Witnesses can be paid for their time, not their testimony. That seemingly simple ethical rule gives rise to a host of practical problems. If money is paid for time, how do you measure the value of the time of an expert? How do you know when the compensation paid stops being for the time spent testifying or preparing and starts being for the testimony itself? The line is blurry and subject to dispute. Beyond questions of time and money, can you confer with witnesses during breaks in their testimony? There are also questions about the extent to which attorneys are ethically bound to correct the misstatements of witnesses. These any many other important ethical questions will be discussed in this real world guide to the ethics of working with and preparing witnesses.

- Ethics of paying and preparing witnesses
- Drawing the ethical line between paying for time versus testimony
- Conferring with witnesses about their testimony during breaks
- Ethical duty to correct misstatements of witnesses
- Online and social media posting of videotaped depositions to embarrass opponents
- Ethics of using inadvertently produced information

**Speaker:**

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Cheap Talk? Witness Payments and Conferring With Testifying Witnesses

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I. INTRODUCTION

Under what circumstances may a lawyer compensate a fact witness? Some lawyers will say, “never.” Other lawyers will say, “even if I am able to do so, the potential impact on credibility is not worth the risk.” Still others might say, “I can cover reasonable expenses, but that’s it.” But what if you must talk with or need a fact witness who is employed by someone or who is self-employed and will lose wages or income by spending time with you in (a) an interview, (b) preparation to testify, or (c) in testifying? Or what if you need information from someone else and that person later becomes a witness as the source of the information?

And whether or not you are paying a witness, may you confer with the witness while the witness is testifying in a deposition? Some lawyers will say, “If I am defending a deposition of a witness, I have to make sure the witness is prepared and that duty continues throughout the deposition. I will confer when I must to discharge that obligation.” Others will say, “only to be certain that a privilege is not waived.”

As all lawyers should know, a fact witness can never be “paid for testimony,” but the fact witness can be reimbursed for reasonable expenses and for the reasonable value of the loss of time. And counseling a witness during a deposition is permissible while coaching is not, but the distinction between the two can be blurry depending upon the applicable rules and the judge before whom a lawyer is appearing so all lawyers should be cautious before counseling unless a matter of privilege is in issue. Below I discuss the intersection of ethics rules,¹ the common law, and rules of court to answer these questions more fulsomely.²

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¹ In this article, I will be referring primarily to the ABA Model Rules of Professional Conduct. Lawyers are advised to review the rules of professional conduct which govern their conduct to ensure that the ABA Model Rule has not been modified in the jurisdiction governing the lawyer’s conduct. The Model Rules can be found at http://www.abanet.org/cpr/mrpc/mrpc_toc.html. Links to state rules of professional conduct and state bar ethics opinions (when available online to nonmembers of a state bar) can be found at http://www.abanet.org/cpr/links.html#States.

² The focus of this article is not on the practice of prosecutors to provide inducements to witnesses (e.g., immunity, recommendation to a court for a favorable sentence). Such practices are routinely approved by courts. However, for a discussion of the contrast between the civil and criminal approaches to witness inducements, see Joseph Swanson, Let’s Be Honest: A Critical Analysis of Florida Bar v. Wohl and the Generally Inconsistent Approach Toward Witness Inducement Agreements in Civil and Criminal Case, 18 Geo. J. Legal Ethics 103 (2005).
II. PAYMENTS TO WITNESSES

Payments to a witness for testimony are forbidden because they undermine the truth-seeking process. Reasonable compensation for loss of time or payment of reasonable out-of-pocket expenses for a witness is not. The common law, the federal anti-bribery or anti-gratuity statute, and Model Rule 3.4(b) provide the applicable legal principles. I discuss each below.

Witness Compensation Agreements Under Common Law

At common law, payments to fact witnesses for testimony were prohibited. Illustratively, in Wright v. Somers, 125 Ill. App. 256 (1906), Wright sued a street car company for personal injuries and called Somers as a witness. After trial, Somers sued Wright alleging that Wright agreed to pay him $200 for the loss of time Somers spent in connection with the personal injury lawsuit. The jury agreed with Somers. Wright appealed. The appellate court acknowledged that the evidence tended to support the contract claim but reversed because the contract was against public policy. The Illinois Constitution at the time provided that every injured person should have a remedy and should have access to courts “without being obliged to purchase it,” and Illinois law provided that a witness subpoenaed to testify received $1 per day and $.05/mile. Any payment beyond this was forbidden by the statute, the appellate court held. Id. at 257. It explained:

If a witness, who knows a fact material to the issue in the cause, either before or after the service of a subpoena upon him, can traffic with the suitor, who desires to call him, as to the value of his testimony, and then call upon the courts to enforce the contract thus made, the tendency to evil consequences is apparent. Such a ruling leans toward the procurement of perjury; toward the raising up of a class of witnesses who, for a sufficient consideration, will give testimony that shall win or lose the lawsuit, toward the perversion of justice; and toward corruption in our courts.

Id.

Under very different circumstances, street car lawsuits prompted a similar proclamation in an oft-cited decision in the witness payment jurisprudence, In Re Robinson, 151 A.D. 589, 136 N.Y.S. 548 (1912) affirmed 209 N.Y. 354, 103 N.E. 160 (1913). Robinson was a lawyer for the Metropolitan Street Car Company which operated a

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3 I make the distinction here between payments for testimony and payments for information. The latter was not prohibited: “It is not illegal to hire someone, whether expert or not, to make investigations, to collect evidence, and to testify to the facts found, or to discover witnesses who can testify on some issue and the content of the testimony that they will give. It is lawful to offer a reward for information that leads to the arrest and conviction of a criminal, in spite of the fact that payment is conditional on conviction....” 6A Arthur Linton Corbin, CORBIN ON CONTRACTS 380-81 (1962).

4 There was no suggestion that the witness had not told the truth. But the appellate court held that the contract lacked consideration. It also distinguished between fact and expert witnesses referring to an English decision from the 1840s: “As was said by Justice Maule in Webb v. Page, 1 Car. & Kirw., 23: ‘There is a distinction between the case of a man who sees a fact and is called to prove it in a court of justice, and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fallen within his knowledge-- without such testimony the course of justice must be stopped. The latter is under no such obligation. There is no such necessity for his evidence, and the party who selects him must pay him.'” 125 Ill. App. at 258.
street railcar system throughout New York City. The company was the object of numerous fraudulent claims by persons claiming to have been injured in railcar accidents. Robinson was the attorney for the company responsible for the defense of the personal injury litigation. Deciding to “fight fire with fire,” he hired “investigators” who tracked down witnesses for plaintiffs and made payments to them for various purposes. The investigators presented “vouchers” for their “expenses,” which Robinson approved—without asking any questions. In fact, the investigators were making payments to witnesses to procure favorable testimony. Robinson was disbarred for his role in the scheme. The Appellate Division explained that Robinson had a duty to “the court and the public” to ensure that assistants employed by him to assist in the defense of the personal injury suits,

had not used the money of his client to obstruct the administration of justice or to induce false testimony from perjured witnesses. Where it appears upon the face of these vouchers that his subordinates had spent the money of his client to accomplish such results, it was his clear duty to the court and to the profession to do all that was possible to discourage such practices. He cannot escape responsibility for his acts by claiming an excess of work when he deliberately approved the application of his client’s money for such purposes and by that approval secured payment to the agents and investigators who had applied the money for the purpose indicated.

136 N.Y.S. at 593.

The Appellate Division recognized that to procure testimony of witnesses, “it is often necessary to pay the actual expenses of a witness in attending court and a reasonable compensation for the time lost.” It also acknowledged that “there are many incidental expenses in relation to the prosecution or defense of an action at law which can with propriety be paid by a party to the action.” In contrast, in this massive bribery scandal, the Appellate Division then unsurprisingly explained:

But on the other hand, the payment of a sum of money to a witness to testify in a particular way; the payment of money to prevent a witness’ attendance at a trial; the payment of money

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5 Illustratively, one voucher from an investigator read: “Night work roping plaintiff and locating and interviewing his witness and learning strength of his case--eighteen dollars and twenty-five cents.” Another read “suppers with plaintiff’s witnesses and two men from P. O. Department, where he works, on February 16 and 17, and general incidentals in getting them right--sixteen dollars and fifty cents.” Yet another read: “Paid to plaintiff’s two witnesses for their incidentals and lunches--seven dollars and fifty cents.” And another: “Expended at night ** with plaintiff’s two witnesses, *** and with their friends for purpose of keeping them away from home--eleven dollars and sixty cents. ‘Their hotel bills, suppers and breakfasts’--five dollars and fifty cents.” And yet another: “Expended with plaintiff’s two witnesses on two evenings before trial of case in order to properly prepare for trial--eight dollars.” 136 N.Y.S. at 594-595. The Appellate Division concluded: “There could have been but one object in the expenditure of this money and that was to break down, as far as possible, the plaintiff’s case, to influence his witnesses favorably to the railroad company, or extort from them admissions, or lay the foundation of testimony that would contradict their testimony.” Id. at 595.

6 Payments—‘constant gratuities—were also made to “court officials, clerks, and attendants” and to policemen as well as payments to physicians for plaintiffs, 136 N.Y.S. at 595-97, prompting the appellate court to call it “a system established by which the railroad company’s employees were justified in spending the railroad company’s money to defeat recoveries by methods which, if they did not fall directly within the criminal law, were designed to accomplish the purposes which the provisions of the criminal law were enacted to prevent.” Id. at 599.
to a witness to make him ‘sympathetic’ with the party expecting to call him; these are all payments which are absolutely indefensible and which are really included in the general definition of subornation of perjury. 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.

*Alexander v. Watson*, 128 F.2d 627 (4th Cir. 1942) rejected a claim by an attorney and an accountant for fees where both were fact witnesses. The attorney was a director and secretary of a company that had gone into receivership. Before the receivership, the accountant was involved in filing a claim for the company to recover income tax paid by the company after the statute of limitations had expired. Both were fact witnesses at a trial on the tax recovery claim because the government had put in issue whether the statute of limitations had been waived by their actions. The claim was successful and the attorney and accountant sought fees consistent with a pretrial deal made with counsel for the receivers. The district court awarded the fees and the receiver appealed. The court of appeals reversed, holding that the agreement to pay the attorney and accountant compensation was void “as lacking in consideration and also contrary to public policy.” *Id.* at 630 (citations omitted). “Except in the case of expert witnesses, we know of no authority which would justify an allowance to witnesses in excess of ordinary witness fees, however valuable their testimony may have been to the parties calling them to testify.” *Id.*

Other cases are discussed below, but no common law case is equivocal: paying for testimony is abhorrent to the administration of justice.

**The Federal “Anti-Bribery” and “Anti-Gratuity” Statute**

A criminal statute also plays a role in the witness payment jurisprudence. Under 18 U.S.C. § 201(b)(3), it is a crime to “corruptly” give, offer, or promise “anything of value” to a person to influence the testimony of that person in a “trial, hearing, or other proceeding.” The key word in this portion of the statute is “corruptly.” The statute requires a “corrupt mind” by “the alleged bribe-giver.” *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Association*, supra, 865 F. Supp. at 1523. I will assume that no lawyer will ever run afoul of this law.

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7 The recipient is also guilty of a crime under 18 U.S.C. § 201(b)(4). In full, the law provides: “Whoever…(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom; (4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom… shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years.”

8 The district court cited *Okabe v. Immigration and Naturalization Service*, 671 F.2d 863, 865 (5th Cir. 1982) (“Offering a bribe under the statute is a crime involving moral turpitude, for a corrupt mind is an essential element of the offense”) and *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817, 822 (9th Cir.), cert denied, 471 U.S. 1139 (1985) (bribery under the statute requires “corrupt intent”).
18 U.S.C. § 201(c)(2) also prohibits payments for testimony but without a “corrupt intent” requirement (this is the anti-gratuity statute). It provides that “whoever”

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, ... authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person’s absence therefrom;...

shall be fined under this title or imprisoned for not more than two years, or both.

However, this law has been interpreted to apply only to the procurement of false testimony. Giving something of value for truthful testimony is not a violation of the statute. Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Association, supra, 865 F. Supp. at 1523-24. I am going to assume again that no lawyer will ever put herself or himself in a position where the lawyer can be accused of procuring false testimony.

To the extent that this portion of the statute might be regarded by a different court to cover truthful testimony, 18 U.S.C. § 201(d) has exceptions for payment of witness fees “provided by law,” or payment of the reasonable expenses or the reasonable value of time lost by a witness. It provides in full:

(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

And to the extent that there might be a concern about nontestifying witness payments, one court has held that 18 U.S.C. § 201(c) does not apply to compensation for time spent by a witness “in connection with legitimate, non-testifying activities, such as reviewing documents in preparation” for a deposition and “meeting with

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9 Subparagraph (c)(3) applies to recipients. It covers a person who “directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person’s absence therefrom.” 18 U.S.C. § 201(c)(3).

10 The district court relied on dicta in United States v. Moody, 977 F.2d 1420 (11th Cir. 1992) cert. denied, 507 U.S. 944 (1993) where the court of appeals upheld the constitutionality of Section 201(c)(2) (against a vagueness challenge) and in so doing explained, “Giving something of value ‘for or because of’ a person’s testimony obviously proscribes a bribe for false testimony; persons of ordinary intelligence would come to no other conclusion.” Id. at 1425.


Model Rule 3.4

Model Rule 3.4(b)

A lawyer shall not:

... 

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;...

Comment [3] to Model Rule 3.4 provides in full:

With regard to paragraph (b), it is not improper to pay a witness’s expenses or to compensate an expert witness on terms permitted by law. The common law 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.

Model Rule 3.4 is the successor to Model Code Rule 7-109(C) which provided in pertinent part that a lawyer could not pay a witness for testimony or based on the outcome of a case but could pay a witness for, “(1) Expenses reasonably incurred by a witness in attending or testifying”; and “(2) Reasonable compensation to a witness for his loss of time in attending or testifying.”

Ethical Consideration 7-28, Canon 7, accompanied DR 7-109(C). It provides:

Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.

What is an inducement prohibited by law under Model Rule 3.4? We have learned already that at common law, an agreement to pay for testimony lacked consideration and was against public policy and that federal law makes it a crime to pay for false testimony. So the focus of an “inducement” under Model Rule 3.4(b) is on truthful testimony but even that cannot be bought as is explained in the following discussion of a number of ethics opinions rendered under a variety of fact patterns. I start with the leading opinion, one from the

American Bar Association, that itself is sandwiched chronologically between a handful of decisions that preceded and followed it.

III. ETHICS OPINIONS ON PAYMENTS TO WITNESSES

The American Bar Association Standing Committee on Ethics and Professional Responsibility and several state bar ethics committees have addressed what type and amount of compensation to a witness do not violate Model Rule 3.4 and Model Code DR 7-109(C).

ABA Formal Opinion 96-402

In Formal Op. 96-402, the ABA Standing Committee on Ethics concluded that Model Rule 3.4(b) permits a lawyer to “compensate a non-expert witness for time spent in attending a deposition or trial or in meeting with the lawyer preparatory to such testimony,” and for travel and lodging expenses. The committee rejected a Pennsylvania ethics opinion (discussed below) that had suggested that compensation of a witness for preparation time might be improper under Pennsylvania RPC 3.4(b).

The committee offered three caveats in its opinion:

1. If the law of the jurisdiction of the lawyer forbids or restricts payment to occurrence witnesses, a lawyer must comply with that law.

2. The lawyer must make it “clear to the witness that the payment is not being made for the substance or efficacy of the witness’s testimony, and is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony in litigation in which the witness is not a party[.]”

3. The amount of any compensation “must be reasonable, so as to avoid affecting, even unintentionally, the content of a witness’s testimony. What is a reasonable amount is relatively easy to determine in situations where the witness can demonstrate to the lawyer that he has sustained a direct loss of income because of his time away from work--as, for example, loss of hourly wages or professional fees. In situations, however, where the witness has not sustained any direct loss of income in connection with giving, or preparing to give, testimony--as, for example, where the witness is retired or unemployed--the lawyer must determine the reasonable value of the witness’s time based on all relevant circumstances.”

A Sampling of State Bar Opinions

In most instances, state bar ethics opinions following ABA Formal Opinion 96-04 have piggybacked on it. Those that were rendered under the Model Code of Professional Responsibility reached conflicting outcomes but most of them permit reasonable compensation for a fact witness. They are only mildly illuminating on how to determine what compensation is reasonable.
I discuss a number of these opinions in alphabetical order by state bar.

**Alabama (1983 and 1997)**  
Alabama State Bar Ethics Op. RO-83-77 addressed the question of payments to an “investigator and consultant” for locating two “direct” witnesses and documents relevant to a lawsuit. According to the question presented by the inquiring lawyer:

*This individual requires the payment of a substantial sum of money to him for the production of the documents and the production of witnesses. On my first contact with him, I told him that I could not deal with him directly, and that it would be necessary for him to employ an attorney of his choice to look at a synopsis of the testimony and at the documentary evidence. The individual has done so. The attorney has called me and told me that the evidence is not only material, but may, in fact, be determinative of the outcome of the litigation. This consultant represents to me and to his attorney of choice that he alone will receive this money, and that it would not be paid to the two witnesses.*

Relying on DR 7-109(C), the office of general counsel said it was ethically proper to pay the investigator/consultant if:

(1) no portion of the money is paid by the investigator/consultant to the witnesses, (2) the content of the witnesses’ testimony is not contingent upon the payment of the sum of money to the investigator/consultant, (3) the payment of the sum of money to the investigator/consultant is not contingent upon the outcome of the lawsuit and (4) the payment is made with the consent of the client after a full disclosure.

In Opinion 1997-02, the Alabama Disciplinary Commission answered this question: “Under what circumstances can an attorney pay a witness who offers testimony at trial or by deposition for an attorney’s client?” The issue was the hybrid witness: the expert who also is providing factual testimony. The committee determined that, “Under these circumstances, the attorney would not be ethically precluded from paying the witness, in his role as expert, his usual and customary fee.” The committee urged the attorney to exercise caution not to pay the expert “more than his usual and customary fee or pay him for more time than he actually expended in preparing and providing his expert testimony, since any excess or unusual fee could be construed as payment for his testimony as a fact witness.”

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13 A chronological listing appears in Appendix I.  
14 [http://www.alabar.org/ogc/fopDisplay.cfm?oneId=410](http://www.alabar.org/ogc/fopDisplay.cfm?oneId=410).  
16 The committee’s summary read: “In summary, it is the opinion of the Disciplinary Commission of the Alabama State Bar that an attorney may pay a fact witness for actual expenses and actual loss of income or wages as long as such payment is not made as an inducement to the witness to testify in a certain way.”
Alaska (1993)
In Opinion 93-2 (September 2, 1993), the Alaska Bar Ethics Committee considered “the circumstances under which it would be unethical to compensate a witness for his or her testimony” under Alaska RPC 3.4(b) focusing primarily on the lay witness who is giving expert testimony.

At the outset, the committee emphasized that there it is not always easy to distinguish between a lay witness and an expert. Hence, it first explained that, “Depending on the size of the case and the demands on the witness’s time, it may be appropriate for the witness to receive a reasonable fee in addition to reimbursement of his or her expenses.” It then explained that Alaska is a “liberal jurisdiction” with respect to the admissibility of expert testimony: there is “no requirement that a witness possess a particular license or academic degree in order to qualify as an expert; the criterion in determining whether a person qualifies as an expert is whether the fact finder can receive appreciable help from that person.” Finally, the committee explained, “the issue of compensation does not necessarily hinge on whether the witness is properly characterized as an expert.” It explained that “a witness may be qualified as an expert on a relatively discrete issue, or for a limited purpose, but the fee for his or her ‘professional services’ could be grossly disproportionate to what the witness would make in his or her normal trade or endeavor. Under those circumstances, a fee for an expert could be so excessive as to no longer be ‘reasonable.”’

With these principles as the backdrop, the committee then offered these examples to assist the bar:

- “How does the fee or compensation paid to the witness compare to the wage or salary in his or her normal trade or occupation”? The committee gave the example of a highly skilled auto mechanic who is paid $30.00 per hour in the shop. “Even though he or she may qualify as an expert mechanic, a fee of $250.00 per hour for testimony in a case may not be ‘reasonable.’” On the other hand, “a highly skilled and educated engineer may be content in his or her twilight years to earn a relatively nominal wage working in a greenhouse. Yet, that person could probably command a fee worth many times his or her hourly wage.”
- “Does the ‘expert’ have other clients and/or a consulting business? If not, and he or she is commanding a fee for services above and beyond what would normally be the case for a person in their trade or occupation, that arrangement might run afoul of the ethical prohibition.”
- “Is the ‘expert’ testifying based upon firsthand observations or experience, or based upon after-the-fact independent analysis and evaluation?” The committee gave this example:

> Former employees of a product manufacturer could testify about their observations during the time they were employed with the product manufacturer, and that, in their opinion, the manufacturer falsified test results, had a deficient quality control procedure, etc. While these may be opinions, in the Committee’s view that person does not qualify as an expert, as defined by Alaska Evidence Rule 702. In effect, the witness is being paid for his or her recollections and observations. It is probably true that many other employees, both present and former, worked for the manufacturer during the same period of time; why is this witness’s

17 [http://www.alaskabar.org/servlet/content/indexes_aeot_93_2.html](http://www.alaskabar.org/servlet/content/indexes_aeot_93_2.html).
observations or comments any more insightful or probative than the other employees, former or otherwise? In fact, the witness’s opinions could be probative because of the position held with the former employer, but that does not qualify the witness as an “expert” in the Committee’s view.

- What “services does the witness provide in return for his or her compensation?” If the witness provides analysis and evaluation followed by testimony in deposition or in court, “the witness is more fairly characterized as an ‘expert.’ If a witness, on the other hand, is paid primarily to provide observations and recollections related to his or her firsthand experience or observations, or to review documentation provided by the attorney for purposes of refreshing their recollection of events and circumstances, the witness is more properly characterized as a lay witness. In the Committee’s view, paying a fee or providing compensation to the latter category of witness should be done with caution, and mindful of the ethical constraints.”

The committee emphasized that the distinction between a lay witness and an expert witness “should not be taken lightly by the practicing bar” because payment to a witness “to tell the truth” is “just as subversive of the proper administration of justice as to pay the witness to testify to what is not true.”

In a footnote cited several times in the opinion, the committee endorsed the view of EC 7-28 that “a lawyer may, if necessary, reimburse a non-expert witness ‘for expenses and financial loss incident to his being a witness.’” (emphasis in the original). For the hybrid witness, the committee explained:

If the lay witness is an engineer or other professional, or a treating physician who often presents a mixed bag of both fact and opinion testimony, their “financial loss” could be a substantial (one) and reimbursement of that loss by the attorney would be ethical. However, the Committee emphasizes that the compensation must always meet some objective standard of reasonableness, which, again, depends for the most part on the witness’s occupation and/or trade.

Arizona (1997)

In its Opinion 97-07, the Arizona Bar Ethics Committee addressed the propriety of a payment to a former employee of a corporate defendant. The former employee was self-employed and operated a business. The committee then answered the question by reference to ABA Formal Opinion 96-402 and opinions from California, Illinois, and New York discussed below:

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18 The committee cited In re Porcelli, 397 N.E.2d 830 (Ill. App. 1979); People v. Belfor, 591 P.2d 585 (Colo. App. 1979) and then added, “Not only is the practice unethical but it also exposes a witness to cross-examination and attacks on his or her integrity and character which could be very damaging to the attorney’s case and the cause of his or her client.”


20 The committee was initially concerned by the language in the comment to Rule 3.4(b) in Arizona provides that “it is not improper to pay a witness’ expenses” and that the “common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying.” But it overcame its concern by accepting the language in the Preamble to the Arizona Rules of Professional Conduct that provides: “Comments do not add obligations to the rules but provide guidance for practicing in compliance with these rules.”
The Committee believes that a reasonable fee may be paid to a fact witness for time spent preparing for testimony, being interviewed and/or testifying at deposition or trial.

The Committee gave these guidelines on what is reasonable compensation:

- It is a question of fact that may vary from situation to situation and it is the attorney’s duty to evaluate the reasonableness of any fee, keeping in mind that a fee that is unreasonably high will tend to appear as an illegal and unethical inducement to color testimony.
- The fee may not be contingent upon the outcome of the litigation.
- The lawyer would do well to instruct the witness to not allow the fee to color or influence testimony in any way and to memorialize their fee agreement in writing.

California (1997)

In Formal Opinion 1997-149, the State Bar of California Standing Committee on Professional Responsibility and Conduct also tackled the question of whether compensation could be made to a nonexpert witness for time spent in preparing for a deposition or trial even if the witness does not suffer a loss of income under California’s RPC 5-310(B). Barring a contingent fee arrangement, the committee said it was permissible to pay the witness for preparation time as long as the compensation was reasonable “in light of all the circumstances.”

The question arose in the context of environmental litigation arising out of a company’s prior ownership of land. The witness was retired but had been a former employee of the company during the relevant time period. The witness had “detailed knowledge of events occurring during the period in question as well as some notes that are relevant to Company’s defense.” Counsel for the company wanted the witness to “review documents and notes and otherwise prepare for a deposition and possibly a trial” and, if necessary, wanted the witness to testify. The witness was agreeable but wanted to be “compensated for his time.”

Noting that the compensation arrangement is discoverable and that “accurate testimony” may be impossible without “substantial preparation,” the committee said that reasonable compensation to a fact witness is no more objectionable than payments to an expert witness. It relied on Wisconsin and New York ethics opinions discussed below for guidance in how to determine “reasonableness,” ultimately concluding that reasonableness could be determined by “the witness’ normal rate of pay if currently employed, what the witness last earned, if currently unemployed, or what others earn for comparable activity.”

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22 Rule 5-310(B) states: “A member shall not: (B) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness’ testimony or the outcome of the case. Except where prohibited by law, a member 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.”
Colorado (1998)

In 1998, the Colorado Bar Ethics Committee issued its Opinion 103 concluding that an attorney may compensate a fact witness in a civil action “not only for expenses incurred in testifying at a trial, hearing or deposition, but also for the reasonable value of the witness’s time expended in testifying and in preparing to testify, so long as such reimbursement is not contingent upon the content of the witness’s testimony or the outcome of the case and is not prohibited by law. The amount of such compensation must be reasonable based on all relevant circumstances, determined on a case-by-case basis.”

The committee attempted to give guidelines on the reasonableness of payments. For a witness who is paid on an hourly basis and who has actually lost wages due to time away from work, “[w]hat is a reasonable amount may be determined easily.” If a witness is salaried and is paid by the witness’ employer despite missing work, “the attorney paying the compensation should attempt to determine if the employer, rather than the witness, should be reimbursed for the witness’s time away from work.” For employees who are unemployed, retired, or self-employed, the committee demurred on attempting to offer any guideline other than the determination of reasonable compensation is “fact-specific” and will vary from case to case. It did reference California, New York, and Arizona opinions discussed here for guidance (what the witness if unemployed last earned; what others earn for comparable activity; what the individual could expect to be paid in the ordinary course of the witness’ profession or business; fees that are too high will appear as an improper, unethical inducement; and a fee that makes the witness better off by testifying than by earning an income is suspect).

Connecticut (1992)

Opinion 92-30 (December 22, 1992) addressed payment to a lawyer called to testify in a will contest brought by a disinherited daughter where the lawyer had, many years earlier, drafted the will for the decedent. The lawyer was not retained by any of the parties in the will contest. The executor of the estate consulted the lawyer regarding the drafting of the will. The executor agreed to pay the lawyer “at the regular rate you charge for legal services, for any time spent reviewing the file, consulting with the estate’s attorney, and testifying in any court proceedings.” The lawyer was specifically not retained as an expert witness. The lawyer wanted to know whether payment for the time spent testifying at court proceedings and preparing for that testimony was compensable under Connecticut RPC 3.4(b).

The Connecticut ethics committee decided that payment was permitted “under these circumstances.” The committee framed the question as whether payment for time lost in order to be a witness was proper and


24 The committee closed with this admonition: “An attorney should keep in mind that compensation paid to a witness may be discoverable in the course of the litigation, and evidence thereof may be admissible at trial. Even though compensating a witness ethically may be permissible in a civil action, such compensation is not necessarily advisable in any and all circumstances. Furthermore, this committee expresses no opinion on the legal question of whether compensation paid to a non-expert witness is recoverable as an item of costs.” Colorado Ethics Op. 103 (1998) (citations omitted).

25 Connecticut ethics opinions are not generally available online.
determined that it was: “Compensation for income lost in order to be a witness is permitted for both payor and payee, as long as the payment neither affects nor is intended to affect the content of the testimony.”

**Illinois (1988)**

The Illinois Bar Ethics Committee interpreted the Model Code’s language that permitted a lawyer to “advance” the payment of “reasonable compensation to a witness for loss of time attending or testifying” as being “broad enough to permit, although certainly not mandate, the payment of reasonable compensation to a witness for time spent in being interviewed.” Illinois Ethics Op. 87-5 (January 29, 1988). The Illinois Committee was quick to caution that if the compensation is “in fact for the purpose of influencing testimony, rendering a prospective witness ‘sympathetic’ to one’s cause, or suborning perjury, it is indefensible.” There was no discussion in the opinion of what amount of compensation is reasonable.

**Kentucky (1997)**

KBA E-400 was also issued in 1997 by the Kentucky Bar Association’s Ethics Committee. Relying heavily on ABA Formal Opinion 96-402, the committee qualifiedly concluded that payments could be made to a witness:

> 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.

**Maryland (1983)**

The Maryland State Bar Association Committee on Ethics issued Opinion 83-38 on its Ethics Docket under the Model Code dealing with the distinction between paying an “informant” and paying a witness under DR 7-109(C). The client was a judgment creditor who held a $20,000 judgment against a debtor. The informant offered to give the client’s lawyer information concerning assets of the debtor and to give testimony as well if necessary but wanted to be paid. “The ‘informant’ has requested a total payment of $5,000.00, of which $2,000.00 would be paid upon his taking a polygraph test and the information that he has being verified, and

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26 Illinois Ethics Opinions are not freely available to nonmembers of the Illinois Bar.

27 [http://www.uky.edu/Law/Library/kba/kba400.htm](http://www.uky.edu/Law/Library/kba/kba400.htm)
the balance of $3,000.00 to be paid at the conclusion of the proceeding. The judgment creditor is willing to pay the amount asked, provided his attorney recommends it.”

The committee opined that “the attorney can ethically enter into a contract with the ‘informant’ to pay him consideration for information which he is willing to provide. However, it is the view of the Committee that it would be unethical for the attorney to agree in behalf of his client to pay for testimony to be given by the ‘informant.’” After citing DR 7-109(C), the committee concluded:

In conclusion, it is the Committee’s view that payment by the judgment creditor client through his lawyer for information which the “informant” is able to provide is not unethical conduct; but, it is also the Committee’s opinion that any agreement by the attorney to pay the “informant” for his testimony as a witness would be unethical, unless limited to reimbursement for expenses and financial loss incident to his being a witness.

Massachusetts (1991 and 2000)

The Massachusetts State Bar Association Committee on Professional Ethics issued Opinion 1991-3 which addressed whether a law firm could compensate a former employee who had been designated as the corporation’s witness under Mass. R. Civ. P. 30(b)(6). “The employee was apparently required to spend a fair amount of time reviewing documents and refreshing his recollection of the relevant events in order to be able to testify competently. At the time of his deposition, the witness, who was between jobs, held himself out as a consultant and had performed some consulting.”

After the deposition, the witness submitted an invoice for his time and his expenses. The corporation’s law firm had agreed to pay expenses, but “nothing had been said about hourly compensation.” The witness who in the interim had secured employment beyond the subpoena power of the court, said he would not appear for trial “unless he is compensated for time already spent and for time preparing for and attending trial.” The law firm was inquiring whether it could make payments to the witness (1) for the time spent on the deposition when he was unemployed but holding himself out as a consultant, and (2) for time spent in preparing for and attending trial now that he has secured employment. If payments were proper, it sought help on how to determine what was reasonable compensation.

The committee passed on answering the last question (“We can only warn that any payment in excess of what the witness ordinarily had charged, and previously received, for his time might evidence an impermissible payment to induce testimony in favor of the paying party”). But it determined that in the specific factual circumstances presented, there was nothing improper about compensating the former employee:

The former employee had to spend a fair amount of time reviewing documents and generally refreshing his recollection of the events involved in the case for his testimony to have any value. This situation will not often present itself with the ordinary fact witness but it will often

be the case with a former employee of a party. Indeed, it may often be the case with a busy employee of a party who will have to work overtime nights and weekends to prepare for testimony in a case. Since the employee and the former employee have such close ties to the employer-party already, paying them for their time (but only for their time) does not seem to present a substantial additional threat to the integrity of their testimony. Given the enormous ambiguity in the rule, we find it difficult to believe that the Supreme Judicial Court would conclude that it was a violation of DR 7-109(C) for a law firm to pay for the time of an employee or former employee taken in testifying and preparing to testify about a matter relating to his or her employment, at least in the circumstances of this case.

Massachusetts Ethics Op. 2000-02\textsuperscript{29} presented very different circumstances: whether it was proper to compensate a lawyer-witness who was subpoenaed by one former client to testify against another former client in connection with matters in which the lawyer represented the former clients jointly. The lawyer would have had to spend several hours reviewing case files, traveling to the place where testimony would be taken, and consulting with counsel for one of the former clients in preparation for this testimony. The lawyer wanted to know whether he could charge the former client calling him to testify, for expenses, lost time, and the work he performed in connection with his appearance as a witness at a deposition or trial.

The committee assumed that the lawyer would be appearing as a fact witness and concluded that acceptance of any compensation beyond a statutory witness fee would be inappropriate under the circumstances because it would undermine the duty of loyalty the lawyer owed to both former clients:

\begin{quote}
In the Committee's view, the permission granted by Rule 3.4(g) to make the listed payments does not include permission to make such payments when other principles embodied in the Rules of Professional Conduct are threatened. A lawyer who has represented two clients jointly owes them equal loyalty with respect to that representation. That loyalty obligation infuses the entire Massachusetts Rules of Professional Conduct. In our view, acceptance by a lawyer of a proposal by Former Client One to pay the lawyer for preparation of testimony and for testifying regarding matters that arose during the lawyer's representation of both is a threat to that obligation of equal loyalty. While the lawyer's obligation is to testify truthfully in any event, it would be reasonable for Former Client Two to fear that the whole process of preparation for testifying, the searching and reviewing of memory and files, may be affected, even subconsciously, by the payment. That payment also puts pressure on Former Client Two to contribute to the payment in order to prevent any such effect. Our advice therefore is that the loyalty principle embodied in the Massachusetts Rules of Professional Conduct and the common law of professional responsibility forbids acceptance of the proposed payment.
\end{quote}

\textit{Id.} (citations omitted).

Michigan (1992)

In Michigan Ethics Committee Opinion RI-117 (1992),\(^{30}\) in a conversation with a lawyer, a witness to a car accident corroborated the clients’ view of the facts and added that he would be “‘getting something’ from the clients in return for the time and trouble of testifying. It was further disclosed that the witness and the clients ‘periodically do things for one another.’” Lending credence to the witness’ honesty, two other witnesses also corroborated the plaintiff’s version of the facts. The lawyer inquired as to his ethical responsibilities under the circumstances.

The Committee decided that as long as there was no violation of law in the arrangement between the clients and the witness, and as long as the compensation was “appropriate” under Michigan RPC 3.4(b), “there would not appear to be any further affirmative duty of inquiry concerning the clients’ compensation of this witness. In this event, the lawyer may call the witness to testify at trial and would not have any duty of disclosure to the court or opposing counsel.” The committee also said that the client could make the payment:

\[
\text{Compensating a witness for the purpose of influencing testimony or making the witness “sympathetic” is clearly prohibited. Payment, however, by a lawyer of expenses reasonably incurred by the witness and reasonable compensation for loss of earnings in necessary preparation, attending and testifying is permitted. There is no rule which would prohibit a client from making this payment if the client’s lawyer were permitted to pay such compensation.… A client, therefore, may reasonably compensate a witness for the witness’ expense and loss incurred for preparation, attendance and testifying at trial.}
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Mississippi (1988)

The Ethics Committee of the Mississippi State Bar was asked whether a psychiatrist subpoenaed to render fact testimony in a divorce action was entitled to payment of $300.00 for a court appearance. In Opinion No. 145 (March 11, 1988),\(^ {31}\) the committee determined that where the expert was called only to give factual testimony, the lawyer may pay the witness’s “expenses” and “any” statutory fee for witness attendance:

\[
\text{Where a witness is a professional or skilled person, but he only gives factual testimony, he is limited to the statutory fee allowed to ordinary occurrence witnesses. 31 Am.Jur.2d Expert & Opinion Evidence, Section 10. The right of a witness to compensation is purely statutory, and he may receive no compensation beyond that provided by statute. 81 Am.Jur.2d Witnesses, Section 23. Based on the above, the Committee is of the opinion that the psychiatrist in this case should be considered to be an occurrence witness, and that the husband’s lawyer may be allowed to pay to the witness his expenses and any statutory fee allowed for such witnesses.}
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As to the nature of the expenses and the amount of the fee allowable, the committee decided that the lawyer may pay to the witness “the statutory witness fee, plus reasonable expenses incurred for mileage, meals and


lodging, plus reasonable compensation for his loss of time in attending or testifying,” but that the client must be ultimately responsible for the payment.

**New Hampshire (1992)**

In a 1992 article on Model Rule 3.4, the New Hampshire Bar Association Ethics Committee discussed the limits of compensation of fact witnesses.\(^{32}\) Consistent with Wisconsin Ethics Opinion E-89-17, discussed below, the committee determined that payments to fact witnesses were permissible under appropriate circumstances.

> In situations, however where witnesses incur expenses greater than the statutory fee, including loss of time for which they are not compensated, the committee believes rule 3.4(b) permits a lawyer to reimburse such witnesses a reasonable amount for those additional expenses. It follows that where witnesses are beyond the subpoena power of the court, they too may be reimbursed for such expenses.

What is a reasonable amount? The committee said there was not a “single hard and fast rule.” It offered these insights:

- The lawyer should inquire into the particular facts and circumstances of the witness’ situation and apply a common sense analysis to the question.
- When the witness is not employed, spends substantial time to prepare for and give testimony, and wants to be compensated for his or her loss of time, one approach is “to determine what the witness most recently earned, or what people in the same occupation are being paid, and to adjust that amount for any special or unusual circumstances.”
- “If the lawyer makes the determination in good faith, keeping in mind the prohibition against improperly influencing a witness, the lawyer should avoid any problem under rule 3.4(b).”

**New Mexico (1984)**

In Advisory Opinion 1984-1,\(^{33}\) the New Mexico Bar Ethics Committee was also interpreting Rule 7-109(C) of the New Mexico Code of Professional Responsibility which, as noted above, provided that a lawyer could not pay a witness for testimony or based on the outcome of a case but could pay a witness for “expenses reasonably incurred by a witness in attending or testifying” and “reasonable compensation to a witness for his loss of time in attending or testifying.”

The law firm inquiring represented a surety company, which had issued numerous surety bonds to a construction highway contractor. The surety company sued the certified public accounting firm that audited the financial statements of the contractor for accounting malpractice. The law firm wanted to interview several

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ex-employees of the contractor who “were employed by the contractor as in-house certified accountants at the time the CPA firm conducted one or more of their audits. The ex-employees have requested that plaintiff compensate them for the time lost from their present jobs while being interviewed by the firm.”

The committee determined that it was not improper or unethical and that it was consistent with DR 7-109(C)(2) for the law firm to compensate the witnesses for loss of time from their present jobs while they were being interviewed by the law firm. “The Committee concludes that compensating lay and expert witnesses alike for expenses, including lost time away from their employment, incurred in interviewing is permissible and in keeping with the purpose and spirit of Rule 7-109(C).”

The committee then addressed the question of whether a reasonable fee could be paid to a witness who is an expert as well as a fact witness with knowledge of the events leading to the commencement of the suit. It concluded that payment was proper for the expert portion of the testimony but improper to the extent that the witness was providing testimony about facts within the first-hand knowledge of the witness:

*The Committee believes that to the extent that a witness is asked by an attorney to state what actions he took and the results therefrom (i.e. matters of first-hand knowledge), the witness may not be compensated as an expert because the witness is testifying about facts upon which he or she has a duty to provide by having witnessed them. To the extent that the witness is asked an opinion or to explain the significance of facts based on special professional training regarding such matters as causation or future ramifications of certain facts, the witness must go beyond the call of duty of an ordinary witness and through investigation and analysis exercise the special knowledge he or she possesses, and which he or she spent time and money in acquiring. The Committee feels the witness may be compensated for investigating, preparing and providing that information. While it is acknowledged that the distinction between these two types of testimony may be difficult to make in certain situations, as well as calculating the percentage of time attributable to being an “expert witness” as opposed to an “ordinary witness,” nevertheless the attorney should attempt to make the distinction. One consideration may be whether the attorney anticipates using the witness as an expert at trial. Obviously the witness will require compensation for providing expert testimony, which is quite proper. If the witness is to be used only as a fact witness, then compensation for services is improper. In any event, the witness may be compensated for lost time away from work as discussed in Question I above.*


In its Opinion 668 (June 3, 1994), the Committee on Professional Ethics of the New York State Bar Association approved of the payment of $150 per hour to a witness. Here were the facts as stated in the opinion:

An attorney represents a client in a potential lawsuit to recover funds allegedly lost due to conspiracy, fraud, and other violations of law. The attorney believes that proof of the case is dependent upon an individual, who, in exchange for services, seeks $150/hour for work that should take approximately 50-60 hours. Such work involves finding and explaining documents, tape recordings, and photographs purporting to prove the client’s case. The individual will attend interviews, examine and explain documents and tape recordings, and otherwise assist in the fact-finding process. The individual also may be required to testify at the trial.

The ethics committee first determined that under DR 7-109(C) there was no ethical prohibition on payment to the witness for pretrial factfinding. As for payment of the time of the witness for testifying at trial, the ethics committee first cited its prior decision in Opinion 547 (1982) in explaining:

The issue is whether $150/hour is “reasonable compensation” for the time, if any, the individual spends testifying, preparing to testify, and attending the trial. DR 7-109(C) is designed to prevent compensation that would have a tendency to lead to the “production of fraudulent evidence and to the giving of falsely colored testimony as well as to [the prevention of] outright perjury.” N.Y. State 547 (1982), citing 6A Corbin on Contracts, §143O (1951). Further, the rule also is influenced by the notion that “the testimonial duty, like other civic duties, is to be performed without pay, the sacrifice being an inherent burden of citizenship…” Id., citing 8 Wigmore Evidence, §202 (McNaughton Rev., 1961).

But the committee then also recognized that a witness might incur expenses or suffer a financial loss by testifying and so it had to attempt “to draw the line between compensation that enhances the truth seeking process by easing the burden of testifying witnesses, and compensation that serves to hinder the truth seeking process because it tends to ‘influence’ witnesses to ‘remember’ things in a way favorable to the side paying them. In doing so, the committee prohibited payments to a witness on a contingency basis. Then relying on NYSBA Ethics Opinion 547 again, the committee set forth these principles on compensating witnesses:

- “The term ‘loss of time in attending or testifying’” means “‘loss of time in testifying or in otherwise attending court proceedings and preparing therefor.’”
- “A witness who loses wages because of his or her role as a witness may be reimbursed for the money lost.”
- “A witness who is unemployed, self-employed, or on salary, also may be compensated since even ‘recreation time is susceptible to valuation.’”
- “A witness who is reimbursed for loss of free time, or does not lose money as a result of the role as a witness, is still entitled to compensation,” but the amount should be given ‘closer consideration’ than it is when the witness is being reimbursed for lost wages.”

36 The NYSBA ethics committee cited Wisconsin Opinion E-89-17 (1989) discussed below.
• “Thus, ‘reasonable compensation’ is not merely out-of-pocket expenses or lost wages.”
• “The amount of compensation that is to be considered ‘reasonable’ will be determined by the market value of the testifying witness. For example, if in the ordinary course of individual’s profession or business, he or she could expect to be paid the equivalent of $150/hour, he or she may be reimbursed at such rate.”

NYSBA Ethics Op. 714 (1999)\(^{37}\) presented another opportunity to address the question of witness compensation. A lawyer anticipated that the lawyer would be called as a witness in litigation between the lawyer’s “client (or former client)” and another party. The lawyer would be asked about the lawyer’s former representation. “The lawyer inquires whether it would be permissible to agree to be paid by the client at the lawyer’s customary hourly fee for time spent in preparing to testify and testifying as a witness.”

The ethics committed demurred on opining on the legality of the payment,\(^{38}\) but decided that if the original engagement did not oblige the lawyer to provide subsequent testimony for no additional compensation, the client could pay the lawyer a fee:

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\text{[W]e conclude that, like other witnesses, lawyers may receive reasonable compensation for}
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\text{time spent preparing and testifying as a witness, as long as the party calling the lawyer as a}
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\text{witness understands or is made aware that there is no obligation to provide more than the}
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\text{statutory fee for the lawyer’s time in court. If the party nevertheless agrees to compensate the}
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\text{lawyer for his or her time, it would ordinarily be reasonable, and therefore permissible, for}
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\text{the lawyer to receive an amount equal to the lawyer’s customary hourly fee (or, where the}
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\text{lawyer charges several different hourly fees, an amount equal to the average of those fees).}
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\text{Pennsylvania (1995)}

The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility’s Opinion 95-126A (Sept. 26, 1995)\(^{39}\) became the first committee to construe the language of Model Rule 3.4(b), although Pennsylvania’s version of Model Rule 3.4(b) expressly permits the payment of “expenses reasonably incurred by a witness in attending or testifying,” and “reasonable compensation to a witness for the witness’ loss of time in attending or testifying.”\(^{40}\) The opinion author said that the failure of the rule to reference preparation time suggested that such compensation is “disfavored,” an opinion later rejected by the ABA Standing Committee on Ethics, as noted above. The author then added, somewhat ominously:

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\text{At the very least, should you decide to pay such compensation to the fact witness, that witness}
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\[
\text{must be instructed that, if asked on cross examination, he is to be candid about the nature and}
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\[\text{---37\hspace{1cm}http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=18873.}\]
\[\text{38\hspace{1cm}The committee made reference to the common law rulings that payment in excess of a statutory witness fee would be against public policy and unenforceable. See also Alexander v. Watson, supra.}\]
\[\text{39\hspace{1cm}1995 WL 935696 (Sept. 26, 1995).}\]
\[\text{40\hspace{1cm}http://www.padisciplinaryboard.org/documents/Pa%20RPC.pdf. The additional language in the Pennsylvania RPC 3.4(b) is not in the Model Rule but incorporates language from DR 7-109(C).}\]
amount of the compensation he has been paid. Even with that protective measure, we cannot say with certainty that compensating a nonexpert for preparation time is not without risk of disciplinary enforcement action.

There was a follow up opinion dated November 16, 1995 and designated as Opinion 95-126B. The question was whether an engineer who will be testifying as an expert but who also has firsthand factual information on the project in question could be paid for preparation time without violating Pennsylvania’s RPC 3.4. The opinion author said that the engineer could be paid for preparation time:

As you state in your letter, it is “virtually impossible” to distinguish the preparation time expended in connection with expert testimony from that expended in preparing for factual testimony. However, the Rule does not appear to require such a distinction where, as here, the expert witness is also a fact witness. Therefore, so long as the engineer is, indeed, testifying as an expert, there appears to be no prohibition against compensating him for his preparation time even though his testimony will also contain nonexpert, factual information.

South Carolina (1993, 1997)

In its Opinion 93-36, the Ethics Advisory Committee of the South Carolina Bar approved of a lawyer’s payment to “a health care provider and another lay witness” of a fee in excess of the fee established in the South Carolina Rules of Civil Procedure to compensate the witnesses for “such things as lost wages or income.” The witnesses were going to be subpoenaed to testify in litigation. The committee determined that as long as payments greater than the per diem established under the procedural rules were not unlawful, there was no ethical prohibition on the payments. The committee added these words of caution: “It would, of course, be improper for the lawyer to offer any payments to a witness for the purpose of influencing the witness to testify falsely.”

In its Opinion 97-42, the committee confirmed its Opinion 93-36. Here was the factual situation. A wife challenged the validity of a separation agreement with her former husband. The husband subpoenaed three attorneys to prove that the wife had the advice of independent legal counsel before signing the agreement. “These attorneys were fact witnesses, not expert witnesses.” After the hearing, each of the wife’s former attorneys submitted bills to the husband for their time in appearing at the hearing. The issue of entitlement, and not reasonableness of the fees sought, was in dispute. The committee determined that, assuming that the payment to a witness above that required to effect a subpoena is lawful, “there would appear to be no ethical prohibition upon such payment being made under the facts presented.” The committee relied on ABA Formal Opinion 96-402, supra, which said that payments “solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony” do not violate Model Rule 3.4(b).

41 http://www.scbar.org/member_resources/ethics_advisory_opinions/&id=386.
42 http://www.scbar.org/member_resources/ethics_advisory_opinions/&id=491.
Cheap Talk? Witness Payments and Conferring With Testifying Witnesses

Virginia (1984)

The Virginia State Bar Association Standing Committee on Legal Ethics, in Opinion 587 (1984), approved without discussion payment to “a witness for the reasonable value of time expended in the preparation for, and rendering of, testimony in litigation,” subject to these conditions: (1) the client “remains ultimately responsible,” (2) the compensation “is not an inducement to testify and is not contingent upon the outcome of the case,” and (3) the amount of the compensation “should be a fair value of time expended calculated by a usual hourly charge or by some other method which determines the reasonable value of time spent.”

Wisconsin (1989)

The question presented in Opinion E-89-17 (1989) issued by the State Bar of Wisconsin Professional Ethics Committee was whether a retired or nonemployed fact witness who “must spend a substantial, but reasonable and necessary, amount of time in preparation, travel and/or testifying” can be compensated “for his or her time at a rate that would approximate the hourly wage that the witness would be earning if he or she had not been unemployed or retired?”

Reaffirming an earlier Wisconsin opinion, Formal Opinion E-88-9, which provided that a witness could be compensated for lost wages incurred in testifying and for travel expenses, the ethics committee determined that while an unemployed or retired person would not lose wages by being a witness, “they obviously are deprived of time that would otherwise be devoted to other endeavors.” The committee then decided that, “When the amount of time reasonably required of such a witness is substantial, we believe that it should be proper to reasonably compensate the witness for his or her loss of time,” as long as the compensation is not otherwise prohibited by law.

The committee elected not to address whether it would be reasonable for the payment to be “based upon an unemployed or retired person’s usual wage when working.” Saying this was not a question that “this committee can definitively answer,” the committee explained, again citing Formal Opinion 88-9, “that this determination would have to be made on a case-by-case basis.”

IV. SANCTIONS FOR VIOLATING RULE 3.4

Courts have imposed a number of sanctions for violations of Rule 3.4 or its predecessor, DR 7-109(C). The sanctions have ranged from suspension in bar grievance proceedings to exclusion of testimony or disqualification of lawyers in court proceedings. Lawyers who were not counsel of record but who were linked to the inducement provided to the witness have not escaped sanctions.

Suspension From Practicing Law

In *Florida Bar v. Wohl*, 842 So. 2d 811 (Fla. 2003), a three-month suspension from the practice of law was meted out to Wohl who was not counsel of record in the litigation in issue.

Wohl represented Bruce Winston who was involved in a dispute with Ronald Winston, his brother, over the estate of their mother. The dispute involved the family’s diamond business. Bruce sought “consulting” help from a former employee of the business, Katherine Kerr, to learn about practices of the business. Working with litigation counsel he had secured, Wohl helped negotiate an agreement between Mr. Winston and Ms. Kerr by which Kerr would receive $25,000 for the first fifty hours of assistance and $500 per hour for time spent beyond the bonus amount, plus a potential bonus of up to $1 million depending on the usefulness of the information she provided but which could only be paid after Bruce obtained relief from Ronald. The question presented was whether Wohl violated Rule 3.4 by virtue of his role in the negotiation and drafting of the agreement. Wohl argued Kerr was a consultant, not a fact witness. However, Kerr testified in a deposition in the estate matter and also was listed as a witness in connection with her knowledge of diversion of assets by Ronald. The grievance referee found she was a fact witness, that the payments under the agreement represented “an inducement that went far beyond reasonable expenses incurred by the witness,” and that Wohl participated in the formation and negotiation of the agreement in violation of the Rule 3.4, but recommended only an admonishment for minor conduct and a one-year probation.

Wohl appealed arguing that Florida Rule 4-3.4(b) applied only to testifying witnesses. He was not helped by Florida’s RPC 4-3.4(b) which is more expansive than Model Rule 3.4. Florida 4-3.4(b) prohibits a lawyer from offering “an inducement to a witness” without the phrase “that is prohibited by law.” And it establishes within the rule the exceptions. It permits a lawyer to pay a fact witness “reasonable expenses” “in attending or testifying at proceedings” and to reimburse the witness for “the loss of reasonable compensation incurred by reason of preparing for, attending, or testifying at proceedings.” Florida Rule 4-3.4(b) provides in full:

> A lawyer shall not:
>
> (b) fabricate evidence, counsel or assist a witness to testify falsely, or offer 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

46 Why the words “preparing for” were not included in the clause addressing payment of reasonable expenses is unclear. It does not appear to be substantive. The Florida comment to Rule 4-3.4(b) does not make the distinction: “With regard to subdivision (b), it is not improper to pay a witness’s expenses or to compensate an expert witness on terms permitted by law.” Cf. Illinois Ethics Op. 87-5 (January 29, 1988) (Model Code language authorizing the payment for time lost by a witness “attending or testifying” also embraced time spent in an “interview”).

47 In the Model Rule, the only reference to payments is in the comment which is identical under Model Rule 3.4(b) and Florida Rule 4-3.4(b): “With regard to paragraph (b), it is not improper to pay a witness’s expenses or to compensate an expert witness on terms permitted by law. The common law 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.”
loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings;... 48

The Florida Supreme Court held that drafting and negotiating the compensation agreement represented the “offer (of) an inducement to a witness,” and that none of the exceptions in Florida Rule 4-3.4(b) applied. 842 So. 2d at 815. It further held that Wohl’s punishment was too light and that he should be suspended for three-months, consistent with precedent in Florida: 49

Offering financial inducements to a fact witness is extremely serious misconduct. As the referee stated, tempting a witness to color testimony is an evil that should be avoided. We condemn the practice of compensating fact witnesses in violation of rule 4-3.4(b) in no uncertain terms. We find that Wohl’s misconduct has demonstrated an attitude that is wholly inconsistent with professional standards. Case law requires that Wohl be suspended. But for the four mitigating factors, 50 Wohl could have earned a more severe sanction. Thus, we disapprove the referee’s recommended discipline of an admonishment and conclude that the seriousness of Wohl’s misconduct and violation of rule 4-3.4(b) warrant a ninety-day suspension.

Id. at 816.

Where a lawyer served as an intermediary to try to obtain compensation for his client/witnesses in another matter, a suspension also resulted. In Florida Bar v. Jackson, 490 So. 2d 935 (Fla. 1986), a grievance referee found that a lawyer had contacted a New York attorney involved in an insurance claim and “requested that his clients be paid $50,000 for their testimony” in the matter. There were also two subsequent contacts made in which the lawyer attempted to negotiate the original amount requested. Id. at 936. The Supreme Court affirmed the referee’s recommendation of a three-month suspension of the lawyer based on the referee’s conclusions:

[The very heart of the judicial system lies in the integrity of the participants... Justice must not be bought or sold. Attorneys have a solemn responsibility to assure that not even the taint

48 In Wohl, 842 So. 2d at 815, the Florida Supreme Court explained the history of Florida Rule 4-3.4(b): “In 1992, in Florida Bar v. Cillo, 606 So.2d 1161 (Fla.1992), Cillo was accused of paying money to a former client as an inducement for the client to dismiss his Bar complaint against Cillo. The question arose whether it was misconduct to induce a witness to tell the truth by offering money or other valuable considerations. At the time, there was no rule governing such a situation so we did not impose discipline for that conduct. We were concerned, however, that the payment of compensation other than costs to a witness could adversely affect credibility and fact-finding functions. We directed that a rule be developed to clarify that any compensation paid would be improper unless certain conditions were met. Id. at 1162. Thereafter, in 1994, in Florida Bar re Amendments to Rules Regulating the Florida Bar, 644 So.2d 282 (Fla.1994), we amended rule 4-3.4(b) to its present form. In so doing, we established that a witness may not be paid, unless the payments fall within the clearly delineated exceptions, such as payments for reasonable expenses or payments to an expert witness.”

49 In addition to Florida Bar v. Jackson, supra, the court cited Florida Bar v. Machin, 635 So. 2d 938 (Fla.1994) where a lawyer was suspended for 90 days for offering “to set up a $30,000 trust fund for the minor child of a victim in a criminal case if the victim agreed not to testify at the client’s sentencing hearing.” 842 So. 2d at 816.

50 They were (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; and (4) character or reputation. 842 So. 2d at 814.
of impropriety exists as to the procurement of testimony before courts of justice. It is clear that the actions of the respondent in attempting to obtain compensation for the testimony of his clients ... violates the very essence of the integrity of the judicial system and the disciplinary rule and code of professional responsibility, the integration rules of the Florida Bar and the oath of his office.

Id. at 936.

In Re Kien, 69 Ill. 2d 355, 372 N.E. 2d 376 (1977) resulted in an eighteen-month suspension of a lawyer who paid a police officer “for allegedly truthful testimony in a criminal case.” The Illinois Supreme Court unequivocally declared: “[W]e will not tolerate payment of any sum of money by an attorney to witnesses for the opposition to secure or influence testimony, whether it be for the purpose of securing truthful testimony or otherwise.” 372 N.E.2d at 379.

Exclusion of Testimony

Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Association, 865 F. Supp. 1516 (S.D. Fla. 1994) affirmed in pertinent part 117 F.3d 1328 (11th Cir. 1997) involved an insurance claim for the loss of $9 million in gold stolen from the insureds who consigned gold to third parties for safe storage. Lloyds found witnesses who had information about the crime and made payments to witnesses, informants, and intermediaries in exchange for information. Two witnesses, Hollock and Lupovitz, gave deposition testimony in the action. Hollock testified that a few weeks before the robbery he participated in the staging of a robbery from the insured at the request of the gold thief who was the chief operating officer of a consignee of the gold. Lupovitz, who received immunity from prosecution, provided information on the whereabouts of the gold thief, who was, indeed located, extradited to the United States, and successfully prosecuted.

Hollock received $260,505 from Lloyds for his participation in insurance coverage action: $85,000 for a deposition noticed by Lloyds, $10,000 for a deposition noticed by another party, $65,000 for living expenses over a three-year period, and $100,000 as a reward for information. Lupovitz received $25,000 for information, $22,000 for living expenses, $25,000 for a deposition, and $72,000 for agreeing to appear to testify against the gold thief at the criminal trial of the thief. Id. at 1521. Insureds sought sanctions against Lloyds for the payments of $95,000 to Hollock and $25,000 to Lupovitz that related to their deposition testimony.

The district court held that the payments for truthful, material testimony that was helpful to Lloyds in the litigation represented “egregious and willful and repetitive violations” of Florida RPC 4-3.4(b). Id. at 1525. In response to Lloyds’ argument that it made the payments directly and the rules of professional conduct apply to lawyers and not to their clients, the district court held that the Rule 4-3.4(b) was still applicable because

51 “Quite simply, a witness has a solemn and fundamental duty to tell the truth. He or she should not be paid a fee for doing so.” 865 F. Supp. at 1526. The district court recognized that payments made to fact witnesses “as actual expenses as permitted by law will not be disturbed or set aside. The Court’s opinion today pertains only to payments made to fact witnesses for the purpose of obtaining their testimony in a case.” Id., n.11.
Lloyds’ litigation counsel “actively had knowledge of, assisted and even negotiated the amounts of the money paid to non-expert witnesses, informants, and intermediaries” and therefore was guilty of procuring the testimony of witnesses through “monetary inducements” in violation of Rule 4-3.4(b). *Id.* As a result, the district court precluded use of all evidence “tainted by the ethical violations” and excluded the testimony of Hollock and Lupovitz.

**Disqualification of Counsel**

*Wagner v. Lehman Bros. Kuhn Loeb Inc.* 646 F. Supp. 643 (N.D. Ill. 1986) was a securities class action. Wagner was a putative class representative. His broker, Travis, was a defendant. The charge was “churning” of customer accounts to generate commissions. After Wagner closed his account with Lehman, Travis called him and told him he would give testimony supporting Wagner’s claims in exchange for a percentage of any sum recovered by Wagner. Wagner told his lawyer, Gomberg, and they both then met with Travis, taping the conversation. They used the tape to try to effect a settlement with Lehman. That did not work. So the suit was filed. Lehman found out about the proposal by Travis to Wagner and moved to disqualify Gomberg. Wagner and Gomberg said that they never had any intention of giving Travis any money and no agreement was ever executed. That did not matter. Relying on DR 7-109(C), the district court judge held that Wagner’s lawyer was aware of the contingent payment arrangement and “acquiesced in the payment” of compensation to a witness contingent upon the content of the testimony of the witness or outcome of the case and the fact that money never changed hands was immaterial. *Id.* at 656. For this and other conduct, Gomberg was then disqualified.53

In *Ward et al. v. Nierlich et al.*, 2006 U.S. Dist. LEXIS 97373 (S.D. Fla. Sept. 18, 2006), a builder sold a home to buyers but did not own the lot on which the home was built. The builder was sued by the buyers and settled. The settlement contained a contingency. Buyers would be paid after they provided truthful testimony in the builder’s civil-racketeering suit against other parties in connection with the development in issue. Buyers also were promised a stake in the outcome of this suit. Defendants in this suit discovered the arrangement and moved for sanctions, including disqualification of counsel who played a major role in the scheme. The magistrate judge refused to dismiss the action as a sanction but awarded defendants their fees in bringing the motion for sanctions, and, at the request of defendants, allowed the buyers to be called as witnesses giving wide latitude to the defendants in cross examination. Citing *Wagner*, and saying that the integrity of the judicial system had been compromised by plaintiff’s counsel who committed “a fraud on the court,” the magistrate also disqualified plaintiff’s counsel for violating Florida’s RPC 3.4.

In *Dyll v. Adams*, 1997 WL 222918 (N.D. Tex 1997), a lawyer, Reynolds, sent a co-defendant, Adams, a letter that proposed “ingredients” for a settlement that involved Reynolds providing “information that will be useful in the trial” against another defendant, and “a monetary payment” to the plaintiff “in an amount to be discussed

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52 Travis was also represented by counsel and Gomberg proceeded with the taping session knowing this. 646 F. Supp. at 657-58.

53 To address the deprivation of Wagner of counsel of his choice, the district court explained that Wagner helped Gomberg “orchestrate the financial arrangement with Travis” so it was “his own fault for engaging in a scheme to purchase the testimony of a witness whom he later turned on and sued as a defendant.” 646 F. Supp. at 660.
and negotiated.” The other defendant learned of the exchange and filed a motion to disqualify Reynolds. Relying on the Texas equivalent to Dr 7-109(C) and Model Rule 3.4(b), the district court held that the letter represented a quid pro quo to a witness that violated the ethical rules. *Id.* at *2. However, the district court did not disqualify Reynolds because Adams rejected the offer to discuss settlement and his testimony had not been “irreparably tainted” by the letter. *Id.*

V. THE SPECIAL CASE OF RETENTION OF FORMER EMPLOYEES

A number of opinions address the execution of “consulting agreements” with former employees who have institutional knowledge of matters in issue in litigation. They are fact witnesses who are unique repositories of knowledge and are usually not only needed to defend or prosecute an action but need to spend substantial time in preparation. They may also be experts in their field even though they are testifying to matters about which they have first-hand knowledge. Often they are retired or in-between jobs.

Consulting agreements with former employees have triggered a number of decisions. The decisions I have selected for discussion focus on whether the purpose of the payment was reasonable compensation for loss of time or payment for testimony, whether a privilege or protection applies to the exchange of information with the “consultant,” and whether the former employee is testifying as an expert or a fact witness.

The Key Finding: What is the Purpose of a Payment?

*Centennial Management Services, Inc. v. Axa Re. Vie et al.,* 193 F.R.D. 671, 682 (D. Kan. 2000) illustrates the distinction between payment for testimony and just compensation for the time of a witness. The lawsuit involved a reinsurance agreement dispute. Axa’s former senior vice president and head of the life insurance department, Grao, had negotiated the reinsurance agreement in issue. Grao had been terminated from employment in September 1997. His severance agreement provided him with certain monetary consideration in return for a covenant not to sue and his agreement to cooperate and consult with Axa through June 30, 1998, with respect to matters with which he was familiar.

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54 The district court added that “the appropriate court response to the improper compensation of a witness is usually to exclude the tainted testimony, or to give the opposing party access to the terms of the agreement between the paying party and the compensated witness.” 1997 WL 222918 at *3 (citations omitted).

55 I have avoided here decisions involving the retention of an opponent’s former employee as a “trial consultant.” See, e.g., *Rentclub, Inc. v. Transamerica Rental Finance Corp.*, 811 F. Supp. 651, (M.D. Fla. 1992) (disqualifying counsel for crossclaimant who retained as a “trial consultant” the former chief financial officer of another defendant providing the witness with a $5,000 retainer and $50.00 per hour for his time; the district court held that the witness was being paid for this testimony and retaining counsel was in violation of Model Code rules relating to contacts with former employees of a represented party, conduct prejudicial to the administration of justice, protection of confidential information, and the appearance of impropriety); *In re Complaint of PMD Enterprises Inc.*, 215 F. Supp. 2d 519 (D.N.J. 2002) (lawyer through an investigator violated, among other RPC, Rule 3.4(b) and “created a clean appearance of impropriety by offering to compensate” a member of PMD’s litigation control group and an adverse fact witness “for his time at $100 per hour for reviewing documents” resulting in the revocation of the lawyer’s pro hac vice admission but not the disqualification of the lawyer’s law firm).
In October 1998, Axa contacted Grao about the reinsurance agreement litigation. Axa needed Grao’s expertise and consulting assistance regarding the reinsurance agreements. His severance agreement having lapsed in June 1998, Grao refused to provide any assistance without a consulting agreement that paid him for his time.

Grao’s deposition had been noticed for January 1999. When counsel for Axa met with Grao in Paris some weeks before the scheduled deposition, Grao told them he would not voluntarily appear for the deposition unless Axa’s counsel agreed to negotiate a consulting agreement to compensate him “for his time away from other matters and for the assistance and expertise Axa’s counsel desired.” Id. at 674.

In December 1998, Grao and Axa’s counsel entered into a “Consulting Agreement” with these terms:

- Grao would provide “expert and consulting services” particularly “in reviewing of documents and deposition transcripts, attending depositions of witnesses and preparing for and attending his deposition and trial.”
- Grao would be reimbursed for “reasonable and necessary out-of-pocket expenses.”
- Grao would be compensated on an hourly basis as follows: $125 per hour for “review and study” of documents and deposition transcripts; $150 per hour for attendance at meetings and in preparation for his testimony; and $200 per hour for testifying at deposition or trial.
- Grao would be paid a minimum daily fee of $750 for any services provided outside of France.
- Axa’s counsel would represent Grao at this deposition and at trial at no cost to Grao.
- Based on a projection of time Grao would spend on the matter, Grao received an upfront nonrefundable payment of $20,000 as an advance to be credited as he performed future services.  

- Grao’s directors and officers liability insurance policy would protect Grao “for purposes of deposition and trial.”

Id. at 674-75.

There was a delay in making the $20,000 payment and Grao refused to appear for his deposition without the money. In the course of efforts by counsel for Axa to get Grao paid immediately, there was facsimile correspondence that Axa’s counsel was not happy that they had to negotiate an agreement “with a former employee who normally should be appearing voluntarily,” but that the agreement was typical for consultants and experts, that the $20,000 would be spent since he had already incurred much of this sum in preparing for his deposition, and that the rationale for the agreement was:

that the individual, who is currently working freelance, is being taken away from other remunerative work and that he is being compensated for the time necessary to devote to this matter, as well as for his expertise, since it is time that cannot be charged to other remunerative activities.

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56 Axa anticipated that Grao’s deposition would take several days, and he would assist Axa’s counsel in preparing for 20 witness depositions and in reviewing many of the 100,000 documents produced in the litigation, in addition to possible trial testimony. 193 F.R.D. at 675.
Id. at 676. Grao was then paid and appeared for his deposition. He later accidentally received an overpayment due to a clerical error.

In August 1999, Grao, acting through an intermediary, contacted Jardine, a third-party defendant in the litigation, and said that he had been paid by Axa to “‘keep quiet’” and that he wanted to meet with representatives of Jardine “in order to tell the truth.” Id. at 677. A meeting ensued. Grao offered to “sell information” to Jardine that would be damaging to Axa. Jardine told the plaintiff and other third-party defendants about Grao’s claims and demand for payment. Counsel for plaintiff then met with Grao who reportedly confirmed what he had told Jardine’s counsel. Rather than deal with Grao, these parties moved for sanctions. When Grao learned of the motion, he sent a letter to Axa’s counsel denying making the statements attributed to him in the motion for sanctions and asserting that it was “‘ridiculous to imagine’” that he received any sum of money “for any reason other than acting as an expert witness” for Axa. Id. at 678.

Discovery then occurred leading to the conclusion that Grao was a malcontent and was not paid hush money. Movants then shifted their sanctions theory, arguing that Axa’s counsel “bought” the testimony of Grao in violation of common law, the federal anti-gratuity statute, 18 U.S.C. § 201(c)(2), and Model Rule 3.4(b). Id. at 678-79.

However, the district court found that Grao was not paid “for the substance or strength of his testimony.” Id. at 679. The upfront payment of $20,000 was justified by Axa’s projection of the time Grao would be spending on the matter. The district court agreed that the overpayment to Grao was due to clerical error. The district court concluded that all payments made to Grao were made “solely for the purpose of compensating” Grao “for the time he lost in order to give testimony in the litigation, review documents produced in the litigation and otherwise consult with Axa and its counsel on matters related to the litigation.” Id.

The district court then had to decide whether Grao’s compensation was reasonable. Relying on ABA Formal Opinion 96-402 (1996), the district court looked to the “relevant circumstances surrounding the value of Mr. Grao’s time, both in terms of the hourly rates received and the number of hours spent in connection with this litigation.” Id. at 680. The district court concluded that the rates paid to Grao were reasonable because of (1) his years of experience in the insurance industry, (2) his first-hand experience with the reinsurance agreements, and (3) the complex nature of the litigation.57 Id. The district court also found it significant that the movants had not offered any evidence that the rates paid to Grao were unreasonable. The rates had been disclosed during his deposition in January 1999 and movants’ counsel then “expressed no concern or surprise.” Id. The district court then determined that the 380 hours billed by Grao were also reasonable. Id. at 680-81.

These findings were outcome determinative. Because the payment was not made for testimony, the common law prohibition on such payments was not applicable. And because the district court found that payments were not made “for” or “because of” Grao’s testimony, 18 U.S.C. § 201(c)(2) was not applicable. And because the

57 The district court never discussed what Grao had earned or could earn from others. Nor was there any discussion of whether the movants had paid for consulting or expert witness assistance.
district court found that Grao was reasonably compensated for his time, there was no violation of Kansas RPC 3.4(b) which was identical to Model Rule 3.4(b).

**Does a Privilege or Protection Apply to the Information Provided to the Consultant?**

In *The State of New York v. Solvent Chemical Company, Inc., et al.*, 166 F.R.D. 284 (W.D. New York, 1996), a former employee’s status as a litigation consultant was rejected as a basis establishing work product protection for discussions with the former employee, but does stand for the approval of the consulting agreement itself.

Breu, the former employee of ICC Industries (ICC), was retained by ICC as a litigation consultant in a CERCLA contribution lawsuit over the allocation of response costs at an industrial chemical facility (Solvent) that ICC allegedly owned or operated through a subsidiary. Breu was a former vice-president of ICC and Dover Chemical Corporation, a wholly owned subsidiary of ICC. He parted ways with ICC and Dover in 1979 on not the happiest of terms. Fourteen years later, in 1993, he was sued by Dover in a CERCLA action involving a former Dover facility. In the course of the Dover litigation, ICC realized that Breu was the author or recipient of a number of documents involving the Solvent facility. Seeking his help on the Solvent facility litigation, in July 1995, Breu and ICC entered into various agreements, the net effect of which were that the Dover litigation was settled (Breu paid $4,000 and received an indemnity); Breu received a covenant not to sue in the Solvent litigation; and Breu was retained under a consulting agreement to assist the trial team in the Solvent litigation. Breu was to review documents and receive $100 per hour worked plus out-of-pocket expenses. *Id.* at 286-87.

Breu was deposed in November 1995. The existence of the consulting agreement was disclosed in response to questions posed although Breu had not produced the consulting agreement in response to the subpoena served upon him with the notice of taking deposition. Breu’s counsel (also ICC and Solvent’s counsel) took the position the agreement and associated invoices were protected under the work product doctrine and did not have to be produced. That position resulted in a motion to compel production of the agreement, invoices, notes produced by Breu, documents shown to Breu, notes of conversations with Breu, and an order requiring Breu to be produced again for deposition and that ICC pay counsel fees in connection with that deposition. *Id.* at 287-88.

The district court held that the work product rule did not apply to the consulting agreement, “any related documents that may reveal the facts and circumstances surrounding” Breu’s retention, “as well as the terms and conditions of his retention.” In the context of its decision to order production of these documents, the district court concluded that ICC and Solvent “purchased” Breu’s cooperation. In fatal words to any reviewer of opinions prohibiting witness payments, the district court explained that the consideration provided to Breu was “the equivalent of making cash payments to Mr. Breu as a means of making ‘sympathetic’ and securing his testimony.” *Id.* at 289.

The district court had no quarrel with the reimbursement of Breu’s travel expenses or apparently the payment of $100 per hour for Breu’s time. “Of course, the court finds nothing improper in the reimbursement of expenses incurred by Mr. Breu in traveling to New York to provide ICC with factual information, or in the payment of a reasonable hourly fee for Mr. Breu’s time.” *Id.* But it held that ICC and Solvent went “too far”
in also providing Breu with a covenant not to sue in the Dover and Solvent lawsuits. *Id.* at 289-90.\(^{58}\) In addition to ordering production of the agreement, it also ordered disclosure of documents shown to Breu in preparation for his deposition, a copy of each document reviewed by Breu under the consulting agreement, any documents prepared by Breu under the agreement, and notes of any conversations between ICC or Solvent and Breu. It also ordered Breu’s redeposition and held that ICC and Solvent “will bear all fees and costs incurred by the parties moving to compel in connection with that deposition.” *Id.* at 292.

By implication, two cases intimated approval of litigation consulting agreements with former employees in the course of addressing attorney-client privilege and work product claims. *In re Gulf Oil/Cities Service Tender Offer Litigation*, 1990 WL 108352 (S.D.N.Y. July 20, 1990) involved two former employees, Miller and Mace, of Gulf Oil Corporation, which had been acquired by Chevron U.S.A., Inc. Chevron was being sued as Gulf’s successor in connection with a repudiation of a tender offer for Cities Services. Miller and Mace knew a lot about the issues in the litigation and attended a meeting in New Orleans with counsel for Chevron to discuss the litigation. Miller was reimbursed for his travel and time in attending the meeting. Mace was “both a fact witness and a paid litigation consultant” for Chevron and he, too, was in attendance. What each was paid was not identified in the opinion.

The issue was whether the substance of the discussions at the New Orleans meeting had to be disclosed by Miller in his deposition. Counsel for Chevron blocked any inquiries into this subject matter prompting a motion to compel the redeposition of Miller and Mace.

Mace’s relationship was not the subject of material discussion in the opinion. As for Miller, the focus of the opinion was not on the payments to him but whether the attorney-client privilege or work product protection insulated him from questioning on what happened at the New Orleans meeting. Demurring on the privilege claim,\(^{59}\) the district court held that the substance of the New Orleans meeting with Chevron’s counsel was

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\(^{58}\) The district court was also troubled by ICC’s decision to retain Breu only after he was served with a subpoena in 1995 even though ICC had been a defendant in the Solvent litigation since 1983; by the failure of ICC’s attorneys to disclose the consulting agreement’s existence; and by ICC’s resistance to production of the consulting agreement. 166 F.R.D. at 290.

\(^{59}\) The district court called it a “close question” whether all discussions at the meeting were privileged. Miller’s personal invocation of the privilege failed because he never testified in his deposition that he was represented by Chevron’s attorneys at the time of the meeting, which predated his deposition (where he was represented by Chevron’s attorneys). Whether the privilege applied to communications with former employees is not “self-evident,” the district court also explained. But because work product protection existed for the discussions, the district court elected not to resolve the privilege question. 1990 WL 108352 at *2.
protected as work product and that Mace’s presence did not undermine the protection. There was apparently no objection to Mace’s role as a litigation consultant despite his status as a fact witness.

In the second case, Barrett Indus. Trucks, Inc. v. Old Republic Insurance Co., 129 F.R.D. 515 (N.D. Ill. 1990), Barrett had hired Komatz, a former employee, to assist it in prosecuting an insurance claim. Komatz had served as Barrett’s vice-president of finance and was responsible for obtaining insurance coverage for Barrett. So he was a “key fact witness” in the matter. Komatz had left Barrett’s employment in 1984 when his job was eliminated. In 1988, after the suit was brought, he was retained as a litigation “consultant” and was paid $50 per hour for his time. Again the issue was the application of the attorney-client privilege or work product protection to conversations between Komatz and Barrett’s attorneys.

The district court held that the privilege did not attach to discussions between counsel and a former employee, id. at 517-518, and that the work product protection did not apply to facts communicated to Komatz by Barrett’s counsel, persons from whom Barrett’s counsel learned the facts, and the existence or nonexistence of documents. Id. at 518-519. Hence, Komatz was ordered to be redeposed. The district court held, however, that the work product protection did apply to “specific questions that Barrett’s counsel has asked him” and to the “area of the case to which counsel directed the majority of the questions” and because Komatz was a consultant to Barrett, the district court also placed off limits questions designed to “elicit answers which would disclose whatever mental impressions, conclusions, opinions, or legal theories Mr. Komatz may have.” Id. at 519.

Goldstein v. Exxon Research & Engineering Co., 1997 WL 599612 (D.N.J. Feb. 28, 1997) was an unusual case that did not provide dispositive guidance on privilege or the enforcement of a consulting agreement with a former employee. It involved an age-discrimination action in which Effron, the retired former supervisor of the plaintiff, between the second and third day of his deposition, executed a consulting agreement whereby he would be paid $400 per day in return for providing Exxon with “assistance in providing information and testimony by way of deposition and, if necessary, assisting in the defense of this matter at trial, including meetings in preparation for the presentation of testimony.” Id. at *1. Apparently, Effron had been called as a witness by the plaintiff, but he was brought into “defendant’s camp” once he signed the consulting agreement. Plaintiff moved for sanctions “including striking defendant’s answer, voiding the consulting agreement, ...”

60 “In this case there is no real dispute that Miller was asked to attend the New Orleans meeting to discuss the matters concerning which he subsequently testified at his deposition. It is therefore obvious that the discussions at the meeting come within the broad purview of the work-product doctrine. Disclosure of statements made or questions posed by Chevron’s counsel at the meeting could tend to reveal their thoughts about or analysis of the issues posed by this litigation. As for any statements made by Mr. Miller at the meeting, even if purely factual they would amount to a statement of a witness provided to counsel, and thus come within the ambit of the rule as factual work-product.” 1990 WL 108352 at *3 (footnote and citations omitted).

61 “Thus, disclose simply to another person who has an interest in the information but who is not reasonably viewed as a conduit to a potential adversary will not be deemed a waiver of the protection of the rule.” 1990 WL 108352 at *4 (citations omitted).

62 The district court in Solvent Chemical Company distinguished In re Gulf Oil by explaining that Miller was not hired as a consultant and the fact circumstances of his retention were very different than those of Breu’s retention, and that Mace was hired as a consultant and no serious challenge was made regarding his retention. 166 F.R.D. at 291.

63 The district court in Solvent Chemical Company distinguished Barrett because Breu’s former employer acted “with haste to secure his cooperation” after Breu was subpoenaed to testify in a deposition by other interested parties and there was no objection to disclosure of the consulting agreement in Barrett (which was oral). 166 F.R.D. at 291.
prohibiting defendant from paying on the contract, barring defendant from calling Dr. Effron as a witness and from consulting further with him, and allowing plaintiff to question Dr. Effron as a hostile witness at trial.” The magistrate judge ordered that the terms of the agreement be disclosed and that Effron be treated as a hostile witness at trial. He rejected the other sanctions demanded but elected not to address the enforceability of the consulting agreement because that issue was not before the court. Nonetheless, the magistrate judge opined: “If the issue before this Court was simply whether or not the agreement between Dr. Effron and Exxon were enforceable, the answer would be easy—it is not enforceable.” Id. at *1, n.2. The district court affirmed with the caveat that it was not addressing the enforceability of the agreement and that the magistrate’s conclusion with respect to enforceability was “purely precatory.” Id. at *2.

**When the Witness Is Both an Expert and a Fact Witness**

If a witness is an expert in the field about which the witness also has first-hand knowledge as a fact witness, can the witness be compensated as an expert? Hamilton et al., v. General Motors Corp., 490 F.2d 223 (7th Cir. 1973) answered this question, “no,” but would have allowed reasonable compensation for the witness’ loss of time.

Hamilton was a GM retiree called into service to assist GM in defending an antitrust suit by providing detailed information to GM’s lawyers on a number of issues with which he was familiar based on his employment with GM. He was deposed in the antitrust action which was ultimately dismissed. Hamilton died and his executor sued GM claiming that Hamilton was entitled to compensation for coming “out of retirement” and devoting “substantially all of his time” for ten years helping GM in the defense of the antitrust action. Suit was brought more than five years after Hamilton last rendered services and because of a five-year limitations period, the complaint was dismissed. On appeal, the Seventh Circuit felt that the case warranted “a much broader consideration” in evaluating the limitations argument. Hamilton had no agreement to be compensated; he was relying on an implied contract. But the court of appeals explained that while Hamilton was one of the foremost experts in areas about which he testified, the fact remained that “he was testifying to matters of his own personal knowledge.” Saying he could not have qualified as an expert because of his partiality and while it might be unfair not to be compensated, the court of appeals concluded that the only contract “that the law could imply would be ‘for reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance.’” Id. at 229 (citing 18 U.S.C. § 201(d)). Because Hamilton had the opportunity to seek compensation for his time while he was submitting invoices for his expenses and because he failed to do so in a timely manner, the court of appeals affirmed.

Can the hybrid witness be compensated for the witness’ expert opinion? As noted earlier, New Mexico Advisory Opinion 1984-1, supra, provides a positive answer to this question: “While it is acknowledged that the distinction between these two types of testimony may be difficult to make in certain situations, as well as calculating the percentage of time attributable to being an ‘expert witness’ as opposed to an ‘ordinary witness,’ nevertheless the attorney should attempt to make the distinction. One consideration may be whether the attorney anticipates using the witness as an expert at trial. Obviously the witness will require compensation for providing expert testimony, which is quite proper.”
VI. ARE INDUCEMENTS TO INFORMANTS PROHIBITED?

Informants play more of a role on the criminal side of the ledger than on the civil side. But the case law, which focuses primarily on the application of the anti-gratuity statute, 18 U.S.C. § 201(c), makes a distinction between nonmonetary (always permissible) and monetary inducements (they may be permissible depending upon their purpose) that bears mention in this analysis.

U.S. v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) (en banc) cert. denied sub nom. Nelson v. United States, 484 U.S. 1026 (1988) held that an informant that is promised a contingent fee by the government “is not disqualified from testifying in a federal criminal trial.” The court of appeals said it was up to the jury to determine the credibility of the witness. The informant was paid at the conclusion of each case “based on the government’s evaluation of his overall performance,” but the amount of his fee “did not depend on “the ultimate outcome of the case or the arrest or conviction of any defendant.” Id. at 311-12.

United States v. Medina, 41 F. Supp. 2d 38, 53-55 (D. Mass. 1999), however, distinguished between payments for information and payments for testimony. The informant received over $105,000. The informant had worked on more than one investigation, worked undercover, made contacts in the drug world, passed information along, was wired, and exposed herself to danger. The payments also ended months before trial. The informant did not testify “as to what her understanding of the payments was” and no evidence related the payments to the informant to any significant events in the prosecution of Medina. Hence, the district court held that the government carried its burden of proof that the payments, which were for the informant to keep regardless of whether she testified, were not made for testimony.

Section 201(c)(2) was the focal point of the legal analysis. The district court explained that the government does not have the right to pay witnesses “for testimony,” id. at 53 (emphasis in the original), but,

Section 201(c)(2) cannot make it illegal to give anything of value to a witness simply because testimony might eventually be desired, but is not the immediate reason for the exchange. Such an interpretation would make criminal the hiring by the defense of an investigator primarily to gather documents or do surveillance, and possibly to testify-an absurd result.

Id. at 53-54. The district court described a “continuum.” On one end, there is payment “purely for information, and testimony is in no way anticipated.” In these cases § 201(c)(2) is not an issue. On the other end, money is given “purely for testimony,” which would violate § 201(c)(2). “In between are mixed cases, running from those where money is given for information and testimony is merely a foreseen possibility, to those where money is given both for information and for testimony.” The district court concluded that the case before it was in the middle category. Id. at 54.

64 The court of appeals explained that truthful testimony should not be excluded on a per se basis and that undercover investigation work is sufficiently dangerous that it is “sometimes necessary to compensate an informant.” The court of appeals also said safeguards existed “to protect against abuses.” The court of appeals also said safeguards existed “to protect against abuses.” The court of appeals also said safeguards existed “to protect against abuses.” The court of appeals also said safeguards existed “to protect against abuses.” The court of appeals also said safeguards existed “to protect against abuses.” The court of appeals also said safeguards existed “to protect against abuses.” The court of appeals also said safeguards existed “to protect against abuses.” The court of appeals also said safeguards existed “to protect against abuses.” The court of appeals also said safeguards existed “to protect against abuses.” The court of appeals also said safeguards existed “to protect against abuses.”
Mataya v. Kingston, 371 F.3d 353 (7th Cir. 2004) involved an informant who was given $1,000 for his “cooperation and testimony.” The court of appeals explicitly stated that to pay a nonexpert witness “for his testimony is irregular and in fact is unlawful in federal trials” citing 18 U.S.C. § 201(c)(2). Id. at 359. But it is lawful for a prosecutor to provide “immunity from prosecution, a lighter sentence, placement in a witness-protection program, and other breaks.” Id. This latter principle has been embraced by the courts of appeals. See, e.g., United States v. Buchanan, 213 F.3d 302, 311 (6th Cir. 2000) cert. denied 529 U.S. 1080 (offer of leniency to testifying witness does not violate § 201(c)(2)); United States v. Hill, 197 F.3d 436, 447 (10th Cir. 1999) (Leniency for testimony did not violate § 201(c)(2) and government lawyer’s offer of leniency did not violate Rule 3.4(b) of the Colorado RPC65 since there was no violation of law and Colorado RPC 3.4(b) provides that a lawyer shall not “offer an inducement to a witness that is prohibited by law” (emphasis in original)); United States v. Smith, 196 F.3d 1034, 1038-40 (9th Cir. 1999) cert. denied 529 U.S. 1028 (grant of immunity to witness and agreement to notify relevant authorities of witness’ cooperation does not violate § 201(c)(2)). Cf. United States v. Dawson, 425 F.3d 389, 393-94 (7th Cir. 2005) (payment of a “bounty” to witness of 20% of any proceeds of drug sales that the government recovered as a result of witness’ efforts was not a contingent fee for testimony since witness received the funds whether or not he testified but paying witnesses for testimony is prohibited under § 201(c)(2)).

One controversial approach to this result involves the question of whether the word, “Whoever,” in 18 U.S.C. § 201 applies to an assistant United States attorney when the attorney is acting for the United States. The Tenth Circuit in United States v. Singleton, 165 F.3d 1297 (10th Cir. 1999) (en banc) cert. denied 527 U.S. 1024 (1999) held that it does not. It held that “Whoever” refers to a person and since the Assistant United States attorney can only prosecute cases in the name of the government “in criminal cases,” “an Assistant United States Attorney, acting within the scope of authority conferred upon that office, is the alter ego of the United States exercising its sovereign power of prosecution. Hence, in the attempt to apply section 201(c)(2), the United States and the Assistant United States Attorney cannot be separated.” Id. at 1300 (emphasis in the original). The court of appeals also explained that the practice of giving a witness leniency in exchange for testimony is ingrained in the common law and “has created a vested sovereign prerogative in the government,” so that if Congress had intended Section 201(c)(3) to apply to the United States, it would have had to do so in “clear, unmistakable, and unarguable language.” Id. at 1301-02. See also United States v. Lott, 310 F.3d 1231 (10th Cir. 2002) (refusing to revisit the holding in Singleton where the government paid a witness $3,450 and offered a reduced sentence in return for testimony).

United States v. Jackson, 213 F.3d 1269 (10th Cir. 2000), however, established that Singleton did not address “whether the bribery statute applies when the government pays a witness for testimony.” The court of appeals recognized the holding in Medina but said no circuit court has addressed the subject of whether “outright

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65 Under 28 U.S.C. § 530B (2004), a state’s rules of professional conduct are applicable to attorneys for the United States: “An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”
payment for testimony by the government may be considered a violation of the statute.” *Id.* at 1288. Citing *Singleton*, it then established this regime for proving a violation of § 201(c)(2):

> We see no reason why the defendant, claiming a violation of 18 U.S.C. § 201(c)(2), should not be required to demonstrate the alleged actions taken by the prosecution were not those normally exercised by the sovereign and recognized under common law. Thus, the defendant asserting a violation of 18 U.S.C. § 201(c)(2) must make a showing the government promised the witness “something of value” in exchange for the testimony, and that by making such a promise, the government stepped out of the shoes of the sovereign - i.e., the government made a promise of something of value not normally offered and this action was inconsistent with the role of the prosecutor. See *Medina*, 41 F. Supp. 2d at 53 (holding the burden shifts to the government after the defendant has made a prima facie showing of a violation of § 201(c)(2)).

*Id.* at 1288-89. On the merits, the court of appeals held that the witness was paid as an informant, and, “Payment for the services of a confidential informant is a long-established practice and cannot constitute a violation of the bribery statute even if the parties contemplated testimony by the paid informant.” *Id.*

*United States v. Condon*, 170 F.3d 687, 689 (7th Cir.), cert. denied, 526 U.S. 1126 (1999) in effect disagreed with the analysis in *Singleton*. The court of appeals elected to focus not on the word “whoever” but on what was a “thing of value” as used in 18 U.S.C. § 201(c). It held that a promise not to prosecute is not a “thing of value” under § 201(c)(2). Therefore, it was unnecessary to determine what Congress meant by the use of “whoever” in the statute. But it then explained why treating “whoever” as excluding prosecutors for the United States was inappropriate: “That approach, if taken seriously, would permit prosecutors to pay cash for favorable testimony, a practice that lacks the statutory and historical support of immunity and sentence reduction.”

*United States v. Harris*, 210 F.3d 165, 168 (3rd Cir. 2000) held that paying an informant for collecting evidence and then testifying does not violate § 201(c)(2). The court of appeals withheld a decision on whether the anti-gratuity statute allows the government to pay a witness solely or essentially for favorable testimony but explained that Congress has authorized “payments for ‘information’ and ‘services’ to apprehend those who violate a number of criminal laws,” and it is logical to assume that Congress intended that such individuals could testify about what they know. *Id.* at 167.

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66 The court of appeals added: “*Nardone v. United States*, 302 U.S. 379, 383-84 (1937), holds that a generic reference to “whoever” or “any person” includes agents of the United States unless application of a statute would “deprive the sovereign of a recognized or established prerogative title or interest” or “a reading which [includes the government] would work obvious absurdity”. This cautions against using § 201(c)(2) to override other statutes but does not imply that § 201(c)(2) is inapplicable even when the federal agent supplies an unapproved testimonial inducement.” 170 F.3d at 689-90.

And many courts have agreed with *United States v. Barnett*, 197 F.3d 138, 144-45 (5th Cir. 1999) *cert. denied* 529 U.S. 1111 which held that payment of $7,500 to informant who testified does not violate § 201(c)(2) adding that there was ample protection of the integrity of justice through other procedural devices: “We have opted to protect the judicial process from the stain of perjury with other safeguards, including the prohibition on the use of perjured testimony, the requirement that the government disclose such arrangements, the opportunity for defense counsel to engage in rigorous cross-examination, and the instruction of the jury on the suspect nature of compensated testimony.” *See also United States v. Albanese*, 195 F.3d 389, 394-95 (8th Cir.1999) (leniency on criminal charges witness faced and payments in excess of $60,000 for witness’ cooperation in investigating and prosecuting defendant’s criminal activities did not violate § 201(c)(2), with the court of appeals adding: “The fact that the Government granted Bartels leniency and paid him for his assistance was known to the jury and was fully explored at trial before the jury convicted Albanese”).

VII. SO, WHAT ARE THE TAKEAWAYS ON THE SUBJECT OF WITNESS PAYMENTS?

There are many answers to this question.

If a witness is being paid for testimony, the lawyer associated with the payment is in trouble. As the cases discussed above demonstrate, it does not matter whether the lawyer is counsel of record, *Florida Bar v. Wohl*, supra, whether the lawyer is acting as an intermediary and has no relationship to the lawsuit, *Florida Bar v. Jackson*, whether the lawyer is seeking truthful testimony, *In Re Kien*, or whether the client makes the payments to the witness, *Golden Door*, supra. Depending upon the factual circumstances:

- The lawyer might be disqualified from representation.
- The witness might be excluded from testifying.
- Attorneys’ fees for bringing a motion for sanctions might be imposed against the lawyer’s client.
- The lawyer might be suspended or otherwise disciplined by the bar association of the state whose RPC govern the conduct of the lawyer.

Contingent fee payments to witnesses are always going to be rejected by courts. Under no circumstances should anything of value be given to a witness that might be construed as contingent on the outcome of a case or an incentive to influence the witness’s testimony.

If the witness is an expert testifying solely as a fact witness, payments made for expertise would be imprudent under the rationale of *Hamilton et al., v. General Motors Corp.*, supra, but reasonable compensation can be made for the loss of time of the witness. *See, e.g.*, Mississippi Ethics Op. No. 145.

If the witness is an expert testifying both as an expert and a fact witness, where it is impossible to distinguish the expert time from the factual testimony time, payment on the basis of expert time is permissible. *See, e.g.*

If the witness is a fact witness who is suffering a loss of wages or income as a result of the time needed to prepare or testify, the witness can be compensated for this loss. See ABA Formal Opinion 96-402; Colorado Ethics Op. 103; Virginia Ethics Op. 587; Kentucky Ethics Op. E-400, NYSBA Ethics Op. 668.

Where a lawyer learns that a witness is “getting something” from a client to testify, as long as the payments being made by the client could have been made by the lawyer under Model Rule 3.4(b) there is no ethical violation. See Michigan Ethics Op. R1-117.

If the witness is a former employee with knowledge of facts important to the client and there are significant demands being made on the witness’ time, the witness can be reasonably compensated for the loss of time. Centennial Management Services, Inc. v. Axa Re. Vie et al, supra. See also Illinois Ethics Op. 87-5; Arizona Ethics Op. 97-07; Massachusetts Ethics Op. 1991-3. Even where the former employee is retired, reasonable compensation is permissible. See California Formal Op. 1997-149; Wisconsin Ethics Op. E-89-17.

If one is documenting a witness compensation agreement, the agreement should expressly state that the payment is for reimbursement to the witness for loss of time, and if there are defined needs (review of documents, e.g.), they should be articulated as the basis for the agreement. The concept of reimbursement for “reasonable” expenses should be a part of the document. The amount of the payments should be stated and if they vary by type of service provided, that should be stated as well. If counsel services are going to be provided the agreement should so state. See Centennial Management Services, Inc. v. Axa Re. Vie et al, supra. See also Arizona Ethics Op. 97-07 (“The lawyer would do well to instruct the witness to not allow the fee to color or influence testimony in any way and to memorialize their fee agreement in writing.”); ABA Formal Opinion 96-402 (The lawyer must make it “clear to the witness that the payment is not being made for the substance or efficacy of the witness’s testimony, and is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony in litigation in which the witness is not a party[,]”). You should assume that the agreement may have to be produced in the litigation and, in jury trials, that there may be an instruction given to the jury on the topic.

If you have identified a need for a witness who demands to be compensated, you should proceed thoughtfully but apace. The closer to the date testimony might be given, the more one increases the chances a court will question the bona fides of the agreement. Retaining a witness after the witness has been subpoenaed or started testimony will never look good, New York v. Solvent Chemical Company, supra; Goldstein v. Exxon Research & Eng. Co., supra. And pre-retention thought should be given to understand the privilege and work product implications of the retention and subsequent discussions. New York v. Solvent Chemical Company, supra; In re Gulf Oil, supra; Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co., supra.
Payment for reasonable expenses is permissible, but lawyers should be sure that the expenses are “reasonable.” Any expense reimbursement that can be interpreted to look like an incentive to gain favor with the witness will be disfavored by a court.

Payments to an informant appear to be acceptable especially if there is no need to call the informant as a witness to testify, but even then there appears to be sufficient authority to permit such payments as long as they are reasonable and the purpose of the payment cannot be successfully challenged. See Maryland Ethics Op. 83-38. Cf. Alabama Ethics Op. 83-77 (approving payments to an “investigator/consultant”).

Lawyer witnesses have been allowed to receive fees from payors willing to pay them for the loss of time in a number of situations where they have testified as fact witnesses. See NYSBA Ethics Op. 714; South Carolina Ethics Op. 97-42; Connecticut Ethics Op. 92-30. However, where their duty of loyalty to former clients is compromised, payment may not be accepted. See Massachusetts Ethics Op. 2000-02. The same is true if an initial engagement required a lawyer to later provide testimony on behalf of a former client. See NYSBA Ethics Op. 714.

And finally, the question everyone wants an answer to: what is reasonable compensation? I am afraid this is, as the ethics opinions repeatedly say, a determination to be made on a case-by-case basis and lawyers are charged with evaluating the reasonableness of any fees paid to compensate a witness for loss of time and out-of-pocket expenses.

But there are common-sense guidelines. A person who loses actual wages or fees can be paid for the loss. See ABA Formal Op. 96-402 (“What is a reasonable amount is relatively easy to determine in situations where the witness can demonstrate to the lawyer that he has sustained a direct loss of income because of his time away from work – as, for example, loss of hourly wages . . . “); NYSBA Ethics, Op. 547 (“Clearly, a witness who earns a salary for his livelihood may be paid an amount equivalent to his lost wages.”); NYSBA Ethics Op. 714, (“It would ordinarily be reasonable, and therefore permissible, for the lawyer to receive an amount equal to the lawyer’s customary hourly fee (or, where the lawyer charges several different hourly fees, an amount equal to the average of those fees.”); New Hampshire Ethics Committee Article (1992) (The lawyer should

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68Reasonable expenses should include legal fees reasonably incurred by the witness. See New York County Lawyers’ Association Ethics Opinion 729 (2000), http://www.nycla.org/siteFiles/Publications/Publications265_0.pdf, (under DR 7-109(C), witness’ counsel fees may constitute “expenses reasonably incurred by the witness in attending or testifying”). The witness in question was a former employee of an adversary in litigation and agreed to be interviewed if counsel would be provided at the expense of the interviewing lawyer’s client. “In the Committee’s view, the payment or provision of counsel to a third-party witness should not be viewed as a payment to influence the content of a witness’s testimony. There are a number of reasons why a witness may wish to be represented by counsel in an interview or in formal discovery proceedings, or in preparing for these events, and a number of reasons why counsel to a litigant may wish to have a third-party witness represented by counsel. By way of example, counsel may assist a witness in understanding complex litigation, or may provide advice to a witness with potential liability (e.g., in regard to the employee’s common law (or contractual) obligation to not reveal trade secrets), or may simply comfort a witness who would otherwise experience discomfort if unrepresented by counsel.” The Committee felt that providing a lawyer to the witness would enhance the truth-seeking process which is the basis for the prohibition on compensation of witnesses. The opinion identifies three limitations on the proposed conduct. Payment should only be made for the fees “reasonably incident” to representation of the witness. The lawyer for the witness must be able to provide independent professional judgment. And the client must consent to, and remain liable for, the payment of the witness’ legal fees. The opinion permitted the lawyer, with the consent of the lawyer’s client, to suggest to the witness retention of counsel and payment of fees even if the witness did not make a request for a lawyer.
inquire into the particular facts and circumstances of the witness’ situation and apply a common sense analysis to the question.).

For a person in-between work, one might look to the salary paid to the person in the person’s last job or to objective indicators of the value of time for that person’s skill set. See California Formal Opinion 1997-149 (suggesting consideration of what the witness last earned, if currently unemployed, or what others earn for comparable activity); New Hampshire Ethics Committee Article (1992) (When the witness is not employed, spends substantial time to prepare for and give testimony, and wants to be compensated for his or her loss of time, one approach is “to determine what the witness most recently earned, or what people in the same occupation are being paid, and to adjust that amount for any special or unusual circumstances.”) Cf. Massachusetts Ethics Op. 1991-3 (referring to a former employee who had sent in a bill for time spent on a Rule 30(b)(6) deposition and wanted to be paid for his trial time, “We can only warn that any payment in excess of what the witness ordinarily had charged, and previously received, for his time might evidence an impermissible payment to induce testimony in favor of the paying party.”).

For retirees, a reasonable sum might be the hourly compensation of the retiree just before retirement, perhaps adjusted for inflation if appropriate. See ABA Formal Opinion 96-402 (where the witness is retired or unemployed--the lawyer must determine the reasonable value of the witness’s time based on all relevant circumstances”); Wisconsin Ethics Op. E-89-17 (agreeing that retirees are entitled to compensation for loss of time they could devote to other endeavors but electing not to decide whether a retired person’s compensation as a witness could be “based upon an unemployed or retired person’s usual wage when working” saying that determination of the amount of payment would have to be made on a case-by-case basis). Cf. California Formal Opinion 1997-149 (as noted above, suggesting consideration of what the witness last earned, if currently unemployed, or what others earn for comparable activity).

If a fact witness has a particular expertise in an area and is being qualified as an expert in that area, compensation for the time spent as an expert “must always meet some objective standard of reasonableness, which, again, depends for the most part on the witness’s occupation and/or trade.” Alaska Ethics Op. 93-2.

It is good to bear in mind this guidance from the New Hampshire Ethics Committee: “If the lawyer makes the determination in good faith, keeping in mind the prohibition against improperly influencing a witness, the lawyer should avoid any problem under rule 3.4(b).” Or always ask this question: if a judge is forced to confront the question and is evaluating the witness’ skills and the demands being made on the witness to assist in the litigation, will the judge conclude that the compensation arrangement is a genuine one for the reasonable value of the witness’ time or that the compensation represents a substantial threat to the integrity of the testimony and to the administration of justice? Let the answer to that question guide you in deciding what is reasonable compensation.

60 Remember the admonition given by the Arizona Ethics Committee: “a fee that is unreasonably high will tend to appear as an illegal and unethical inducement to color testimony,” and “payment of a fee may appear unreasonable if the fee is so high that the witness is ‘better off’ than she would have been if she spent the time otherwise earning an income rather than testifying or preparing to testify.” Arizona Ethics Op. No. 97-07.
VIII. COURT RULES ADDRESSING DEPOSITION CONFERENCES BETWEEN A LAWYER AND A WITNESS

In the discussion above we learned about the rules on the circumstances under which a fact witness can be compensated and what “reasonable” compensation is. Another form of “talk” raises a number of ethics and rule-compliance questions: when is it appropriate to confer with a witness during a deposition?

Most lawyers would regard it as intuitive that they have the duty to prepare and counsel with their clients in a deposition. Model Rule 1.1 requires competence in lawyers and a competent lawyer is going to prepare a witness properly and defend a client throughout a deposition. But lawyer abuses have prompted some courts either by order or by state rule to impose limits on conferring with a witness, and to attempt to achieve some uniformity, prompted the ABA to modify its Civil Discovery Standards to address the subject. The subject can be divisive, as the following discussion demonstrates.

Setting the Table

Two cases present the arguments on each side of the issue. Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993) involved a lawyer who sought to confer with a client off the record and outside “earshot” of the other lawyers during a deposition of the client. The district court was concerned that allowing a lawyer to confer with a witness would permit the lawyer to “mold a legally convenient record” and to be “creative with the facts.” Id. at 528. The district court recognized a lawyer’s duty to prepare a client for a deposition and the client’s right to counsel and to due process. But the district court held that once a deposition begins, “the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth.” Under F.R. Civ. P. 30(c), the district court explained, depositions are to be conducted “under the same testimonial rules as are trials.” A witness and the witness’ lawyer “are not permitted to confer at their pleasure” during the witness’ testimony. “Once a witness has been prepared and has taken the stand, that witness is on his or her own.” The district court held that the same rules should apply to a deposition. Id.

For a thoughtful discussion of the reasons to disallow and allow a lawyer to confer with a witness in a deposition, see the report of the New York State Bar Association Commercial and Federal Litigation Section, Committee on Federal Procedure entitled “Should Deposition Witnesses Be Allowed To Confer With Their Counsel During a Deposition?” (December 3, 2002) which can be found at: https://www.nysba.org/AM/Template.cfm?Section=Committees2&Template=CM/ContentDisplay.cfm&ContentFileID=5672. The Committee concluded: “In deciding when counsel and a deposition witness should be allowed to confer, there should be a balancing between the reasons for prohibiting consultation – coaching and interference with the interrogator’s examination – and the reasons why a consultation could occur – correction of errors, reassurance of the witness, or legal advice about assertion of a privilege or protection, harassing questions, or issues relating to the case. This balance should prohibit consultation during a deposition while a question is pending, except for the purpose of ascertaining whether a privilege or other protection from discovery should be asserted, and permit consultation during overnight breaks. Beyond that, each court may weigh the considerations. No further consensus seems possible.”

The district court explained: “Lawyers, of course, do not often attempt to interrupt the questioning of their clients at trial to have private conferences, probably because they think that doing so would tend to diminish the witness-client’s credibility. Some district courts have ordered lawyers and witness-clients not to confer even during lunch and overnight breaks in the witness-client’s testimony. In Aiello v. City of Wilmington, 623 F. 2d 845, 858-59 (3d Cir.1980), the district court, because of its concern over “witness coaching,” ordered the plaintiff and his counsel not to communicate during breaks in the plaintiff’s cross-examination. The Third Circuit did not decide, and to this court’s knowledge still has not decided, whether such an order might violate the right to counsel.” 150 F.R.D. at 528 n.5.
The district court carried the rule a step further: to conferences initiated by the witness, not the lawyer.

To allow private conferences initiated by the witness would be to allow the witness to listen to the question, ask his or her lawyer for the answer, and then parrot the lawyer’s response. Again, this is not what depositions are all about—or, at least, it is not what they are supposed to be all about. If the witness does not understand the question, or needs some language further defined or some documents further explained, the witness can ask the deposing lawyer to clarify or further explain the question. After all, the lawyer who asked the question is in a better position to explain the question than is the witness’s own lawyer. There is simply no qualitative distinction between private conferences initiated by a lawyer and those initiated by a witness. Neither should occur.

Id. at 528-29. (footnote omitted).

In addition, the district court decided that conferring is barred during recesses as well. Saying that once the deposition has started, “the preparation period is over,” the district court held that the deposing lawyer should be able to pursue inquiries “without interjection” by the witness’ counsel:

Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules. Otherwise, the same problems would persist. A clever lawyer or witness who finds that a deposition is going in an undesired or unanticipated direction could simply insist on a short recess to discuss the unanticipated yet desired answers, thereby circumventing the prohibition on private conferences. Therefore, I hold that conferences between witness and lawyer are prohibited both during the deposition and during recesses.

Id. at 529 (footnote omitted). Moreover, the district court held that a conference held in violation of the district court’s order is “not covered by the attorney-client privilege, at least as to what is said by the lawyer to

72 Cf. Geders v. United States, 425 U.S. 80 (1976) (the trial court’s order directing a defendant not to consult his attorney during an overnight recess called while the defendant was on the witness stand violated the defendant’s Sixth Amendment right to the assistance of counsel); Perry v. Leeks, 488 U.S. 594, 602 (1989) (in a habeas corpus matter, state court order preventing defendant from conferring with his lawyer during a 15-minute break after his direct testimony did not violate the Sixth Amendment right to assistance of counsel. “The interruption in Geders was of a different character because the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant’s own testimony-matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. It is the defendant’s right to unrestricted access to his lawyer for advice on a variety of trial-related matters that is controlling in the context of a long recess. See Geders v. United States, 425 U.S., at 88, 96 S.Ct., at 1335. The fact that such discussions will inevitably include some consideration of the defendant’s ongoing testimony does not compromise that basic right. But in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice”). Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1118-19 (5th Cir.1980) applied Geders in a civil litigation setting. The district court had barred conversations with witnesses during breaks in their testimony. Counsel had not understood the bar to apply to conversations with his client and a sanction was imposed. In reversing, the court of appeals, relying on Geders, held: “Recognizing that a civil litigant has a constitutional right to retain hired counsel, we hold that Judge Hand’s rule prohibiting a litigant from consulting with his attorney during breaks and recesses in the litigant’s testimony impinges upon that right.” But see Reynolds v. Alabama Dept. of Transportation, 4 F.Supp. 2d 1055, 1066 (N.D. Ala. 1998) (explaining that Potashnick preceded Perry and, in light of Perry, stating the rules thusly: “Considering the development of the cases in the
the witness. Therefore, any such conferences are fair game for inquiry by the deposing attorney to ascertain whether there has been any coaching and, if so, what.” Id., n.7.

If a document is shown to a witness in the deposition, the deposing attorney “is entitled to have the witness, and the witness alone, answer questions about the document.” Counsel for the witness should be given a copy of the document, but may not confer with the witness “about the document before the witness answers questions about it.”

If the witness does not recall having seen the document before or does not understand the document, the witness may ask the deposing lawyer for some additional information, or the witness may simply testify to the lack of knowledge or understanding. But there need not be an off-the-record conference between witness and lawyer in order to ascertain whether the witness understands the document or a pending question about the document.

Id. at 529 (footnote omitted).

There was one exception to the district’s ban on conferring. If the purpose of the conference is to decide whether to assert a privilege, “it makes sense to allow the witness the opportunity to consult with counsel about whether to assert a privilege. Further, privileges are violated not only by the admission of privileged evidence at trial, but by the very disclosures themselves. Thus, it is important that the witness be fully informed of his or her rights before making a statement which might reveal privileged information. However, when such a conference occurs, the conferring attorney should place on the record the fact that the conference occurred, the subject of the conference, and the decision reached as to whether to assert a privilege.” Id. at 529-30. The district court’s order contained a deposition protocol summarizing its rulings, id. at 531-32, which I have replicated in Appendix II.

criminal context and analogizing this development to the civil context, the court concludes that the scope of a civil party’s right to access to his counsel, and thus the scope of the counsel’s right to access to a civil party, is clear. A civil party does not have a right to consult with his counsel at any time about any matter during the course of his or her testimony. Rather, the trial court has broad power to control the progress of testimony before it. This broad power is, however, limited by a testifying party’s right to engage in such non-testimonial matters as giving and receiving information and working on the presentation of his or her case through strategizing, developing tactics, and generally managing the progress of the case. Because these non-testimonial matters arise most often during extended recesses-in particular, over evenings and weekends-the court must be sensitive to allow a testifying party to confer with his or her attorney during such periods. Here, the defendants sought an unqualified right to consult with all their witnesses at any time about any matter, both testimonial and non-testimonial, and the law does not support such.

The district court also addressed speaking objections by lawyers and banned them as well. “Without guidelines on suggestive objections, the spirit of the prohibition against private conferences could be flouted by a lawyer’s making of lengthy objections which contain information suggestive of an answer to a pending question.” 150 F.R.D. at 530. “It should go without saying that lawyers are strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness’s answer to an unobjectionable question.” Id. at 531. It then gave this warning to the bar: “Depositions are the factual battleground where the vast majority of litigation actually takes place. It may safely be said that Rule 30 has spawned a veritable cottage industry. The significance of depositions has grown geometrically over the years to the point where their pervasiveness now dwarfs both the time spent and the facts learned at the actual trial-assuming there is a trial, which there usually is not. The pretrial tail now wags the trial dog. Thus, it is particularly important that this discovery device not be abused. Counsel should never forget that even though the deposition may be taking place far from a real courtroom, with no black-robed overseer peering down upon them, as long as the deposition is conducted under the caption of this court and proceeding under the authority of the rules of this court, counsel are operating as officers of this court. They should comport themselves accordingly; should they be tempted to stray, they should remember that this judge is but a phone call away. Id. (footnote omitted).
Several courts have followed *Hall*, or have done so in part. *Armstrong v. Hussman Corp.*, 163 F.R.D. 299, 303 (E.D. Mo. 1995) (citing *Hall*, “Attorneys are also prohibited from acting as an intermediary during their client’s deposition—from interpreting opposing counsel’s questions; having private conferences with their client during the deposition; and conferring with their client about a document presented by the deposing attorney”); *Chapsky v. Baxter Healthcare Corp.*, 1994 WL 327348 *1 (N.D. Ill. July 6, 1994) (citing *Hall* for the proposition that “private conferences during a deposition between a deponent and his or her attorney for any purpose other than to decide whether to assert a privilege are not permitted”); *In re Matter of Anonymous Member of the South Carolina Bar*, 552 S.E. 2d 10, 16-17 (S.C. 2001) (explaining that South Carolina’s Rule 30(j)(5), discussed below, was derived from *Hall*, adding, “Off-the-record conferences not specifically permitted by the rule are not allowed whether they are called by the deponent’s attorney or the deponent. ‘There is simply no qualitative distinction between private conferences initiated by a lawyer and those initiated by a witness. Neither should occur.’ *Hall*, 150 F.R.D. at 528. According to our rule, even during breaks in the deposition such as a lunch or overnight break, witnesses and their counsel cannot talk substantively about prior or future testimony in the deposition. See Rule 30(j)(5), SCRCP”; *In re PSE&G Shareholder Litigation*, 726 A.2d 994, 997 (N.J. Superior Ct., Essex 1998) (“Although this court believes that the decision of the court in *Hall v. Clifton Precision* is laudatory, this court does not believe that blanket restrictions should be imposed in every case. Each case must be dealt with on the basis of the individual facts presented to the court. In the present cases, the court believes that the following restrictions should apply to the depositions of the defendant directors: once the deposition commences there should be no discussions between counsel and the witness, even during recesses, including lunch recess, until the deposition concludes that day. However, at the conclusion of the daily deposition, counsel and the witness should be permitted to confer and to prepare for the next day’s deposition”). *Cf. Phinney v. Paulshock*, 181 F.R.D. 185, 205 (D.N.H. 1998) (conference with third-party witness during a break should not have occurred since there was no attorney-client privilege issues requiring discussion); *Christy v. Pennsylvania Turnpike Authority*, 160 F.R.D. 51, 53 (E.D. Pa. 1995) (indicating that the protocol in *Hall* was “adopted in this litigation”).

Some portions of *Hall* were not followed in *In re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614 (D. Nev. 1998). 75 In this decision, the magistrate judge favored the right to counsel over the fear of witness

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74 Before *Hall*, see also *Refco, Inc. v. Troika Investment Ltd.*, 87 C 9272, 1989 WL 94326 at *11 (N.D. Ill. Aug. 2, 1989) (“2. Troika’s counsel are ordered not to instruct or advise deponents that they are free to decline to answer any questions, but may advise them not to answer only pursuant to a privilege or if a question touches sensitive areas or goes beyond reasonable limits. 3. Troika’s counsel are ordered not to consult with witnesses during the course of their depositions except during mutually-agreed-upon breaks in those depositions or in the instances identified in numbered paragraph 2”); *Cascella v. GDV, Inc.*, No. 5899, 1981 WL 15129, *1 (Del. Ch. Jan. 15, 1981) (unpublished) (suggesting that it is impermissible for an “opposing counsel to discuss a question with a witness off the record prior to the time that an answer is given”). The district court in *Hall* relied on the following cases to support its decision: *In re Braniff, Inc.*, Nos. 89-03325-BKC-6C1, 92-911, 1992 WL 261641 (Bankr.M.D.Fla. Oct. 2, 1992); *RTC v. KPMG Peat Marwick*, Civ.A. No. 92-1373 (E.D.Pa. Sept. 19, 1992); *In re Domestic Air Transp. Antitrust Litig.*, 1992-1 Trade Cases ¶ 69,731, 1990 WL 358009 (N.D.Ga. Dec. 21, 1990); *In re San Juan DuPont Plaza Hotel Fire Litig.*, No. MDL 721, 1989 WL 168401 (D.P.R. Dec. 2, 1989); *In re Rhode Island Asbestos Cases*, R.I.M.L. No. 1 (D.R.I. March 15, 1982); *In re Asbestos-Related Litig.*, No. CP-81-1 (E.D.N.C. Sept. 15, 1981). 150 F.R.D. at 527 n.2 (saying that these cases hold that “private conferences between deponents and their attorneys during the taking of a deposition are improper unless the conferences are for the purpose of determining whether a privilege should be asserted”).

76 The magistrate judge did not quarrel with *Hall*’s analysis in several respects: “This Court agrees with the Hall court that a questioning attorney is entitled to have the witness, and the witness alone, answer questions. *See Hall* at 529. When there is a
coaching. “It is one thing to preclude attorney-coaching of witnesses. It is quite another to deny someone the right to counsel….It is this Court’s opinion that the right of counsel does not need to be unnecessarily jeopardized absent a showing that counsel or a deponent is abusing the deposition process.” Id. at 621.

The magistrate explained that it was not aware of any cases which preclude counsel “from speaking to his or her client/witness during recesses called by the court during trial or during regularly scheduled recesses of depositions. Such breaks in the action are usually not taken when a question is pending and are usually not at the instigation of the deponent or counsel.” Id. 

It is this Court’s experience, at the bar and on the bench, that attorney’s and clients regularly confer during trial and even during the client’s testimony, while the court is in recess, be it mid morning or mid afternoon, the lunch recess, (or) the evening recess. The right to prepare a witness is not different before the questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during trial). What this Court, and the Federal Rules of Procedure seek to prevent is coaching the witness by telling the witness what to say or how to answer a specific question. We all want the witness’s answers, but not at the sacrifice of his or her right to the assistance of counsel.

...To deny a client any right to confer with his or her counsel about anything, once the client has been sworn to testify, and further to subject such a person to unfettered inquiry into anything which may have been discussed with the client’s attorney, all in the name of compliance to the rules, is a position this Court declines to take.

Id.

Hence, the magistrate concluded that the court would not “preclude an attorney, during a recess that he or she did not request, from making sure that his or her client did not misunderstand or misinterpret questions or documents, or attempt to help rehabilitate the client by fulfilling an attorney’s ethical duty to prepare a witness. So long as attorneys do not demand a break in the questions, or demand a conference between question and answers, the Court is confident that the search for truth will adequately prevail.” Id.

The magistrate did agree that if a lawyer instructs a witness not to answer a question because of a claim of privilege, the lawyer should place on the record “the fact that a conference is held (if one is held), the subject of the conference (i.e., the document or subject matter to which the privilege is asserted, not the substance of question pending neither the deponent nor his or her counsel may initiate the interruption of the proceeding to confer about the question, the answer, or about any document that is being examined, except to assert a claim of privilege (conform to a court order or seek a protective order). If the deponent does not understand the question, or the meaning of a word or phrase, or even if the deponent has a question about a document, he or she should ask the questioning attorney. Id. If the deponent lacks knowledge or understanding, then the deponent should say so, not seek understanding or direction about how to answer the question from his or her attorney. Id. The interrogating counsel has the right to the deponent’s answers, not an attorney’s answers.” 182 F.R.D. at 621.

76 The magistrate added that if a break is requested by the deponent or deponent’s counsel, “and the interrogating attorney is in the middle of a question, or is following a line of questions which should be completed, the break should be delayed until a question is answered or a line of questions has been given a reasonable time to be pursued.” 162 F.R.D. at 621.
the communications themselves), and the decision reached as to whether to assert a privilege.” Id. at 621-22. However, the magistrate disagreed with Hall “that any conference counsel may have with the deponent during a deposition waives the claim of privilege as to the communications between client and counsel during any conference or other break in the deposition.” Id. at 622 (citation omitted). The magistrate’s order contained a deposition protocol summarizing its rulings, id., which I have replicated in pertinent part in Appendix III.

A number of cases follow Stratosphere or adopt the same approach. Odone v. Croda Int’l PLC, 170 F.R.D. 66, 68 (D.D.C.1997) looked to conduct at trial in the examination of a witness for guidance on how to address a motion for sanctions sought because of a conference between a lawyer and the witness during a five-minute recess of the deposition. Citing Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1118-19 (5th Cir. 1980) which looked at the right of a judge to limit conferences between a witness and counsel at trial (“a civil litigant has a constitutional right to retain hired counsel ... [and that the Judge’s] rule prohibiting a litigant from consulting with his attorney during breaks and recesses in the litigant’s testimony impinges upon that right”), id. at 67-68, the magistrate judge held that Hall was not applicable in holding:

> Certainly, in retrospect, it would have been preferable for the plaintiff’s attorney to ascertain on the record whether his client misinterpreted a document. The Court, however, cannot penalize an attorney for utilizing a five-minute recess that he did not request to learn whether his client misunderstood or misinterpreted the questions and then for attempting to rehabilitate his client on the record. An attorney has an ethical duty to prepare a witness.

Id. at 69 (footnote omitted). See also McKinley Infuser, Inc. v. Zdeb, 200 F.R.D. 648, 650 (D. Col. 2001) (“The Hall case has met with substantial, and I believe justified, criticism...[T]he truth finding function is adequately protected if deponents are prohibited from conferring with their counsel while a question is pending; other consultations, during periodic deposition breaks, luncheon and overnight recesses, and more prolonged recesses ordinarily are appropriate”), State v. King, 205 W. Va. 708, 520 S.E. 2d 875, 881 (1999) (“With regard to discovery depositions taken in the course of litigation, we believe that the approach taken in Stratosphere is the more logical and fair approach. An attorney should be able to ensure that his or her client did not misunderstand or misinterpret a question or a document. In fact, an attorney has an ethical duty to prepare a witness for a deposition.”). Cf. Damaj v. Farmers Ins. Co., 164 F.R.D. 559, 560-61 (N.D. Ok. 1995) (electing not to impose the full range of Hall restrictions but setting forth a protocol that bans speaking objections); Henry v. Champlain Enterprises, Inc., 212 F.R.D. 73 (N.D.N.Y. 2003) (“Lastly, Defendants move this Court to direct the Plaintiffs to reveal to them what Henry’s counsel said to him during the break of his deposition. Defendants rely heavily on Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993), which is embraced within that circuit, but seems to be highly criticized elsewhere. Furthermore, it has not been followed by the Second Circuit or by any district court within the circuit. In the scheme of things, the motion is of no moment either. To gain this information may truly intrude upon the attorney-client privilege and the work

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77 Local Rule 30.3 of the District Court of Colorado also provides: “Interrupting examination for an off-the-record conference between counsel and the witness, except for the purpose of determining whether to assert a privilege. Any off-the-record conference during a recess may be a subject for inquiry by opposing counsel, to the extent it is not privileged.”
product doctrine. To have this information is only to gain a tactical advantage of some nature, but hardly seems to be a quest for relevant subject matter germane to the issues at hand. Therefore, this Motion is denied.

Against this backdrop, a number of district courts or judges have adopted local rules or orders establishing the protocols to be followed in the interrogation of witnesses.

**Local Rules in Some Federal District Courts Limit Off-the-Record Conferences**

A number of federal district court local rules address the topic of conferencing with a witness during a deposition. The local rules take two forms: (1) prohibition on conferring with a witness while a question is pending except to address the preservation of a privilege (e.g., S.D. Fla., S.D. Ind.) and (2) prohibition on any conference with a witness during the deposition (e.g., D. Md., M.D. N.C., D. S.C.). Otherwise, the prohibitions appear to permit conferences during normal breaks or overnight and the fact of a conference and its duration can be pointed out on the record, depending upon the jurisdiction. There is also an ambiguity in some of the rules regarding who initiates the conference. In some jurisdictions, an attorney may not initiate a conference but there is no indication that the attorney may not respond if the deponent initiates the conference (e.g., E.D.N.Y, W.D. Tex.).

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<tr>
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<td>Alabama</td>
<td>M.D. Ala. Guideline II.G.; S.D. Ala. Guideline II.G.</td>
<td>“Except during normal breaks and for purposes of determining the existence of privilege or the like, normally at the request of the client, a deponent and his attorney should not normally confer during a deposition. The fact and duration of the conference may be pointed out on the record and, in the event of abuse, an appropriate protective order may be sought.”</td>
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<td>California</td>
<td>N.D., Standing Order for Civil Practice Deposition Guidelines</td>
<td>“5. <strong>Private Consultation.</strong> Private conferences between deponents and their attorneys in the course of deposition are improper and prohibited except for the sole purpose of determining whether a privilege should be asserted.”</td>
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| Colorado  | D. Col. LR 30.3 A., p. 13                                       | “The following abusive deposition conduct is prohibited:

. . . 2. Interrupting examination for an off-the-record conference between counsel and the witness, except for the purpose of determining whether to

78 This list is not represented to be exhaustive and you should always check the local rules of the district court, any discovery or deposition guidelines, and standing orders of the judge on this topic.
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<td>state a privilege. Any off-the-record conference during a recess may be a subject for inquiry by opposing counsel or pro se party, to the extent the conference is not privileged.”</td>
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<td>Indiana</td>
<td>S.D. Ind. L.R. 30.1(b), p. 44</td>
<td>“An attorney for a deponent shall not initiate a private conference with the deponent regarding a pending question except for the purpose of determining whether a claim of privilege should be asserted.” <a href="http://www.insd.uscourts.gov/Publications/LocalRules.pdf">http://www.insd.uscourts.gov/Publications/LocalRules.pdf</a></td>
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<td>Maryland</td>
<td>D. Md. Rules App. A Discovery Guideline 5.g., p. 77</td>
<td>“During breaks in the taking of a deposition, no one should discuss with the deponent the substance of the prior testimony given by the deponent during the deposition. Counsel for the deponent may discuss with the deponent at such time whether a privilege should be asserted or otherwise engage in discussion not regarding the substance of the witness’s prior testimony.” <a href="http://www.mdd.uscourts.gov/LocalRules/localrule2004finalver.pdf">http://www.mdd.uscourts.gov/LocalRules/localrule2004finalver.pdf</a></td>
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<td>North Carolina</td>
<td>M.D.N.C. LR 30.1(3), p. 17</td>
<td>“Counsel and their witness-clients shall not engage in private, off-the-record conferences while the deposition is proceeding in session, except for the purpose of deciding whether to assert a privilege.”</td>
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<td>New York</td>
<td>E.D.N.Y. Rule 30.6, p. 28</td>
<td>“An attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted.”</td>
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<td>New York</td>
<td>Guidelines for Discovery Depositions of Magistrate Judge Foschio (W.D.N.Y)</td>
<td>“(5) Counsel and their witness/clients shall not initiate or engage in private off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege.</td>
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<td>(6) Any conferences which occur pursuant to, or in violation of, guideline (5) are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what.</td>
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<td>Oregon</td>
<td>D. Ore. LR 30.5</td>
<td>“If a question is pending, it must be answered before a recess is taken unless the question involves a matter of privacy right; privilege; or an area protected by the constitution, statute, or work product.”</td>
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<td>South Carolina</td>
<td>D.S.C. Local Civil Rule 30.04, p. 36 (follows S.C. RCP 30(j) below)</td>
<td>“(E) Counsel and witnesses shall not engage in private, ‘off the record’ conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.</td>
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<td>(F) Any conferences which occur pursuant to, or in violation of, Local Civil Rule 30.04(E) are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature.</td>
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<td>(G) Any conferences which occur pursuant to, or in violation of, guideline Local Civil Rule 30.04(E) shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record.”</td>
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<td>Rules of Civil Procedure 30(d)(1)</td>
<td>“Continual and unwarranted off the record conferences between the deponent and counsel following the propounding of questions and prior to the answer or at any time during the deposition are prohibited.” <a href="http://www.state.ak.us/courts/civ.htm#30">http://www.state.ak.us/courts/civ.htm#30</a></td>
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<td>Court of Chancery</td>
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State Court Rules That Limit Off-the-Record Conferences

While the list below is not necessarily intended to be exhaustive, several states or state courts address conferences between lawyers and witnesses during depositions. Some are loosely worded (e.g., Alaska’s rule appears to apply only if the conferences are “continual and unwarranted”) while others are strict (e.g., South Carolina’s rule prohibits private conversations with a witness during a deposition or in breaks or recesses except to discuss the application of a privilege). There again is an ambiguity in some rules on the propriety of a conference if the witness initiates the conference (e.g., Maryland’s rule says the attorney for the deponent “should not” initiate a private conference with the deponent and Wyoming’s rule says the same except uses “shall not” instead of “should not”). One state with a rule on this topic (Washington) allows conferences during recesses unless prohibited by the court.

State Court Rule Language From the Rule

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79 In other words, you should always check the civil procedure rules, the local rules of the trial court, and any standing orders of the judge on this topic.
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<td>Delaware</td>
<td>Rule 30(d)(1); Del. Rule of Civil Proc. for the Super. Ct. 30(d)(1)</td>
<td>attorney(s) for the deponent shall not: (A) consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given, except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order, or (B) suggest to the deponent the manner in which any questions should be answered. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion under paragraph d)(3) [dealing with depositions taken in bad faith or to annoy or harass a witness].”</td>
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<tr>
<td>Kansas</td>
<td>Rules of Court for the 6th Judicial District, Rule 11.1</td>
<td>“Private conferences between deponents and their attorneys during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Unless prohibited by the Court for good cause shown, such conferences may, however, be held during normal recesses and adjournments.”</td>
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<td>Maryland</td>
<td>Discovery Guideline 8(e)</td>
<td>“An attorney for a deponent should not initiate a private conference with a deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted. To do so, otherwise, is presumptively improper.” (not freely available online)</td>
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<tr>
<td>Massachusetts</td>
<td>Civil Procedure Rule 30(c)</td>
<td>“Counsel for a witness or a party may not instruct a deponent not to answer except where necessary to assert or preserve a privilege or protection against disclosure, to enforce a limitation on evidence directed by the court or stipulated in writing by the parties, or to terminate the deposition and present a motion to the court pursuant to Rules 30(d) or 37(d).”</td>
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Reporter’s Notes were added to Mass. RCP 30 in 2001 on the subject of witness conferencing:

Despite the 1998 amendment which requires that objections be made in a non-argumentative and non-suggestive manner, suggestive objections or
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<th>State</th>
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<th>Language From the Rule</th>
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<td>comments continue to be made at depositions. Further commentary is therefore in order. The intent of the 1998 amendment was to prevent the indirect coaching of witnesses by objections or comments from counsel. Thus, the attorney who, after a question, interjects the suggestive objection or comment “if you remember,” “if you understand,” or “if you have personal knowledge,” acts contrary to the language or spirit of the rule by indirectly suggesting how the witness should respond. The questioning attorney may consider taking appropriate action in response to such coaching suggestions the deposition for purposes of obtaining an appropriate court order (Rule 30(d)).</td>
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It has been suggested that some attorneys, cognizant of the prohibition against suggestive comments or hints during the deposition, may accomplish the same result by seeking to confer with the client in private prior to the client answering the question. It appears that the rule does not permit such conferences except where appropriate to preserve a privilege or protection against disclosure. A deponent, for example, may not realize that the privilege against self-incrimination provides a legal basis to decline to answer a question; intervention of counsel and a conference with counsel may be necessary to determine whether the deponent will invoke the privilege. In other circumstances, however, the use of private conferences between lawyer and deponent would serve to provide an end-run around the 1998 rule against suggestive objection and the general rule that examination of witnesses at depositions “may proceed as permitted at the trial...” (Rule 30(c)). Just as a lawyer may not interrupt the questioning of a witness in order to confer in private and develop strategy with the witness, nor should the lawyer be allowed to interrupt the flow of questions at a deposition. Nor may the deponent stop the deposition in order to seek the advice of counsel (except in the case of a privilege or protection against disclosure).

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<th>State</th>
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<td>New Jersey</td>
<td>New Jersey Court Rules, Rule 4:14-3(f)</td>
<td>“(f) Consultation with the Deponent. Once the deponent has been sworn, there shall be no communication between the deponent and counsel during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege, a right to confidentiality or a limitation pursuant to a previously entered court order.”</td>
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<td><a href="http://www.njlawnet.com/njcourtrules/4-14.html">http://www.njlawnet.com/njcourtrules/4-14.html</a></td>
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<tr>
<td>New York</td>
<td>Uniform Rules of Trial Courts, Part 221.3</td>
<td>“An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.”</td>
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<td><a href="http://www.nycourts.gov/rules/trialcourts/221.shtml">http://www.nycourts.gov/rules/trialcourts/221.shtml</a></td>
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</table>
| South Carolina| Rules of Civil Procedure 30(j)                                             | “(5) Counsel and a witness shall not engage in private, off-the-record conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.  

(6) Any conferences which occur pursuant to, or in violation of, section (5) of this rule are proper subjects for inquiry by deposing counsel to ascertain whether there has been any witness coaching and, if so, to what extent and nature.  

(7) Any conferences which occur pursuant to, or in violation of, section (5) of this rule shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall be noted on the record.” |
|               |                                                                             | http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=30.0&subRuleID=&ruleType=CIV                                                                                                                   |

80 Those grounds are (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person.
## State | Court Rule | Language From the Rule |
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<td>Texas</td>
<td>Rules of Civil Procedure 199.5(d)</td>
<td>“Private conferences between the witness and the witness’s attorney during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments. If the lawyers and witnesses do not comply with this rule, the court may allow in evidence at trial statements, objections, discussions, and other occurrences during the oral deposition that reflect upon the credibility of the witness or the testimony.” <a href="http://www.supreme.courts.state.tx.us/Rules/TRCP/trcp_part_2.pdf">http://www.supreme.courts.state.tx.us/Rules/TRCP/trcp_part_2.pdf</a></td>
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<tr>
<td>Washington</td>
<td>Superior Court Rule 30(h)(5)</td>
<td>“Except where agreed to, attorneys shall not privately confer with deponents during the deposition between a question and an answer except for the purpose of determining the existence of privilege. Conferences with attorneys during normal recesses and at adjournment are permissible unless prohibited by the court.” <a href="http://www.courts.wa.gov/court_rules/?fa=court_rules.display&amp;group=sup&amp;set=CR&amp;ruleid=supcr30">http://www.courts.wa.gov/court_rules/?fa=court_rules.display&amp;group=sup&amp;set=CR&amp;ruleid=supcr30</a></td>
</tr>
<tr>
<td>Wyoming</td>
<td>Uniform Rules for the District Courts, Rule 601(c)</td>
<td>“An attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted.” <a href="http://www.courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=DistrictCourt.xml">http://www.courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=DistrictCourt.xml</a></td>
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### American Bar Association Civil Discovery Standards

The ABA publishes Civil Discovery Standards (August 2004)\(^81\) that address the topic of conferring with a witness during a deposition. Standard No. 18.a(i) provides that during a deposition, an attorney for a deponent “should not initiate a private conference with the deponent during the taking of the deposition except to determine whether a privilege should be asserted or to enforce a court-ordered limitation on the scope of discovery.”

However, with two caveats, Standard No. 18.a(i) provides that a deponent and the attorney may confer during any recess in a deposition. The first limitation is a common one in those court rules that address this subject:

An attorney for a deponent should not request or take a recess while a question is pending except to determine whether a privilege should be asserted or to ascertain whether the answer to the question would go beyond a court-ordered limitation on discovery.

ABA Civil Discovery Standards, No. 18.a(ii).82

The second limitation appears in Standard 18.b and applies to communications between an attorney and a deponent during recesses. The communication is permitted and is deemed subject to the attorney-client privilege. If the communication results in a decision to clarify or correct testimony, the deponent or the attorney for the deponent “should, promptly upon the resumption of the deposition, bring the clarification or correction to the attention of the examining attorney.” ABA Civil Discovery Standards, No. 18.b(ii). The examining attorney then is permitted “to inquire as to the circumstances that led to the clarification or correction, including inquiry into any matter that was used to refresh the deponent’s recollection,” but “should not attempt to inquire into communications between the deponent and the attorney for the deponent that are protected by the attorney-client privilege.” Id., No. 18b(iii).

Comments add this gloss to the Standards:

- A witness can request the opportunity to consult with counsel. However, “counsel should be mindful of the obligation to avoid the suggesting of answers or other abuse of the consultation right.”
- An attorney may intervene “when the attorney has a good faith concern that the witness is unable to continue the deposition.”
- An attorney for the witness “(or for any party) should not be permitted to take a recess while a question is pending. The only exception is to clarify an issue to determine whether the attorney-client (or some other) privilege should be asserted.
- “To afford every person an unrestricted right to obtain the advice of his or her counsel, the bar against conferring with counsel should not apply (i) when the conference is initiated by the witness and (ii) whenever there is a recess from the actual taking of deposition testimony. E.g., Odone v. Croda Int’l PLC, 170 F.R.D. 66, 68-69 (D.D.C. 1997). The witness and counsel should therefore be able to confer during a recess, either during the day or between deposition sessions, without having to risk a finding that the attorney-client privilege does not apply.”

IX. SO, WHAT ARE THE TAKEAWAYS ON THE SUBJECT OF CONFERRING WITH WITNESSES DURING A DEPOSITION?

They are obvious ones:

- Know the civil rules under which you are operating.

82 Standard No. 18.a(v) prohibits an attorney from instructing or permitting any other attorney or person to violate the guidelines set forth in Section 18.a of the Standards.
Know your local court rules.
Know your judge’s practice. Find out if there are any standing orders.
If there is any doubt, obtain clarification from the court.
Objectively respect the truth-seeking goals of the deposition process without objectively compromising your 
obligation to act competently on behalf of your client.

X. CONCLUSION
I discussed “takeaways” for lawyers above, but for a quick summary here, at times, lawyers may encounter 
situations where talk may not be cheap! Don’t pay witnesses for testimony and otherwise carefully assess the 
reasonableness of any compensation arrangements made for fact witnesses. And, except as to privileged 
matters, know your rules and your judge before you confer with a witness during a deposition.
### APPENDIX I: CHRONOLOGICAL LISTING OF (INITIAL) STATE ETHICS OPINIONS ON WITNESS PAYMENTS

<table>
<thead>
<tr>
<th>Ethics Opinion</th>
<th>Year</th>
<th>Citation</th>
</tr>
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<tbody>
<tr>
<td>Maryland Ethics Op. 83-38</td>
<td>1983</td>
<td>Not publicly available to non-Maryland bar members</td>
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<tr>
<td>Illinois Ethics Op. 87-5</td>
<td>1988</td>
<td>Not publicly available to non-Illinois bar members</td>
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<td>Ethics Opinion</td>
<td>Year</td>
<td>Citation</td>
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<tr>
<td>Alaska Ethics Op. 93-2</td>
<td>1993</td>
<td><a href="http://www.alaskabar.org/servlet/content/indexes_aeot__93_2.html">http://www.alaskabar.org/servlet/content/indexes_aeot__93_2.html</a></td>
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<tr>
<td></td>
<td>1997</td>
<td><a href="http://www.scbar.org/member_resources/ethics_advisory_opinions&amp;id=491">http://www.scbar.org/member_resources/ethics_advisory_opinions&amp;id=491</a></td>
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APPENDIX II: DEPOSITION PROTOCOL (HALL v. CLIFTON)

1. At the beginning of the deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness’s own counsel, for clarifications, definitions, or explanations of any words, questions, or documents presented during the course of the deposition. The witness shall abide by these instructions.

2. All objections, except those which would be waived if not made at the deposition under Federal Rules of Civil Procedure 32(d)(3)(B), and those necessary to assert a privilege, to enforce a limitation on evidence directed by the court, or to present a motion pursuant to Federal Rules of Civil Procedure 30(d), shall be preserved. Therefore, those objections need not and shall not be made during the course of depositions.

3. Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court.

4. Counsel shall not make objections or statements which might suggest an answer to a witness. Counsels’ statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more.

5. Counsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege.

6. Any conferences which occur pursuant to, or in violation of, guideline (5) are a proper subject for inquiry by deposing counsel to ascertain whether there has been any witness-coaching and, if so, what.

7. Any conferences which occur pursuant to, or in violation of, guideline (5) shall be noted on the record by the counsel who participated in the conference. The purpose and outcome of the conference shall also be noted on the record.

8. Deposing counsel shall provide to the witness’s counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and the witness’s counsel do not have the right to discuss documents privately before the witness answers questions about them.

9. Depositions shall otherwise be conducted in compliance with the Opinion which accompanies this Order.
APPENDIX III: DEPOSITION PROTOCOL (IN RE STRATOSPHERE)

(1) Any depositions may be videotaped, in addition to being recorded stenographically, if the intention to videotape is stated in the deposition notice or otherwise agreed between the taking party and the witness.

(2) All depositions shall be conducted at the offices of Plaintiffs’ or Defendants’ counsel if possible. If such accommodations are unavailable, depositions may alternatively be taken at some other facility adequate to accommodate all those attending.

(3) All depositions and witness examinations shall be held from 9:30 a.m. until 5:30 p.m., with a one-hour lunch break and one 15-minute break during the morning and afternoon sessions, unless transportation or health or other physical needs require reasonable modifications of this schedule.

(4) All cellular telephones shall be turned off during depositions and all pages shall be turned to silent signal modes during depositions.

(5) Smoking in the deposition room is prohibited during all depositions.

(6) No firearms shall be permitted at depositions.

(7) During all depositions counsel shall adhere strictly to Rule 30(d)(1) and (3), Federal Rules of Civil Procedure and specifically, “Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3) [of Rule 30(d)].”

(8) Neither a deponent nor Counsel for a deponent may interrupt a deposition when a question is pending or a document is being reviewed except as permitted in Rule 30(d)(1).

(9) Whenever counsel instructs a witness not to answer a question, he or she shall state on the record the specific reason for such an instruction, the specific question, part of a question, or manner of asking the question, upon which counsel is basing the instruction not to answer the question.

(10) Depositions shall otherwise be conducted in compliance with the Federal Rules of Civil Procedure the Federal Rules of Evidence.
ABOUT THE AUTHOR

John M. Barkett

Mr. Barkett is a partner at the law firm of Shook, Hardy & Bacon L.L.P. in its Miami office. He is a graduate of the University of Notre Dame (B.A. Government, 1972, summa cum laude) and the Yale Law School (J.D. 1975) and served as a law clerk to the Honorable David W. Dyer on the old Fifth Circuit Court of Appeals. Mr. Barkett is an adjunct professor of law at the University of Miami Law School.

Mr. Barkett has, over the years, been a commercial litigator (contract and corporate disputes, employment, trademark, and antitrust), environmental litigator (CERCLA, RCRA, and toxic tort), and, for the past several years, a peacemaker and problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of environmental or commercial contexts. He is a certified mediator under the rules of the Supreme Court of Florida, serves on the CPR Institute for Dispute Resolution’s “Panel of Distinguished Neutrals,” and is on National Roster of Environmental Dispute Resolution and Consensus Building Professionals maintained by the U.S. Institute for Environmental Conflict Resolution. He has served or is serving as a neutral in more than fifty matters involving in the aggregate more than $450 million. He has conducted or is conducting arbitrations under CPR, AAA, LCIA, and UNCITRAL rules. In November 2003, he was appointed by the presiding judge to serve as the Special Master to oversee the implementation and enforcement of the 1992 Consent Decree between the United States and the State of Florida relating to the restoration of the Florida Everglades. He also consults with major corporations on the evaluation of legal strategy and risk and conducts independent investigations where such services are needed.

Mr. Barkett is a Fellow of the American College of Environmental Lawyers. Mr. Barkett served on the Council of the ABA Section of Litigation after service as the Section’s Co-Director of CLE and Co-Chair of the Environmental Litigation Committee. In 2009-10, he is serving as the Section’s Liaison to the Federal Judicial Conference’s Civil Rules Advisory Committee.

Mr. Barkett is editor and one of the authors of the ABA Section of Litigation’s Monograph, Ex Parte Contacts with Former Employees (Environmental Litigation Committee, October 2002). His paper, A Baker’s Dozen: Reasons Why You Should Read the 2002 Model Rules of Professional Conduct, was presented at the Section of Litigation’s 2003 Annual Conference. Mr. Barkett also wrote The MJP Maze: Avoiding the Unauthorized Practice of Law, which was presented at the 2005 Section of Litigation Annual Conference. He also wrote Refresher Ethics: Conflicts of Interest, for the Section’s January 2007 Joint Environmental, Products Liability, and Mass Torts CLE program, and Tattletales or Crimestoppers: Disclosure Ethics Under Model Rules 1.6 and 1.13, presented at the ABA Annual Meeting (Atlanta, August 7, 2004) and, in an updated version, at the ABA Tort and Insurance Practice Section Spring CLE Meeting, (Phoenix, April 11, 2008). Mr. Barkett also presented his paper, From Canons to Cannon, at the Ethics Centennial sponsored by the ABA Section of Litigation (Washington, D.C. April 18, 2008) commemorating the 100th anniversary of the adoption of the Canons of Ethics. At the ABA’s Third Annual National Institute on E-Discovery, which Mr. Barkett chaired,
Mr. Barkett also presented his papers, Fool’s Gold: The Mining of Metadata and More on the Ethics of E-Discovery (Chicago, May 22, 2009).

Mr. Barkett has published two books on e-discovery, E-Discovery: Twenty Questions and Answers, (First Chair Press, Chicago, October 2008) and The Ethics of E-Discovery (First Chair Press, Chicago, January 2009) and has served as a Special Master appointed by the 11th Judicial Circuit in Miami-Dade County, Florida to address e-discovery issues in a matter. Mr. Barkett has also published or presented a number of articles in the e-discovery arena:

- The Battle For Bytes: New Rule 26, e-Discovery, Section of Litigation (February 2006).

In the fall of 2007, Mr. Barkett taught a first-ever course at the University of Miami Law School entitled “E-Discovery.”

At the University of Miami Law School, Mr. Barkett teaches a course entitled, “Environmental Litigation,” that covers four statutes (CERCLA, RCRA, the Clean Water Act, and the Clean Air Act). Mr. Barkett is the author of A Database Analysis of Superfund Allocation Case Law (Shook, Hardy & Bacon, Miami, 2003). He is also an editorial board of Natural Resources & Environment, a publication of the ABA Section of Environment, Energy, and Resources. Among his other recently published works are:

- Burlington Northern: The Super Quake and Its Aftershocks, 58 Chemical Waste Lit. Rprt. 5 (June 2009)
- Orphan Shares, 23 NRE 46 (Summer 2008)
- Tipping The Scales of Justice: The Rise of ADR, 22 NRE 40 (Spring 2008)
- The CERCLA Limitations Puzzle, 19 N.R.E. 70 (Fall, 2004)

Mr. Barkett is also the author of Ethical Issues in Environmental Dispute Resolution, a chapter in the ABA publication, Environmental Dispute Resolution, An Anthology of Practical Experience (July 2002),

Mr. Barkett has been recently recognized in the areas of alternative dispute resolution and environmental law in a number of lawyer-recognition publications, including Who’s Who Legal (International Bar Association) (since 2005); Best Lawyers in America (National Law Journal) (since 2005); Legal Elite (since 2004), (Florida
Cheap Talk? Witness Payments and Conferring With Testifying Witnesses

Trend), and Chambers USA America’s Leading Lawyers (since 2004). Mr. Barkett can be reached at jbkrett@shb.com.
Model Rule 1.15: The Elegant Solution to the Problem of Purloined Documents

BY BRIAN S. FAUGHNAN & DOUGLAS R. RICHMOND

Lawyers are plainly challenged by cases in which they receive an adversary's privileged or confidential information that is clearly intended for them, but furnished by someone who may not have been authorized to have it in the first place. Consider, for example, a scenario in which a lawyer represents a plaintiff in employment litigation and laments that the case would be much stronger if only they had some e-mails that they are certain that the plaintiff's supervisor must have sent to others in the company. Days later, hard copies of the e-mails appear in the lawyer's mail in an envelope bearing no return address. The plaintiff denies obtaining the e-mails. What is the lawyer to do? This scenario is now aggravated by technological advances that allow litigants and their allies to download staggering amounts of data onto electronic storage devices that seem to get smaller and smaller in size with every passing week.

Castellano v. Winthrop, 27 So. 3d 134, 26 Law. Man. Prof. Conduct 94 (Fla. Dist. Ct. App. 2010), exemplifies both the increasing ease of access to large swaths of information belonging to others and the likelihood of consequences for lawyers and law firms that find themselves holding such information where a court concludes that the documents were illegally obtained by the source. Castellano began as a paternity action which transformed into lengthy litigation involving fights over custody issues and other disputes regarding the child's care and well-being. After the mother, Castellano, illegally obtained a USB flash drive that belonged to the father and reviewed its contents, she hired a law firm which then spent more than 100 hours reviewing the contents of the USB drive. The law firm then filed a petition on Castellano's behalf to vacate a prior final order that relied upon information obtained from the USB drive and which, in its title, accused the father of "repeated intentional fraud upon the court." Id. at 135. Once the father's lawyers understood that Castellano had obtained the USB drive, they demanded its immediate return. The USB drive was not returned; instead, Castellano's law firm filed the contents in the public court record and helped deliver the actual USB drive to law enforcement. The father then filed an emergency motion demanding return of the USB drive, seek-
ing to disqualify Castellano's law firm, and requesting sanctions against Castellano.

After an evidentiary hearing, the trial court entered extensive findings of fact, including finding that the USB drive housed "thousands of pages of documents," including privileged communications between the father and his counsel, opinion work product in the form of musings on litigation strategy and even outlines for questioning witnesses, as well as confidential medical, financial, and business information of the father. Id. at 136. The court also found no evidence of fraud. The most damning aspect of the court's findings, however, related to the law firm's conduct in spending over 100 hours reviewing the contents of the USB drive "although it was apparent within moments of inspection that it belonged to the [father] and contained attorney/client communications with the [father's current counsel]... as well as a complete history and chronology of strategy, work product, and confidential communications spanning the near decade-long period of this litigation." Id.

Because an "informational advantage was obtained," the trial court concluded that Castellano's law firm had to be disqualified. The trial court also ordered a number of other remedies, including striking the petition, sealing the portions of the court file containing the information, requiring Castellano to return the USB drive and all copies, requiring Castellano and her law firm to delete the information from their computers and to make those computers available to a third-party to confirm the deletion, having Castellano and the law firm provide affidavits identifying anyone who had reviewed or been given any of the information on the USB drive, requiring Castellano and the firm to indemnify the father for any damages he might suffer from the improper use of the information, and enjoining Castellano from any use of the USB drive's contents. Id. The trial court left for another day the determination of whether the father should be awarded attorney's fees as a sanction.

Castellano appealed only the trial court's disqualification of her law firm, arguing that given all of the other remedial measures, disqualification was unnecessary and prejudicial—an argument that was summarily rejected by the Florida appellate court. The appellate court also embraced a 2007 Florida Bar Committee on Professional Ethics opinion and commended it as guidance to indicate that any attorneys faced with a similar situation as the mother's law firm are required to "advise the client that the materials cannot be retained, reviewed, or used without first informing the opposing party that the attorney and/or client have the documents at issue" and that in the event that the client will not consent, then the attorney must cease representation of the client. Id. at 137.

ABA Committee's Views. The variations on ways that lawyers can find themselves in a position where they possess documents that could create a difficult ethical dilemma are seemingly unlimited. Assume that you are representing a plaintiff in connection with a workplace injury, and one day he shows up at your office to hand you a letter he says was in his mailbox at work. The letter is written by a defendant in the case and is addressed to her lawyer asking for legal help and outlining the facts about why your client hired her, and providing facts about various witnesses that could affect their credibility. Or, imagine instead that you've been engaged by several executives who are interested in suing their former employer. Prior to suing on their behalf, one of your clients tells you that an envelope full of documents showed up mysteriously yesterday at his office, that the envelope does not reflect who sent them, but that he has read them and they appear to be very helpful in that they seem to prove a number of the wrongful things that his former employer is doing. These documents would likely form the basis of his and your other clients' claims against their former employer. The client excitedly tells you that he is on his way to your office to deliver the folder full of documents to you for your review.

Many authorities have focused on state analogs of Model Rule 4.4, but the application of that rule is less than seamless.

What would you do in either of those scenarios? Well, the Model Rules of Professional Conduct are not a source of definitive guidance if the ABA's Standing Committee on Ethics and Professional Responsibility is to be believed. The trial to this conclusion starts back in 1994, when the Committee issued a formal opinion that initially answered this kind of dilemma by saying that it was not based on any sound reasoning tethered to the Model Rules. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-382 (1994). In Formal Opinion 94-382, the Committee determined that when a lawyer receives, or receives an offer for, privileged or confidential materials belonging to an adversary from a person not authorized to have or disclose them, the lawyer must follow the same requirements outlined in Formal Opinion 92-368 for lawyers receiving inadvertently disclosed privileged materials. Namely, the lawyer must not review the materials beyond what is required to determine how to proceed; must notify the adverse party or its lawyer about the possession of the documents; and must either follow the adversary's instructions or seek a definitive resolution from a court. See Am. Bar Ass'n, Standing Comm. on Ethics & Prof'l Responsibility, Formal and Informal Ethics Opinions 1983-1998 237-38 (2000) (reprinting Formal Op. 94-382). In addition, the lawyer must not use the materials until obtaining such a ruling.

Twelve years after issuing that opinion, and one year after withdrawing Formal Opinion 94-382, the Committee issued Formal Opinion 06-440, withdrawing Formal Opinion 94-382. In so doing, the Committee explained that because the scenario described in our hypothetical examples does not involve inadvertence, Model Rule 4.4(b) and its notice requirement do not even apply. Ultimately, the Committee simply concluded that "whether a lawyer may be required to take any action in such an event is a matter of law beyond the scope of Rule 4.4(b)." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-440, at 2-3 (2006).

The Magic Mailbox. While the Committee opined that determining what lawyers should do is a question of law rather than rule-based professional responsibility, courts do not necessarily agree. A New Jersey federal court ordered the disqualification of the plaintiff's law-
yers whose client gave them a letter from the defendants to their lawyer that the plaintiff claimed had shown up in his work mailbox in *Maldonado v. New Jersey*, 225 F.R.D. 120, 21 Law. Man. Prof. Conduct 7 (D.N.J. 2004). Maldonado, a probation officer, had filed a complaint for employment discrimination and retaliation against his employer, the Administrative Office of Courts of the State of New Jersey, and several individual defendants. Two individual defendants wrote a letter in October 2001 to their attorney seeking legal assistance, providing information relating to the credibility of certain witnesses, and containing certain assertions about Maldonado’s motivations in suing. This letter eventually found its way into Maldonado’s work mailbox and he in turn provided it to his attorneys. A dispute over the letter followed and the authors of the letter and the intended recipient offered ample proof that Maldonado likely took a copy of the letter from out of a folder in the office of another probation officer; however, there was no “direct evidence offered by either party explaining how the letter appeared in Maldonado’s mailbox.” Id. at 126.

It took more than two years from the time that the letter was written for the defendants to learn that Maldonado’s lawyers had the letter. They first requested that Maldonado’s counsel return the letter, but they refused. The defendants then asked the court to order that the letter be returned, the attorney-client privilege not be waived, Maldonado’s lawsuit be dismissed, and the plaintiff’s lawyers be disqualified. The court, treating the situation as an involuntary disclosure case and applying the same middle-ground approach used there, concluded that the defendants had taken reasonable steps to protect their communication, that they had acted promptly upon learning of the disclosure to rectify it, and that all other relevant factors weighed against finding any waiver of the privilege.

Concluding that it did not have sufficient evidence to determine that Maldonado had acted willfully or in bad faith because the record reflected only “mere innuendo showing that Maldonado intentionally took the letter,” and crediting Maldonado for delivering the letter to his lawyers, who would be the experts on its importance and whether it could be used in his case, the court declined to dismiss the lawsuit as a sanction. Id. at 134. The court, however, did conclude that Maldonado’s lawyers failed in their handling of the letter and determined that they should be disqualified. Id. at 136-42. Although the court focused considerable attention on the lawyers’ failure to comply with the “cease, notify, and return” protocol in ABA Formal Op. 94-382, the court disclaimed any reliance upon the opinion or any opinions of the New Jersey ethics committee as precedent; rather, the court concluded that disqualification was required according to a six-factor test. Id. at 139 (citing Richards v Jain, 168 F. Supp. 2d 1195, 1205 (W.D. Wash. 2001)). Of particular and obvious significance to the court was the clear privileged nature of the letter from even a facial review and the fact that the plaintiff’s lawyers never notified defense counsel that they were in possession of the letter and made no attempt to either return the letter or cease reviewing it upon notice of possession. Had the defendants not figured out on their own that Maldonado had the letter, the issue likely would have never come up. Id.

*Anonymous* Ald. In *Burt Hill, Inc. v. Hassan*, No. Civ. A. 05-1285, 2010 WL 419433, 26 Law. Man. Prof. Conduct 127 (W.D. Pa. Jan. 29, 2010), a United States Magistrate Judge was faced with a series of dueling motions arising from a scenario in which apparently helpful documents, including documents that were privileged, proprietary, or otherwise confidential, allegedly showed up out of the blue from an anonymous source. The court, ultimately unconvinced that the defense lawyers who came to possess the “ anonymously” provided documents acted appropriately, entered a sanctions order requiring not only the return of all the documents but also prohibiting those documents from ever being introduced into evidence even if they could have been otherwise obtained through legitimate, formal discovery efforts. Id. at *9. Interestingly, the court declined to disqualify the attorneys involved because they had previously obtained an opinion from an outside ethics expert blessing their retention of the documents in question. Id. at *6. Despite resisting disqualification, however, the court was none too subtle in criticizing the merits of the ethics expert’s opinion. Id. at *5 (“Any suggestion that Defense counsel’s receipt and retention of the (documents) carried no ethical concerns would come not from a careful study of the applicable law, but rather from a failure to appreciate it.”).

The answer lies in Model Rule 1.15 and its provisions establishing lawyers’ obligations with respect to “safekeeping property.”

Despite its skepticism regarding the expert’s opinion, the court in *Hassan* explained its rationale for not ordering disqualification as stemming from the fact that the lawyers “operated under a cloak of ethical propriety, having retained an expert who opined that the retention and review of [plaintiff’s] privileged and confidential documents was permissible. However questionable the expert’s reasoning . . . defense counsel’s reliance on his opinion mitigates against disqualification.” Id. at *6. Yet, the court also explained the important issues at stake that merited a sanction more significant than merely requiring return of the documents:

[The court cannot undertake the importance of its duties to “preserv[e] the public trust,” “the scrupulous administration of justice,” and “the integrity of the bar.” The court also concludes that firm sanctions are necessary to discourage similar conduct in the future. There appears no way of preventing a litigant who has obtained his opponent’s privileged and/or confidential materials from claiming that the materials were received through an “anonymous” source. Were the court merely to require the return of clearly privileged documents, this would be to deny the recipient something he was never entitled to in the first place. Under the circumstances, restricting sanctions to the return of privileged documents would be to impose no meaningful sanction at all.]

Id. at *9 (quoting Arnold v. Cargill, No. 01-2086, 2004 WL 2203416, 20 Law. Man. Prof. Conduct 613, at *14 (D. Minn. Sept. 24, 2004)). Thus, the court concluded that the defendants and their counsel could not use in any way the documents from the anonymous source;
the plaintiff owed no duty to produce copies of the documents in discovery; the plaintiff could move to strike evidence in the future upon "a good faith reason to believe" that any evidence had been secured as a result of use of the excluded documents; and that if they were to receive documents from an "anonymous" source in the future, the defendants were to follow a specific protocol outlined by the court. Id. at *9-10.

Searching for the Relevant Rule. Over the years, there have been a number of efforts directed at fixing the scope of the lawyer's duty where the lawyer is purposefully given helpful documents containing someone else's privileged or confidential information, either from a client or a third-party, and where it appears either doubtful or uncertain that the ultimate source of the documents was authorized to possess or disclose them. Ethics opinions addressing these questions have taken different approaches depending on whether they were issued before or after ABA Formal Opinion 94-382 was withdrawn, and depending on whether wrongdoing by the lawyer's client was or was not implicated.

The most intriguing aspect of this question of professional responsibility in litigation, however, is whether there is a place in the ethics rules indicating lawyers' duties in the wide variety of circumstances that can arise in practice, or whether this is a question of law outside the scope of ethics rules. Many authorities have focused on state analogs of Model Rule 4.4, but the application of that rule is less than seamless. First, any effort to apply Model Rule 4.4(b) is little more than sophistry given the rule's express requirement that what the lawyer must know or reasonably should know is that the document was "inadvertently" sent. Model Rules of Prof'l Conduct R. 4.4(b) (2009) ("A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document is inadvertently sent shall promptly notify the sender."). Model Rule 4.4(a) is no help given that it prohibits "using methods of obtaining evidence that violate the legal rights of such a person," which strongly implies something more than passive action by an attorney as a mere recipient of materials purloined by someone with whom the attorney has no relationship is necessary for a violation. Id. R. 4.4(a). Model Rule 8.4(a), which makes it professional misconduct for a lawyer to violate the ethics rules "through the acts of another" is a plausible mechanism for concluding that a lawyer who receives purloined documents from a stranger acts unethically because the theft, although the act of another, would clearly violate Rule 4.4(a) if committed by the lawyer. But such an analytical approach would grease a slope with respect to the ability to discipline a lawyer for actions undertaken by others outside of the lawyer's control.

An argument could also be made, as was done in one ethics opinion, that Model Rule 8.4(d) and its prohibition on acts prejudicial to the administration of justice could be relevant at least as a basis for requiring notification to the party to whom the information belongs. Utah Ethics Op. 99-01, 1999 WL 48784, at *1 (Utah State Bar, Ethics Advisory Op. Comm. Jan. 29, 1999). In so doing, the Utah State Bar Ethics Advisory Opinion Committee acknowledged that there was nothing in the ethics rules directly addressing preservation of the attorney-client privilege but asserted its belief "that Rule 8.4(d) places an obligation upon every lawyer to take steps to preserve the attorney-client privilege in order to effect the orderly administration of justice." Id. The Utah Committee further explained that the benefit of requiring notification was that after "the fact of disclosure is before both parties, they can then turn to the legal implications of the disclosure and a legal assessment of whether waiver has occurred." Id. at *3. Given the myriad other questions that Model Rule 8.4(d) raises with respect to what conduct falls within its scope, it seems a reluctant solution to add to it the implication that lawyers must take steps to preserve the attorney-client privilege or risk being accused of a Rule 8.4(d) violation. Moreover, while Rule 8.4(d) might provide a basis for disciplining lawyers who mishandle questionable information that falls into their hands, the rule offers no guidance to lawyers who are committed to ethical practice but simply need direction in understanding and meeting their professional obligations.

An Elegant Answer. The Model Rules do, in fact, appear to offer an elegant answer for lawyers who question their professional responsibilities when they receive documents that may have been purloined or otherwise improperly obtained from another. The answer lies in Model Rule 1.15 and its provisions establishing lawyers' obligations with respect to "safekeeping property." See Model Rules of Prof'l Conduct R. 1.15 (2010). Although lawyers are generally familiar with Rule 1.15 in the trust account context, the scope of the rule is clearly not so limited, as amply evidenced by its repeated references not just to funds or fees or expenses, but also to "property."

Model Rule 1.15(a) declares that "[a] lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property." Id. R. 1.15(a) (emphasis added). Model Rule 1.15(d) further requires that "[u]pon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person." Id. R. 1.15(d) (emphasis added). Finally, Model Rule 1.15(e) mandates that "[w]hen in the course of the representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved." Id. R. 1.15(e) (emphasis added).

Analysis of over-the-transom deliveries through the lens of Rule 1.15 establishes that a lawyer, upon receiving purloined documents (or if not clearly purloined at least clearly reflecting privileged or confidential information belonging to someone other than the person who delivered the documents), is obligated to hold those documents separate from the rest of the lawyer's documents, promptly notify the person from whom the documents were taken, and, if the lawyer is going to refuse to return the documents to that person (and thereby claim either that the lawyer or the lawyer's client has an interest in them), continue to keep those documents segregated from the rest of the lawyer's property until the dispute over the documents is resolved, presumably through a ruling by a tribunal. This approach places no meaningful burden on the receiving lawyer and respects the rights of the party to whom the materials belong.
Additional Considerations. Finally, a Florida ethics opinion makes important points regarding other potential obligations that a lawyer may have when it appears that a client has wrongfully obtained documents belonging to the other side. See Fla. Ethics Op. 07-1, 2007 WL 5404833 (Fla. State Bar Ass’n Comm. on Prof’l Ethics Sept. 7, 2007). The Florida State Bar Association’s Professional Ethics Committee was presented with a scenario in which a lawyer representing a wife in a marriage dissolution action learned that his client, who prior to the parties’ separation had often had access to her husband’s corporate office space, had:

1. Removed documents from her husband’s office prior to and after separation;
2. Figured out husband’s computer and e-mail password and, at his office, printed off certain documents, including financial documents of the corporation, husband’s personal documents and e-mails with third parties of a personal nature, and documents or e-mails authored by husband’s attorney in this action;
3. Accessed husband’s personal e-mail from wife’s home computer, and printed and downloaded confidential or privileged documents; and
4. Despite repeated warning of the wrongfulness of wife’s past conduct by this office, removed documents from husband’s car which are believed to be attorney-client privileged.

Id. at *1.

The Florida Committee, acknowledging that it was not authorized to answer questions of law, made clear that the lawyer would be obligated to produce the documents in response to any legitimate discovery request that encompassed them. Id. at *9. The Florida Committee also explained that if the documents were stolen, the lawyer would be obligated to turn them over to law enforcement authorities, stated that the attorney was ethically obligated to refrain from assisting the client in conduct that the attorney knew or reasonably should have known was criminal or fraudulent, and asserted that “[i]f the client possibly committed a criminal act, it may be prudent to have the client obtain advice from a criminal defense attorney if the inquiring attorney does not practice criminal law.” Id. at *10.
Refresher Ethics: Steering Clear of Witness Minefields

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INTRODUCTION
We have pooled our experiences and our knowledge of the experiences of others to put together these factual vignettes to help you recalibrate your ethical compass—in the unlikely event you need to do so—in navigating potential ethical minefields in dealing with witnesses. As a good test of your memory or knowledge, you may want to analyze each issue yourself before reading the discussion of the issue!

THE WITNESS WHO DOES NOT TELL THE TRUTH
Let’s hope you never face such a witness, but in the event you might, consider this scenario.

Issue 1
A lawyer is representing her celebrity client, Elliot Robinson. Opposing counsel is deposing Mr. Robinson, and asks: “Did anyone travel with you from your hotel to this deposition?” Mr. Robinson answers: “No.” Mr. Robinson’s lawyer knows that her client came to the deposition in a car with his driver and two assistants. What ethical obligations, if any, does the lawyer have?
Discussion of Issue 1:
As an initial matter, the lawyer is required to explain to her client that providing a false statement in a deposition could cause him substantial harm. Rule 1.4(b) of the ABA’s Model Rules of Professional Conduct requires a lawyer to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” In addition, Rule 1.4(a)(5)1 states that a lawyer shall “consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.” In the above hypothetical, the client may expect the lawyer to assist him by keeping quiet about the false testimony, and not revealing it to opposing counsel. The lawyer is not allowed to provide such assistance, as will be shown below.

In explaining to the client the potential consequences of not answering deposition questions truthfully, the lawyer should instruct the client that he could (a) face criminal liability for perjury, making a false statement, and/or obstruction of justice; (b) face civil sanctions for contempt of court; and (c) expose himself to impeachment at trial, should opposing counsel learn of his false statement.

The lawyer is also required to explain her own obligations, in connection with the client’s deposition conduct. Rule 3.3(a) states that a lawyer “shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” Similarly, if a lawyer represents a client in an adjudicative proceeding, and knows that a person “has engaged in criminal or fraudulent conduct related to the proceeding,” Rule 3.3(b) requires the lawyer to take “reasonable remedial measures, including, if necessary, disclosure to the tribunal.”

Comment 1 to Rule 3.3 clarifies that the Rule applies to deposition testimony: “[Rule 3.3] requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.”

Rule 3.3(c) states that the duty to comply with Rule 3.3(a) and Rule 3.3(b) applies “even if compliance requires disclosure of information otherwise protected by Rule 1.6,” which, subject to certain exceptions prohibits a lawyer from disclosing confidential information relating to a representation. One of those exceptions in Rule 1.6 applies when a client engages in crime or fraud, as discussed further below.

Rule 4.1 forbids a lawyer from knowingly “fail[ing] to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.” Comment 3 to Rule 4.1 sets forth some of the remedial measures a lawyer must take to avoid assisting in a crime or fraud:

Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid

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1 Henceforth, all references to a Rule will be to the ABA’s Model Rules, unless otherwise indicated.
assisting a client’s crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

As noted above, Rule 1.6 forbids a lawyer from revealing information relating to representation of a client without consent, unless an exception applies. Again the crime or fraud exception may be applicable. Under it, a lawyer “may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services” or to comply with the Rules.

CONFERRING WITH A WITNESS DURING A DEPOSITION BREAK

Always a thorny issue, you must pay attention to your jurisdiction as we explain below.

Issue 2

An attorney is representing an architect sued for malpractice. During a break in the deposition, the architect asks his attorney: “How do you think I’m doing so far?” What are the attorney’s ethical obligations in this situation?

Discussion of Issue 2

Although the absolute safest course of action is for the lawyer to advise the client that they should not discuss his prior testimony while the deposition is still in progress, this is not required in all jurisdictions.

Several jurisdictions have local rules, orders, or guidelines regulating deposition recesses. For example, one such rule states:

(E) Counsel and witnesses shall not engage in private, "off the record" conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.


On the other hand, some jurisdictions permit counsel to confer with a client during a break in the client's deposition. In the U.S. District Court for the Middle District of North Carolina, the relevant rule states:

(3) Counsel and their witness-clients shall not engage in private, off-the-record conferences while the deposition is proceeding in session, except for the purpose of deciding whether to assert a privilege. Counsel may confer with their clients during mid-morning, lunch, mid-afternoon, or overnight breaks in the deposition. However, counsel for a deponent may not request such a break while a question is pending or while there continues a line of questioning that may be completed within a reasonable time preceding such scheduled breaks.
M.D.N.C. Civ. R. 30.1.

Some jurisdictions have guidelines on the issue. In the U.S. District Court for Maryland, Discovery Guideline 5 states:

_During breaks in the taking of a deposition, no one should discuss with the deponent the substance of the prior testimony given by the deponent during the deposition. Counsel for the deponent may discuss with the deponent at such time whether a privilege should be asserted or otherwise engage in discussion not regarding the substance of the witness’s prior testimony._

In some jurisdictions, there is no rule or guideline, but there is case law governing the question. See _Hall v. Clifton Precision_, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (holding that “conferences between witness and lawyer are prohibited both during the deposition and during recesses.”); _but see McKinley Infuser, Inc. v. Zdeb_, 200 F.R.D. 648, 649-50 (D.Colo.2001) (truth finding function of deposition is adequately protected if deponents are prohibited from conferring with their counsel while question is pending; other consultations, during periodic deposition breaks, luncheon and overnight recesses, and more prolonged recesses ordinarily are appropriate).

Even where no case law, rule, or guideline regulates conduct during deposition breaks, the judge presiding over the case may have issued an order governing the issue – either a standing order, for all cases before the judge, or an order specific to the pending case.

From ethics perspective, if there is no rule or case law restricting an attorney from speaking to the client during a deposition recess, the attorney’s duty to provide competent representation, and his obligation to communicate with his or her client, may require the attorney to confer with the client, so long as the attorney complies with his ethical responsibilities of honesty and fairness to opposing counsel and the tribunal.

Standard 18 of the ABA's Civil Discovery Standards (2004 edition) states:

b. During a Recess.

i. During a recess, an attorney for a deponent may communicate with the deponent; this communication should be deemed subject to the rules governing the attorney-client privilege.

ii. If, as a result of a communication between the deponent and his or her attorney, a decision is made to clarify or correct testimony previously given by the deponent, the deponent or the attorney for the deponent should, promptly upon the resumption of the deposition, bring the clarification or correction to the attention of the examining attorney.

iii. The examining attorney should not attempt to inquire into communications between the deponent and the attorney for the deponent that are protected by the attorney-client privilege. The examining attorney may inquire as to the circumstances that led to any clarification or correction, including inquiry into any matter that was used to refresh the deponent's recollection.
If a lawyer believes that his client has testified falsely in a deposition, the attorney’s duty to prevent perjury may require the attorney to ask for a recess to advise a client to correct false testimony. See generally Los Angeles County Bar Ass’n, Professional Responsibility and Ethics Comm., Formal Op. 497 (1999).

CONFERRING WITH A CRIMINAL DEFENDANT IN A RECESS DURING THE DEFENDANT’S TESTIMONY

Issue 3
A lawyer is representing a criminal defendant at trial, and the court takes a recess during the client’s testimony. The client asks the lawyer, “How am I doing so far?” What are the lawyer’s ethical obligations in this situation?

Discussion of Issue 3
This issue is related, obviously, to Issue 2, discussed above. In a criminal case, the court’s truth-seeking function can be at odds with the defendant’s Sixth Amendment right to counsel. In Geders v. U.S., 425 U.S. 80 (1976), the Supreme Court held that a trial court violated a criminal defendant’s Sixth Amendment right to assistance of counsel, by ordering him not to consult with his attorney during an overnight recess called while the defendant was on the witness stand. But subsequently, in Perry v. Leeke, 488 U.S. 272 (1989), the Supreme Court held that a trial court could order “no consultation” during a 15-minute recess, as opposed to an overnight recess. The Court explained that the normal consultation between defendant and counsel during an overnight recess would encompass matters beyond the content of the defendant’s own testimony, such as the availability of other witnesses, trial tactics, or the possibility of negotiating a plea bargain. Thus, communication in such situations is acceptable. See Paul Mark Sandler, Talk to Me: Consulting with Counsel During Recess, Md. Daily Record, Dec. 14, 2006.

POSTING AN EXCERPT OF A VIDEOTAPED DEPOSITION ONLINE

Issue 4
A lawyer is representing the plaintiff in a products liability case, and has just completed a video deposition of the defendant’s corporate designee. Plaintiff’s counsel feels that parts of the designee’s testimony were very favorable to his client’s case, and he wants to post those excerpts on a website, www.youtube.com, where any member of the public with internet access can view the excerpted deposition. Is there an ethical obligation governing this course of conduct?

Discussion of Issue 4
There is nothing improper about the lawyer posting a deposition on the Internet, unless there is a court order in place prohibiting such conduct, so long as (1) the deposition (or a transcript of it) has been publicly filed with the court; and (2) the lawyer provides a disclaimer with the video, noting that the video does not include the
entire deposition. Rule 3.6 permits a lawyer to state “information contained in a public record.” In some cases, the court will place discovery materials under seal, or otherwise safeguard the confidentiality of a deposition – a lawyer must comply with any such orders.

The hypothetical is derived from a (very) recent case in Texas. The plaintiff sued a car dealership for fraud, and plaintiff’s counsel took a videotaped deposition of the dealership’s chief financial officer. Plaintiff’s counsel then made excerpts of the video deposition available on both youtube.com and his firm’s own website, where anyone with Internet access could view the excerpts.

Defendant filed a motion for a protective order, asking the court to order plaintiff’s counsel to remove the video from the internet. The trial judge granted the motion, citing two reasons: (1) the deposition was not in the public record; and (2) the online video showed only parts of the deposition, and not the full deposition. Plaintiff’s counsel filed a transcript of the deposition in court, and posted the excerpted deposition a second time. The court found that this was a violation of its order, instructing plaintiff’s counsel that if he posted the video online again, the video should include a disclaimer noting that it includes only a portion of the deposition.

A lawyer who posts a video of a deposition on a website must also keep in mind the rules applicable to attorney advertising and marketing. Rule 7.1 (Communications Concerning A Lawyer's Services) states:

\[
A \text{ lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.}
\]

**INADVERTENT PRODUCTION OF A PRIVILEGED DOCUMENT**

**Issue 5**

During pre-trial discovery in a civil case, plaintiff’s attorney receives in document production a letter from the defendant to his attorney. This letter has helpful information for plaintiff’s case, and plaintiff’s counsel decides to use this document in cross-examining adverse party. Any ethical issues?

**Discussion of Issue 5**

ABA Model Rule 4.4 provides that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly

notify the sender.” Comment 3 to Model Rule 4.4 indicates that, “unless other law requires otherwise, a lawyer who receives an inadvertently sent document ordinarily may, but is not required to, return it unread, as a matter of professional judgment.” See ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 06-442 (2006); see also Formal Op. 06-440; Formal Op. 05-437 (2005). This standard represents a departure from the ABA’s former position, which held that a lawyer should not use inadvertently-produced materials, and should return them.

In the scenario above, do the circumstances suggest an advertent production of the privileged letter? It may be imprudent to take the risk. Cf. Rico et al. v. Mitsubishi Motors Corp. et al., 42 Cal.4th 807, 171 P.3d 1092 (2007). In this case, the California Supreme Court disqualified counsel who had reviewed privileged information. The Court set forth this rule:

‘When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified.’

171 P.3d at 1099 (quoting from State Comp. Ins. Fund v. WPS, Inc. 70 Cal.App.4th 644, 656-57 (1999). In affirming the trial court’s order of disqualification, it then held that the damage caused by the receiving lawyer’s “dissemination and use” of the document was “unmitigable.”

Model Rule 4.4 does not determine whether an inadvertent production waives the privilege. Assuming there is not a stipulation among counsel to return, or a protective order that provides for the return of, inadvertently-produced privileged documents, litigants should be aware of new Federal Rule of Evidence 502. First, it provides that such a protective order would insulate the parties from a waiver claim from third parties. Second, it provides that inadvertent disclosure of a communication or information covered by the attorney-client privilege or work-product protection does not waive such privilege or protection, if “the holder of the privilege or protection took reasonable steps to prevent disclosure;” and “the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).”

Rule 26(b)(5)(B) provides:

(B) If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.
IN A CRIMINAL CASE, GIVING THE APPEARANCE OF HAVING INFORMATION ON BAD ACTS COMMITTED BY A WITNESS WHEN, IN FACT, YOU HAVE NO SUCH INFORMATION

Issue 6
During cross examination in a criminal case, defense counsel cross-examines a witness about alleged bad acts. During the questioning, counsel holds and periodically glances at a sheet of paper, as if the bad acts he is inquiring about are written on the paper. In fact, those acts are not referred to in the paper, and defense counsel does not necessarily know for sure whether the acts were committed. Is the lawyer’s conduct consistent with the rules and standards of professional responsibility?

Discussion of Issue 6
The lawyer’s conduct is clearly improper under Rule 3.4, which states that a lawyer shall not “in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused[.]” The lawyer cannot reasonably believe that facts exist to support his implication that the witness is guilty of any prior bad acts.

IN A CRIMINAL CASE, LEARNING FROM AN ALIBI WITNESS PROPOSED BY THE DEFENDANT THAT THE WITNESS HAS NO ALIBI TESTIMONY

Issue 7
An attorney is representing a criminal defendant, who tells the attorney he was with his cousin at the time of the alleged crime. When defense counsel contacts the cousin, she says, after careful recollection, that she is positive that the defendant was not with her at the time of the crime. What ethical obligations, if any, does the lawyer have?

Discussion of Issue 7
The discussion of Issue 1, above, already set forth a lawyer’s duties with respect to suspected perjury, and false statements. A lawyer may not knowingly offer evidence that the lawyer “knows to be false.” Rule 3.3(a)(3). In the hypothetical, however, the lawyer does not know for certain that the client intends to commit perjury or make a false statement. The lawyer has been presented two conflicting accounts, only one of which can be correct.

In a civil matter, a lawyer “may refuse to offer evidence . . . that the lawyer reasonably believes is false.” Rule 3.3(a)(3). A lawyer may not refuse to offer the testimony of the defendant in a criminal matter, however, based solely on the lawyer’s reasonable belief that the testimony will be false. Rule 3.3(a)(3). Comment 9 to Rule 3.3 states:
Because of the special protections historically provided criminal defendants . . . this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

Even if the lawyer knows for certain that the client’s testimony will be false, courts in some jurisdictions “have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires,” and “[t]he obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements.” Rule 3.3 cmt. 7. Notably, however, this is not the view of the Supreme Court. See Nix v. Whiteside, 475 U.S. 157 (1986). In Whiteside, the Court held that a defense counsel did not violate his client’s right to effective counsel when the lawyer threatened to disclose perjured testimony by the defendant.

For more information, the Annotated version of Rule 3.3 collects a variety of cases and sources that discuss client perjury in the criminal context.

**IN A CRIMINAL CASE, HEARING THE ALIBI WITNESS PROVIDE AN ALIBI AFTER A CONSULTATION WITH THE DEFENDANT**

**Issue 8**

Defense counsel tells her client that the client’s cousin contradicts the client’s alibi. The client tells defense counsel, “I will be back in touch with you.” Subsequently, the cousin calls defense counsel, and states that after meeting with the client, she now recalls she was with him at the time of the crime. What ethical obligations, if any, does the attorney have?

**Discussion of Issue 8**

This hypothetical is slightly different from the one in Issue 7. As noted, a lawyer representing a criminal defendant cannot refuse to put the client on the stand based on a mere reasonable belief that the client will offer false testimony. By contrast, a lawyer may decline to present testimony from a non-client witness, if the lawyer reasonably believes the testimony will be false. Rule 3.3(a)(3).

The right to present a defense “is designed to serve the truth-seeking function of the trial process. It does not grant criminal defendants license to knowingly present perjured testimony.” U.S. v. Williams, 205 F.3d 23, 30 (2nd Cir. 2000). The lawyer’s ethical duties are similar to those set forth in the discussion of Issue 1, above. In sum, the lawyer must try to dissuade the client from offering the alibi witness, and inform the client of the consequences of presenting a witness who will offer false testimony. If the client insists that the lawyer present the witness, the lawyer has a duty to withdraw from the representation, and may have a duty to inform the court of the reason for his withdrawal.

The lawyer’s duties to the alibi witness, who is apparently an unrepresented party, are set forth in Rule 4.3 which provides:

*In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably*
should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

PREPARATION OF A WITNESS AFFIDAVIT FOR EXECUTION BASED ON A CLIENT’S RECITATION OF FACTS BEFORE THE WITNESS HAS BEEN INTERVIEWED BY COUNSEL

Issue 9
An attorney for the plaintiff in an age discrimination lawsuit interviews the plaintiff’s friend and former co-worker. The lawyer begins by explaining the theory of the lawsuit and the importance of recalling certain facts, then asks the witness to sign an affidavit that had been drafted in advance based on the plaintiff’s version of events. Is the lawyer’s conduct consistent with the rules and standards of professional responsibility?

Discussion of Issue 9
This hypothetical concerns a lawyer’s ethical duties in interviewing and preparing a witness. The question also concerns an attorney’s duties with respect to submitting evidence, assuming that the lawyer obtains the witness’s signature and files the affidavit. Several rules may be relevant to this hypothetical, including Rule 3.3 (Candor Toward the Tribunal); Rule 3.4 (Fairness to Opposing Party and Counsel); Rule 4.1 (Truthfulness in Statements to Others); and Rule 4.3 (Dealing with Unrepresented Person).

If the lawyer in the hypothetical obtains the witness’s signature on the affidavit without first taking steps to assess whether the affidavit accurately reflected the witness’s knowledge, the lawyer should not submit the affidavit as evidence. The bar on offering false evidence “only applies if the lawyer knows that the evidence is false.” Rule 3.3, Comment 8. Nonetheless: “A lawyer’s knowledge that evidence is false, however, can be inferred from the circumstances . . . Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.” Id.

But what if the lawyer holds off on obtaining the witness’s signature, but merely uses the affidavit in an interview with the witness? On this question, there are conflicting views.

On the issue of affidavits prepared in advance by attorneys, one authority states: “A document, such as an affidavit or declaration, prepared by a lawyer for verification by another person must include only factual statements that the lawyer reasonably believes the person would make if testifying in person before the factfinder.” Restatement (Third) of The Law Governing Lawyers, § 118, Comment b. The Restatement suggests that a pre-scripted affidavit may be improper. In the hypothetical, the lawyer has learned plaintiff’s version of events, and knows that the former co-worker is the plaintiff’s friend. But the lawyer does not know whether the witness shares the plaintiff’s view of the relevant events, or even whether the witness has any knowledge of the relevant facts.
On the other hand, the Fifth Circuit considered a similar scenario in *Resolution Trust Corp. v. Bright*, 6 F.3d 336 (1993). The *Bright* Court considered whether the district court erred in sanctioning two attorneys for including, in a witness’s draft affidavit, statements that the attorneys had not previously discussed with the witness. The appellate court held that the trial court abused its discretion in sanctioning the two attorneys. The Court reasoned:

> Placing statements in a draft affidavit that have not been previously discussed with a witness does not automatically constitute bad-faith conduct . . . It is one thing to ask a witness to swear to facts which are knowingly false. It is another thing, in an arms-length interview with a witness, for an attorney to attempt to persuade her, even aggressively, that her initial version of a certain fact situation is not complete or accurate.

*Id.* at 341 (Emphasis added).

On witness coaching/preparation generally, Maryland’s Court of Appeals has observed: “The question of just how far an attorney may go in preparing a witness for trial is a difficult one.” *State v. Earp*, 319 Md. 156, 170 (1990). In *Earp*, the State’s prosecutor took a video deposition of the victim of an attempted murder. The prosecutor then showed this taped deposition to other witnesses in the case before they were to testify at trial. The court of appeals held that the trial court properly permitted the witnesses to testify, but criticized the prosecutor’s conduct. The court of appeals explained:

> Attorneys have not only the right but also the duty to fully investigate the case and to interview persons who may be witnesses. A prudent attorney will, whenever possible, meet with the witnesses he or she intends to call. The process of preparing a witness for trial, sometimes referred to as “horse-shedding the witness,” takes many forms, and involves matters ranging from recommended attire to a review of the facts known by the witness.

Because “the line that exists between perfectly acceptable witness preparation on the one hand, and impermissible influencing of the witness on the other hand, may sometimes be fine and difficult to discern,” the court of appeals urged attorneys to follow the following advice from the Supreme Court of Rhode Island:

> [I]n the interviews with and examination of witnesses, out of court, and before the trial of the case, the examiner, whoever he may be, layman or lawyer, must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses.

*State v. Papa*, 32 R.I. 453 (1911); see also *Geders v. U.S.*, supra, 425 U.S. at 90 n.3 (“An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.”)

The court of appeals went on to advise:

> It is permissible, in a pretrial meeting with a witness, to review statements, depositions, or prior testimony that a witness has given. It also may be necessary to test or refresh the recollection of the witness by reference to other facts of which the attorney has become aware during pretrial preparation, but in so doing the attorney should exercise great care to avoid suggesting to the witness what his or her testimony should be.
In the hypothetical described above, the lawyer’s conduct could be considered improper because the lawyer is “injecting” facts. The lawyer knows that the witness was a co-worker of his client, and that they are friends. By showing the witness an affidavit setting forth a version of events favorable to his client, the lawyer is telling the witness what to say, rather than asking the witness what he or she actually knows and remembers. But if the lawyer heads into the witness interview with a reasonable belief about what the witness knows and remembers, based on documents and/or statements from other witnesses, showing the affidavit to the witness may be proper.

**PROMPTING A WITNESS TO “NOT REMEMBER” UNFAVORABLE INFORMATION AND EMPHASIZE FAVORABLE INFORMATION**

**Issue 10**

A corporate defendant’s attorney is preparing a corporate employee for a deposition. When the witness is uncertain regarding facts that are unhelpful to the defense, the attorney suggests answering, “I don’t remember,” and when the witness is uncertain about helpful facts, the attorney encourages the witness to answer with greater clarity. Is the lawyer’s conduct consistent with the rules and standards of professional responsibility?

**Discussion of Issue 10**


> It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer . . . and is to be commended because it promotes a more efficient administration of justice and saves court time.

The Restatement (Third) of the Law Governing Lawyers, § 116, Comment b states:

> In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: discussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and
discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness’s meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact (see § 120(1)(a)).


One component of witness preparation is to inform the witness that he or she should give truthful answers, and that if the witness does not know the answer to a question, the witness should so state. But an attorney should make clear that “I don’t remember” is not an appropriate response where the client knows the answer. In Sheriff, Clark County v. Hecht, 710 P.2d 728 (1985), an attorney was charged with suborning perjury on the following facts:

Respondent, an attorney, represented a client who had been charged with indecent exposure. The client was originally charged with a gross misdemeanor. However, when the district attorney learned that the client had previously been convicted in California of indecent exposure, the district attorney amended the complaint pursuant to NRS 201.220(1)(b) to allege a felony.

At the client’s preliminary hearing, respondent decided that it would be necessary to put his client on the witness stand. When the client expressed concern about what he should answer if asked about his prior conviction in California, respondent allegedly advised him: “When the district attorney asks you about your past, tell him you don’t remember.” The client subsequently took the witness stand and, when asked by the district attorney whether he had been convicted of indecent exposure in California, answered that he did not remember. The district attorney asked numerous questions concerning the California incident. However, the client continually answered, in essence, that he did not remember.


PAYMENTS TO FACT WITNESSES

Issue 11

A corporate defendant’s attorney contacts a former employee, now living out-of-state, about the possibility of coming to the trial to give favorable testimony. The former employee, now retired, is reluctant. The attorney offers to have the corporation fly the employee first class along with her husband, put them up at a deluxe hotel, reimburse them for all meals, and compensate the former employee for “lost earnings.” Is the lawyer’s conduct consistent with the rules and standards of professional responsibility?
Discussion of Issue 11
The ABA’s Standing Committee on Ethics and Professional Responsibility (“Committee”) examined the question of the propriety of compensating non-expert, “occurrence” witnesses in ABA Formal Ethics Opinion 96-402.

The Committee concluded that a lawyer “may compensate a non-expert witness for time spent in attending a deposition or trial or in meeting with the lawyer preparatory to such testimony,” and for travel and lodging expenses. But the Committee added three caveats:

(1) If the law of the jurisdiction of the lawyer forbids or restricts payment to occurrence witnesses, a lawyer must comply with that law. The “common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying.” Rule 3.4, Comment 3. The federal anti-bribery statute, 18 U.S.C. § 201(d), on the other hand, provides that it is not a violation to pay a witness “the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing or proceeding.”

(2) Even if the law does not forbid payment to occurrence witnesses, the lawyer must make it “clear to the witness that the payment is not being made for the substance or efficacy of the witness's testimony, and is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony in litigation in which the witness is not a party[.]”

(3) The amount of any compensation “must be reasonable, so as to avoid affecting, even unintentionally, the content of a witness's testimony. What is a reasonable amount is relatively easy to determine in situations where the witness can demonstrate to the lawyer that he has sustained a direct loss of income because of his time away from work--as, for example, loss of hourly wages or professional fees. In situations, however, where the witness has not sustained any direct loss of income in connection with giving, or preparing to give, testimony--as, for example, where the witness is retired or unemployed--the lawyer must determine the reasonable value of the witness's time based on all relevant circumstances.”

In the hypothetical discussed above, it appears that the witness is receiving hefty compensation for testifying, in the form of luxurious accommodations. An ethics committee might carefully consider whether this remuneration is reasonable, given the fact that the witness is retired. Moreover, a competent lawyer should recognize that the witness’ compensation is a proper subject of cross-examination by the opposing party’s attorney.

CONCLUSION
Know your jurisdiction’s rules. Know your judge. Use common sense. In a witness-ethics minefield, careful lawyers always survive.
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Mr. Sandler is a trial lawyer with a national reputation for successfully representing many notable clients in trial and appellate courts. He is a partner in the Baltimore law firm of Shapiro Sher Guinot & Sandler, P.A., and is known for his thorough representation of clients, as evidenced by his remarkable courtroom victories.

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As an academic, Professor Green’s principal work is in the areas of legal ethics and criminal law. He has authored dozens of articles in law journals and professional journals. As director of the law school’s ethics center, he has organized more than a dozen conferences and symposia and overseen more than two dozen law review publications on issues of law and ethics. He is a frequent presenter at CLE programs and academic conferences in New York and nationally.

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- Orphan Shares, 23 NRE 46 (Summer 2008)
- Tipping The Scales of Justice: The Rise of ADR, 22 NRE 40 (Spring 2008)
- The CERCLA Limitations Puzzle, 19 N.R.E. 70 (Fall, 2004)

Mr. Barkett is also the author of Ethical Issues in Environmental Dispute Resolution, a chapter in the ABA publication, Environmental Dispute Resolution, An Anthology of Practical Experience (July 2002),

Mr. Barkett is editor and one of the authors of the ABA Section of Litigation’s Monograph, Ex Parte Contacts with Former Employees (Environmental Litigation Committee, October 2002). His paper, A Baker’s Dozen: Reasons Why You Should Read the 2002 Model Rules of Professional Conduct, was presented at the Section of Litigation’s 2003 Annual Conference. Mr. Barkett also wrote The MJP Maze: Avoiding the Unauthorized
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Practice of Law, which was presented at the 2005 Section of Litigation Annual Conference. He also wrote Refresher Ethics: Conflicts of Interest, for the Section’s January 2007 Joint Environmental, Products Liability, and Mass Torts CLE program, and Tattletales or Crimestoppers: Disclosure Ethics Under Model Rules 1.6 and 1.13, presented at the ABA Annual Meeting (Atlanta, August 7, 2004) and, in an updated version, at the ABA Tort and Insurance Practice Section Spring CLE Meeting, (Phoenix, April 11, 2008). Mr. Barkett also presented his paper, From Canons to Cannon, at the Ethics Centennial sponsored by the ABA Section of Litigation (Washington, D.C. April 18, 2008) commemorating the 100th anniversary of the adoption of the Canons of Ethics.

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Help Is On The Way...Sort Of: How the Civil Rules Advisory Committee Hopes to Fill the E-Discovery Void ABA Section of Litigation Annual Meeting, Los Angeles (2006)
Help Has Arrived...Sort Of: The New E-Discovery Rules, ABA Section of Litigation Annual Meeting, San Antonio (2007)
The Battle For Bytes: New Rule 26, e-Discovery, Section of Litigation (February 2006).
E-Discovery For Arbitrators, 1 Dispute Resolution International Journal 129, International Bar Association (Dec. 2007).

In the fall of 2007, Mr. Barkett taught a first-ever course at the University of Miami Law School entitled “E-Discovery.” In 2009, Mr. Barkett is chairing the ABA’s Third Annual National Institute on E-Discovery (Chicago, May 22, 2009).

Mr. Barkett has been recently recognized in the areas of alternative dispute resolution and environmental law in a number of lawyer-recognition publications, including Who’s Who Legal (International Bar Association) (since 2005); Best Lawyers in America (National Law Journal) (since 2005); Legal Elite (since 2004), (Florida Trend), and Chambers USA America’s Leading Lawyers (since 2004). Mr. Barkett can be reached at j barkett@shb.com.
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