Compensation of Witnesses by Lawyers

An attorney may ethically make payments to witnesses only in limited circumstances. Inducing a witness to testify falsely is the felony of subornation of perjury, and paying a witness to testify to a certain set of facts, even if they are believed to be true, is unethical.² In disbarring an attorney for cooperating in such a practice, a New York court commented, “The payment of a sum of money to a witness to ‘tell the truth’ is as clearly subversive of the proper administration of justice as to pay him to testify to what is not true.”³ The ABA Code of Professional Responsibility bans the payment to a witness of compensation which is contingent either on the content of the testimony or the outcome of the case.⁴ In addition, an attorney may not advertise for a person who will testify to a specific set of facts, though he may advertise for a witness to an event or specific transaction.⁵ At one time, even the payment of travel expenses and compensation for lost time was subject to criticism. A California decision⁶ found it a practice “not to be commended.”⁷ It said that “... a deep knowledge of human nature is not necessary in order to draw the conclusion that a witness liberally compensated for his time by the party serving him with a subpoena will be apt to color his testimony.”⁸

On the other hand, testifying in a lawsuit can be a real hardship for one not interested in the outcome, even with statutory witness fees. Consequently, several court decisions⁹ and bar association

1. R.M. Perkins, Criminal Law 466. See ABA, Code of Professional Responsibility [hereinafter cited as ABA Code], Ethical Consideration 7-28 [hereinafter cited as EC].

2. In re Robinson, 151 App. Div. 589, 136 N.Y.S. 548 (1912); In re Shapiro, 144 App. Div. 1, 128 N.Y.S. 852 (1911); ABA Code, Disciplinary Rule 7-109(c) [hereinafter cited DR].


7. Id., 130 P.2d at 185.

8. Id.

opinions have authorized the payment of expenses and compensation for lost time in instances of great hardship. In his work, Legal Ethics, Henry Drinker comments that an attorney may advise a client to pay “actual expenses and reasonable compensation to persons who cannot afford to come and testify at the statutory fees, with no attempt to influence their testimony, the arrangement being disclosed to the court and jury.” The ABA Code of Professional Responsibility accepts such practices, without any qualification regarding need. Paying the travel expenses of a witness coming from out of state does not even have to be disclosed and paying expert witnesses is generally considered proper. However, some states have avoided these issues. The Alabama Code of Professional Responsibility, for example, omits any mention of these subjects in a provision otherwise identical to the ABA version.

According to the New York County Lawyers’ Association Committee on Professional Ethics, “A lawyer should not advise his client to pay money to unseal the lips of a witness.” Though actual expenses and lost time may usually be compensated for, there is a public policy against paying a witness to induce him to testify, and a lawyer’s involvement in such a practice is unethical. This holds

10. ABA COMMITTEE ON PROFESSIONAL ETHICS, INFORMAL OPINIONS [hereinafter cited as ABA INFORMAL OPINIONS], No. 847 (1965); NEW YORK COUNTY LAWYERS’ ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS [hereinafter cited as N.Y. COUNTY OPINIONS], No. 165 (1918); THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SELECTED OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS [hereinafter cited N.Y. CITY OPINIONS], No. 110 (1917).


12. ABA CODE, DR 7-109(c)(1) and (2), EC 7-28.


14. In re Robinson, 151 App. Div. 589, 136 N.Y.S. 548 (1912); ABA CODE, DR 7-109(c)(3); N.Y. COUNTY OPINIONS, No. 165 (1918); N.Y. COUNTY OPINIONS, No. 110 (1917).

15. ABA CODE, DR 7-109.


17. N.Y. COUNTY OPINIONS, No. 110 (1917).


19. N.Y. COUNTY OPINIONS, No. 165 (1918); ABA CODE, EC 7-28; H. DRINKER, LEGAL ETHICS 75 (1953); R. WISE, LEGAL ETHICS 187 (1966).
true even where there is no attempt to influence the content of the testimony.\textsuperscript{20}

A recent New Jersey Supreme Court case, \textit{In re Shamy},\textsuperscript{21} involved a problem of this nature. A Pontiac driven by McArthur Jones collided with the car of Kenneth Ward, injuring him. Jones maintained that the accident occurred because his accelerator stuck. Ward retained George Shamy to represent him, and suit was filed against the manufacturer on the basis of Jones’s story. Prior to the trial, Jones, who was obviously a key witness, came to Shamy and asked him for a loan. In order to keep Jones in the state, Shamy agreed and loaned him six hundred dollars. Shamy was disciplined by the local bar association, and the Supreme Court upheld the discipline. Speaking of the loan, it said, “In actuality it involved a clear conflict of interest and in appearance it bore decidedly sinister implications.”\textsuperscript{22}

The loan which Shamy gave to Jones was not an ordinary business transaction. Jones does not appear to have been a friend of Shamy, and the bar does not normally serve as a commercial lender. The implication is clear that the loan was designed by Shamy to advance his client’s cause. This was, in fact, Shamy’s explanation of the incident and the finding of the local bar association\textsuperscript{23} and of the court.\textsuperscript{24} It is perhaps possible to imagine a situation in which the fact of the loan could work to the client’s disadvantage, as where the witness used a threat not to repay against the attorney. But Shamy’s loyalty to his client was demonstrated by the fact of the loan itself. And to refer to a transaction which was undertaken purely for the client’s benefit, and which in fact probably was to his benefit, as a “conflict of interest” is to elevate form over substance. Stripped to its essentials, this was an example of a payment to a witness to obtain testimony, and it should be analyzed as such.

It is not clear from the opinion exactly what demands, express and implied, Jones made and what his financial position was. But suppose, for example, that a key witness in a case saw an opportunity to profit from his position and made his testimony conditional on the attorney for one of the parties making him a loan. This would

\begin{flushleft}
\begin{enumerate}
\item \textit{Id.}
\item 59 N.J. 319, 282 A.2d 401 (1971).
\item \textit{Id.}
\item \textit{Id.}
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place this case in the category of payments to "unseal the lips of a witness," 25 which are of course unethical. 26 The fact that the payments were technically a loan really makes little difference. The possibility that the lender would never be repaid is clear, and it should not be possible to evade important ethical requirements by so obvious a subterfuge. And even if the loan was repaid, the use of money over a period of time is a financial benefit, which is the equivalent of direct payment.

A more difficult problem is posed where a witness finds it economically impossible to remain within the jurisdiction, or to come to the trial, without some financial assistance. Would an attorney be justified in giving the witness the aid necessary to get him to the courthouse on the day of the trial? This is not quite the same as paying a witness to induce him to testify, because the witness is willing to speak truthfully if he can get to the trial. If it is simply a matter of advancing travel expenses, there should be no problem. He may pay the costs of getting the witness to court, 27 and there seems to be no reason why this could not be done ahead of time, where it is necessary. Such expenses are easily calculable and thus the danger of abuse is small. If the witness promised to pay back the money given him, it is hard to see how it would substantially change matters. He has in fact received a lesser benefit than he is allowed. On the other hand, what does the lawyer do when a potential witness says that he will have to leave the jurisdiction if he does not get some financial help? It could be argued that there is basically no difference between paying travel expenses back from another jurisdiction and paying the expenses necessary to keep the witness there in the first place. However, the potential for abuse in this type of situation is enormous. An attorney can calculate travel expenses by calling an airline or looking on a mileage chart, but he must take the witness's word for the amount of money needed to keep him in the jurisdiction. Further, the ABA Code only authorizes the attorney to compensate the witness for losses arising from his having to testify. 28 Payments which enable the witness to stay in town are not necessarily losses arising from court appearance. It is possible for the witness to gain a positive benefit rather than simply

25. See N.Y. County Opinions, No. 110 (1917).
26. N.Y. County Opinions, No. 110 (1917).
27. ABA Code, DR 7-109(c)(1) and (2), EC 7-28.
28. Id.
avoiding loss as a result of testifying. This would be the equivalent of paying to "unseal the lips of a witness," and thus could be unethical.\(^{29}\)

In the final analysis the standards set by DR 7-109(c)(2) of the ABA Code are vague and leave a lawyer in Shamy's case in an ambivalent position. What is "reasonable compensation" for "loss of time" will surely be a difficult question for any lawyer to answer. But it is at least clear that any payment to a witness probably can be justified only in these terms.

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\(^{29}\) ABA Informal Opinions, No. 847 (1965); N.Y. County Opinions, No. 165 (1918); ABA Code, EC 7-28; H. Drinker, Legal Ethics 75 (1953); R. Wise, Legal Ethics 187 (1966).