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The Shoals to Avoid When Paying Potential Witnesses

BY MARY C. DALY

The Beatles sang, "I get by with a little help from my friends." But the Beatles weren't lawyers. Some forms of help are ethically perilous for lawyers, especially if they involve paying compensation to a third party for assistance in a potential or pending litigation. A recent decision of the Florida Supreme Court that was a subject of some notoriety in New York starkly illustrates the risks of such payments.

Florida Bar v. Wohl, 842 So. 2d 811 (Fl.2003) arose out of an acrimonious dispute between the sons of the famed jeweler, Harry Winston, who died in 1978. The respondent, attorney Wohl, had represented one of the brothers, Bruce Winston, for over twenty-five years in a variety of matters. Bruce and his brother were at loggerheads over the distribution of their mother 's estate. In addition to the respondent, two trial lawyers admitted in New York represented Bruce in his fight with his brother. The brothers' dispute prompted Bruce to examine the operation of their deceased father 's diamond business. Bruce located a former employee of the business who agreed to help him, but she demanded compensation. Bruce and the employee entered into a complex payment agreement, one component of which was a contingent fee. The respondent and the two trial lawyers assisted in drafting the agreement. The employee retained her own separate counsel.

The employee provided considerable information after executing the payment agreement, including information that ultimately led to her becoming a witness in the estate proceedings. Acting upon a complaint filed by Bruce's brother, Ronald, Bar Counsel subsequently charged the respondent with violating Rule 4-3.4(b) of the Florida Rules of Professional Conduct. That Rule prohibits a lawyer from

> offer[ing] an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings.

The respondent argued that Bruce had hired the former employee strictly as a consultant, not as a witness, and that Bruce had no reason to anticipate that the information she would provide would later lead to her testifying in the estate proceeding. The Florida Supreme Court, however, flatly rejected those arguments, concluding that "paying an individual who has personal knowledge of the facts is to pay a witness, whether or not that person is expected to testify." Citing a long line of precedent, the Court insisted that "[o]ffering financial inducements to a fact witness is extremely serious misconduct.... [T]empting a witness to color testimony is an evil that should be avoided. We condemn the practice of compensating fact witnesses... in no uncertain terms." The Court imposed a ninety-day suspension on the respondent, placed him on probation for one year, and ordered him to complete a Practice and Professionalism Enhancement Program.

The notoriety that the *Wohl* case received in New York is attributable to the fact that Ronald also filed a complaint with a State disciplinary authority against the two trial attorneys who negotiated the agreement with the former employee. Those attorneys were admitted in New York, but apparently not in Florida. The reasoning of the Florida court in *Wohl* may not be dispositive of the New York complaint, however.

DR 7-109(C) of the New York Code of Professional Responsibility explicitly prohibits a lawyer from "pay[ing], offer[ing] to pay, or acquiesc[ing] in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case." It basically recognizes the same three exceptions as those in Florida's Rule 4-3.4(b).

Why then would the disposition in New York be different? The answer to this question is found in Opinion 668 of the Commit- tee on Professional Ethics of the New York State Bar Association. The Committee in that Opinion reached a conclusion that is inconsistent in part with the conclusion of the Florida Supreme Court. The inquiring lawyer who prompted Opinion 668 asked if it was ethically permissible to hire an individual to "attend interviews, examine and explain documents and tape recordings, and otherwise assist in the fact-finding process," even though the individual might have to testify in the underlying trial. The Committee's analysis was straightforward. Reasoning that DR 7-109(C) on its face applied only to "witnesses," the Committee concluded that the Rule did not prohibit a lawyer from employing an individual to assist in the fact-finding process, even though that individual might later be designated a testifying witness. It specifically recited, "...the attorney may pay an individual whatever amount the client consents to for pre-trial fact-finding services that the individual provides." (Emphasis added).

Opinion 668 does not give an across-the-board approval to the employment, however. It contains two important reservations. First, the compensation cannot serve as a pretext for avoiding the proscriptions in DR 7-109(C). Second, once it becomes clear that the individual will be a testifying witness, the compensation may not be greater than "reasonable". The Committee took a broad view of what constitutes reasonable compensation for a witness within the meaning of the Rule, noting that it includes reimbursement not only for lost wages, but also for lost free time and recreation time. Payments to a witness's counsel may also be made under certain circumstances without violating DR 7-109(C). NY County Law. Ass'n Op. 729 (2000).

Bar association ethics opinions are, of course, not binding authority. The disciplinary authority with which Ronald Winston has lodged his complaint is free to disagree with Opinion 668 and sanction the two trial lawyers for their conduct. A powerful public policy, however, supports the proposition that lawyers who consciously conform their conduct to a well reasoned ethics opinion should not be sanctioned.

It is also possible that the disciplinary authority will charge the two trial lawyers with violating DR 1 102(A)(5) for having engaged in conduct that is prejudicial to the administration of justice by assisting in the wrongful conduct of the respondent in *Wohl* or with violating DR 3-101(B) by having engaged in the unauthorized practice of law in Florida. Based on the public record to date, these charges seem unlikely.

Opinion 668 is not the only important ethics committee opinion interpreting DR 7-109(C). Questions have arisen with respect to the compensation of a broad class of witnesses: lawyers, private investigators, medicolegal consulting services, and clients in a class action who perform investigatory services. The NYSBA Committee on Professional Ethics in Opinion 714 (1999) concluded that a lawyer who testifies on behalf of a client in an action in which the client is represented by another lawyer may be compensated in the amount of the lawyer's customary hourly rate. The Committee warned the lawyer, however, to be certain that the compensation was legal in all other respects and that it did not violate the fee arrangement with the client in the event that the testimony related to a prior matter in which the lawyer provided legal services to the client.

As Opinion 714 suggests, the compensation of a potential witness raises legal as well as ethical issues. For example, Section 84(1) of the General Business Law forbids a private investigator from accepting contingent fee compensation. This statutory bar prompted the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York in Opinion 1993-2 (1993) to advise the inquiring lawyer against entering into such an arrangement. The Committee explained that it would cause the lawyer to violate either DR 1-102(A)(3) prohibiting a lawyer from engaging "in illegal conduct that adversely reflects on the lawyer 's honesty, trustworthiness or fitness as a lawyer" or DR 1-102(A)(7) prohibiting a lawyer from engaging "in any other conduct that adversely reflects on the lawyer 's fitness as a lawyer." The Committee also cautioned the lawyer that the payment could violate DR 7-109, if the private investigator was to be called as a witness. Subsection (C) of DR 7-109 prohibits compensation to a witness contingent upon the outcome of a case. The Committee on Professional Ethics issued a similar caution in Opinion 572 (1985) with respect to a contingent fee arrangement with a medico legal consulting service.

Under unusual circumstances, a lawyer in a class action may decide that it is more efficient to hire his or her own client to perform research and investigative tasks instead of hiring a private investigator. The prohibitions in DR 7-109(C) complicate that decision, however. Under no circumstances may the lawyer's payment to the client be used as compensation for the client's testimony. (In addition, compensation may raise other significant ethical issues such as sharing fees with a non-lawyer and making payments to recommend or obtain employment by a client in violation of DR 3-102 and 2-103(B), respectively.) See NYSBA Op. 679 (1996).

Finally, violations of DR 7-109 can lead to disqualification or the exclusion of the testimony of the witnesses who received the unethical payments. *E.g., Cresswell v. Sullivan & Cromwell,* 922 F.2d 60 (2d Cir. 1990), cert. denied, 505 U.S. 1222 (1992); *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 865 F. Supp. 1516 (S.D. Fl. 1994), affirmed in relevant part, 117 F.3d 1328 (11th Cir. 1997).

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