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The Dos and Don'ts of Witness Compensation

By David L. Brandon

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Every so often something occurs in the context of your practice that causes you to revisit an area of the law, leading to a broader understanding of that particular subject. The following scenario is based on a true story, and leads to a broader understanding of the circumstances under which a lawyer may, or may not, compensate a witness.

In a binding attorney fee arbitration, Client sought a disgorgement of fees paid to Attorney. Client's Counsel submitted testimony from a standard of care expert (an attorney practicing in the same field as Attorney), who testified that many of the actions for which Attorney had charged Client had little to no value, or were grossly overcharged. During cross-examination, Attorney's Counsel questioned the expert about his fee arrangement with Client and Client's Counsel. The expert testified that besides charging an hourly rate, he would get a "bonus" depending on the outcome of the arbitration. In other words, the larger the amount ordered refunded to Client, the larger the expert fee. (There were no depositions allowed in this arbitration, so this exchange was the first time Attorney's Counsel or the arbitrators had heard of this arrangement.)

Besides calling the objectivity of the expert's testimony into serious question (the expert was obviously motivated to testify that large amounts of Attorney's fees had no value and therefore should be refunded), the fee arrangement likely was in violation of former Rule of Professional Conduct 5-310 (which was in effect at the time the testimony was elicited), and would likely be in violation of current Rule of Professional Conduct 3.4(e). Former Rule 5-310 stated that an attorney may not "[d]irectly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon…the outcome of the case." Current Rule 3.4(e) states that "[a] lawyer shall not…offer an inducement to a witness that is prohibited by law, or directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case."

It is possible that Client's Counsel and the expert did not consider this as a "contingent fee" in the common sense of the term; after all, most contingent fee arrangements are "all or nothing" deals: if the client gets nothing, the lawyer gets nothing. This was not an "all or nothing situation." Instead, it was a hybrid contract where the expert was getting paid an hourly rate regardless of the result, but the final fee would depend on the eventual outcome.

Unfortunately for Client's Counsel and the expert, this arrangement does in fact constitute a contingent fee under California law. "The term 'contingency fee contract' is ordinarily understood to encompass any arrangement that ties the attorney's fee to successful performance, including those which incorporate a no contingent fee based on

a fixed rate of payment… [T]he term refers to a contract providing for a fee the size or payment of which is conditioned on some measure of the client's success." Both former Rule 5-310 and current Rule 3.4(e) do not refer to "all or nothing arrangements," instead prohibiting payments to witnesses "contingent upon" the outcome of the case. The size of the award would appear to be part of the "outcome" of the fee arbitration.

Which brings us to the broader question: Are there other restrictions on what can a lawyer pay a witness, expert, or nonexpert? A review of current Rule 3.4 in its entirety lays out the parameters of witness compensation. The remainder of current Rule 3.4(e) states "[e]xcept where prohibited by law, a lawyer may advance, guarantee, or acquiesce in the payment of: 1) expenses reasonably incurred by a witness in attending or testifying; 2) reasonable compensation to a witness for loss of time in attending or testifying; or 3) a reasonable fee for the professional services of an expert witness."

Comment 4 to current Rule 3.4 explains what can be paid to a nonexpert witness, and emphasizes that the payment must be reasonable: "Paragraph (e) permits a lawyer to pay a nonexpert witness for the time spent preparing for a deposition or trial. Compensation for preparation time or for time spent testifying must be reasonable in light of all the circumstances and cannot be contingent upon the content of the witness's testimony or on the outcome of the matter. Possible bases upon which to determine reasonable compensation include the witness' normal rate of pay if currently employed, what the witness last earned if currently unemployed, or what others earn for comparable activity." The Comment's statement that these are possible bases indicates that there may be other bases for determining what may be reasonable compensation, but the emphasis remains on "reasonable."

The Comments to current Rule 3.4 do not list examples of payments that may be "prohibited by law." However, there are various statutes and common law doctrines that offer guidance. For example, a contract to bribe a witness to influence the witness' testimony is illegal, as is one to dissuade a witness from attending any judicial proceeding. It is also illegal to contract to compensate a witness for providing information regarding a crime. And federal law prohibits paying incarcerated persons even the normal statutory costs permitted to be paid to witnesses.

Practitioners would be well served to keep these concepts in mind when contemplating a compensation agreement with a witness.