, however, to pay reasonable amounts to witnesses to compensate for lost wages incurred in testifying, and for travel and similar

expenses, and to pay a customary witness fee. [Citing DR 7-109(C)(1) and Model Rule 3.4, Comment 3].

KRPC 3.4(b) states that a lawyer shall not “offer an inducement to a witness that is prohibited by law.” Comment [3] to KRPC 3.4 states that “it is not improper to pay a witness’s expenses ... on terms permitted by law.” The Comment [which is a clone of the ABA Comment to ABA Model Rule 3.4] goes on to state that “[t]he common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying.”

Prior to the adoption of KRPC 3.4(b), DR 7-109(C)(1) & (2) of the Kentucky CPR stated that a lawyer “may advance, guarantee, or acquiesce in the payment of ... (1) (e)xpenses reasonably incurred by a witness in attending or testifying ... [and] ... (2) [r]easonable compensation to a witness for his loss of time in attending and testifying.”

This question was thoroughly considered by the ABA Standing Committee on Professional Responsibility in ABA Formal Opinion 96-402 (1996). The question posed was whether “[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 a meeting with the lawyer preparatory to such testimony, provided that the payment is not conditioned on the content of the testimony and provided further that the payment does not violate the law of the jurisdiction.” The Committee answered the question in the affirmative, noting that there was nothing to indicate that the drafters of the Model Rules intended to be more restrictive than the drafters of the Code. The Committee also alluded to ABA Prosecution Standard 3-3.2, which states that “it is not improper to reimburse an ordinary witness for the reasonable expenses of attendance upon court, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interview. Payments to a witness may be for transportation and loss of income provided there is no attempt to conceal the fact of reimbursement.” To summarize, ABA Formal Opinion 94-402 (1996) specifically approved of compensating a non-expert witness for time spent in actually attending a deposition or a trial, and for time spent in pretrial interviews in preparation for trial, and for time spent in reviewing and researching records that are germane to his or her testimony, so long as the payment is not being made for the substance or the efficacy of the witness’s testimony, and provided that such compensation is not barred by local law.

The ABA Opinion also alludes to the question of what is or is not “reasonable compensation” where the witness is retired or unemployed. The advice offered by the Committee is that the lawyer must determine the reasonable value of the witness’s time based on all relevant circumstances.

From the forgoing it can be seen that there is and has been some, indeed considerable¹ agreement among the sources in so far as ethical standards are concerned. But the law must also be consulted.

¹ The ABA Committee cited Pennsylvania Op. 95-126 (1995), which differs from the ABA Opinion to the extent that the Pennsylvania Committee reads the [identical] Pennsylvania Rule 3.4(b) “to disfavor compensation for time invested in preparing for testimony.” The ABA Annotated Model Rules of Professional Conduct (3d ed. 1996) p. 329, cites the Pennsylvania opinion, and in addition cites Alabama

Op. 93-2 (1993)(lawyer may reimburse witness for expenses and lost time; however caution must be exercised to ensure compensation reasonable relative to witness's occupation and normal wages).

Law

While the Committees does not convene to answer questions of law [KBA E-297 (1984)] the KRPC sometimes require that Committee to consult the law in order to answer the questions of ethics. This is such an occasion.

The federal bribery statute, 18 USC sec. 201(j) provides that payments to a lay witness for “the reasonable value of time lost in attendance of any such trial, hearing or proceeding do not violate the federal bribery statutes.” Based on this language, the ABA Committee concluded that payment for the witness’s loss of time is not prohibited by Model Rule 3.4(b).

KRS 524.010 - .030 et seq. provides that it is a Class D felony to offer, confer, or agree to confer any “pecuniary benefit” on a witness or potential witness with intent to influence that person’s testimony or to induce the person to avoid legal process or not appear pursuant to process.” It is also a Class D felony for a witness or a potential witness to solicit, accept, or agree to accept a bribe. It is suggested that “[A]ny payment to a lay witness in excess of the witness’s actual expenses raises the inference [may allow an inference?] that the witness is being paid for his testimony.” See Robert Lawson & William Fortune, Kentucky Criminal Law, Chapter 14 (To be published September 1997).

It is not the Committee’s role to provide the bar with definitive interpretations of the law. To the extent that we must inform ourselves of the law in reaching an interpretation of the ethics rules, we perhaps take a guarded or cautious approach. In the opinion of the Committee, KRPC 3.4(b) allows the lawyer, but does not compel the lawyer, to compensate a witness for reasonable out of pocket expenses and reasonable lost income that will actually be incurred by the witness while testifying at a trial, hearing, or deposition, or while engaging in necessary preparation with the attorney. The Committee is of opinion that additional payments are imprudent, and may be questioned as being unethical or even illegal. Obviously, no payment may be made for the substance or efficacy of the witness’s testimony. We further emphasize that witnesses must respond to process, and no lawyer is required to make payments that are not expressly provided for in the governing statutes and court rules.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.