

Advisory Opinion No. 2009-6

SYNOPSIS

In securing the attendance of an out-of-state fact witness for a trial, an attorney does not violate the Vermont Rules of Professional Conduct by reimbursing the witness for wages that would otherwise have been earned by the witness during the relevant time period. The wages may be paid in addition to the statutory attendance fee and travel allowance, so long as the wage replacement payment is not conditioned on the delivery of favorable testimony and the payment is disclosed to the opposing party.

FACTS

In connection with a jury trial, the requesting attorney needs to secure the attendance of a key fact witness who lives out of state and therefore, is beyond the reach of local subpoena. The witness is willing to testify at trial voluntarily but only if the requesting attorney's client will reimburse him for the wages he will lose by attending the trial in Vermont in addition to payment for travel and lodging expenses and the statutory witness fee. The attorney will make full disclosure of the wage replacement to the opposing party and to the jury.

QUESTION PRESENTED

Will payment of the wage replacement, in addition to other required witness fees and expenses, violate the Vermont Rules of Professional Conduct?

DISCUSSION

We do not find a Vermont Rule that directly addresses this question. Witnesses are entitled under statutes and rules to certain fees and mileage when subject to a subpoena. In this case, the out of state witness is beyond the reach of a local subpoena.

Expert witnesses in civil matters are commonly paid by parties for witness fees, travel and other expenses in connection with their expert testimony. One rationale for these expert fees is that the expert may forego other employment in order to take on a set of tasks and analyses on behalf of a litigant. The reasonableness of the fees and their effect upon the credibility and weight of testimony is subject to review and cross-examination.

The Comment to Rule 3 notes: "...it is not improper to pay a witness' expenses or to compensate an expert on terms permitted by law. *The common rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.*" [No citations provided] However, Vermont statutes do provide for witness attendance fees; witness certification of costs; and taxation of costs that include witness costs. See 32 V.S.A. §§ 1551, 1553, 1471. Neither Vermont statutes nor federal statutes, see, e.g., 28 U.S.C. § 1821 ("Per diem and mileage generally; subsistence") appear to directly address the wage replacement

involved in this request. The losing party might assert that wage replacement of a fact witness need not be paid over to the prevailing party because it is not included in the statutory language that establishes what witnesses shall be paid for attendance and travel, etc.¹ but such analysis is beyond the scope of this advisory opinion.

As in the case of an expert witness, it would be improper for the requesting attorney to condition payment of any amounts, including wage replacement upon the delivery of favorable testimony, since this would violate Rule 3.4(b) (“ a lawyer shall not...offer an inducement to a witness that is prohibited by law.”} In addition, all funds paid to the witness must be disclosed to the opposing party so that the information can be utilized in cross-examination.¹

CONCLUSION

The Vermont Rules of Professional Conduct do not preclude a lawyer from compensating (with the cost borne by the client) an out-of-state trial witness for wages that are lost by the witness as a result of attending and testifying at trial.

¹ Inasmuch as paying a wage replacement goes beyond that which is specifically allowed under applicable law, one might conclude that such action would be an "inducement prohibited by law." We do not believe that the absence of reference in state law to witness wage replacement, with full disclosure, constitutes a "prohibition" of it, within the meaning of Rule 3.4, entitled "Fairness to Opposing Party and Counsel.