

Trial Law TIPS

Roy D. Wasson's
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Payments to Witnesses—Lay and Experts

Introduction

The FHP Traffic Homicide investigator who worked your client's collision has agreed to meet with you at the scene of the accident during her off hours on Saturday. You do not expect to ask the Trooper to render many, if any, expert opinions during that meeting, nor at trial. Instead you are trying to learn more factual details of the fatal crash, such as details about road surface conditions which may have affected traction, and how crush damage patterns matched up with stationary objects at the scene.

You also have no intention of asking the Trooper to color her recollection of the events to suit your theory of liability. Instead, you want to make sure that you have all the relevant facts about the collision, and that the Homicide Investigator has her memory for details jogged shortly before she testifies.

Time was (for some of us at least) twenty years ago and more, when a meeting between a lawyer and a cop at an accident scene carried with it an implicit understanding that a check would be exchanged. The same courtesy was sometimes extended to the underpaid paramedic who returned to the scene, pointing-out scorch marks left by burning wreckage he had braved to pull a child to safety. No billing statement was needed; the dollar amount of the check was not fixed, but it was generally understood: \$50 was accepted for a half-hour to hour walk around a railroad crossing or exit ramp where lives were lost, and survivors' lives were and changed forever due to a moment's inattention, a failed piece of steel, or some other matter of mere inches and seconds at highway speeds.

Of course no one would ever suggest that a trained FHP investigator might be swayed to testify about an accident scene differently, if that cop did or did not receive the once customary check as compensation for her time and trouble. Plaintiffs and defense attorneys alike understood that such a "consulting fee" was nothing improper. But what if the witness the lawyer arranged to meet at the crash site was not wearing a uniform; and was an ordinary person who just had happened by on the date of the accident? Would it be proper to offer the same gift to a civilian witness as was the accepted cost of meeting at the scene with fire rescue personnel or D.O.T. enforcement officers?

Payments to witnesses by litigants and their lawyers is a delicate and complex subject. In addition to the payments parties would gladly make, such as the fair fees paid to consult with off-duty investigators, there are other sorts of potential recipients of monetary compensation as well, many of whom have their hands outstretched. For example, most of us have had the unpleasant experience of being "held up" by someone who makes it clear that he or she will not cooperate as a witness, unless and until payment of a given amount is received.

Such witnesses who have their hands out generally have an overblown sense of their own importance to the presentation of the case at trial. They often match that aggrandized view of their contribution to the case with unrealistic expectations about the value of their time and effort as witnesses.

Trial lawyers encounter witnesses along the full range of extremes—from the helpful witness who went out of her way to explain small details of the accident scene, and who you can count on to be in the courtroom on time—on the one hand—to the clueless parasite on the legal system who wants to exchange marginal information for large sums (and who will not appear without cash in advance)—on the other hand. Whether your witness compensation question arises out of gratitude and respect for someone who has selflessly helped your case, or results from near extortionist efforts by marginal witnesses to profit from the fortuitousness of their knowledge, some common questions abound, such as:

—Must Full Payment in Advance Accompany the Subpoena?

—How May Payments to Potential Witnesses Be Calculated and Paid?

—Can I Legally and Ethically Compensate a Truthful Witness for Cooperating?

—Can I Recover Payments to Witnesses as Taxable Costs?

All of those questions are addressed somewhat in this TIP. This area of the law is too broad to fully cover the subject in a short piece such as this. Readers are encouraged to use this article as a starting point for your own further research into the specific questions of interest.

Witnesses Must Obey Subpoenas Accompanied Only By Statutory Witness Fee and Mileage —No Other Prepayment Required (Lay or Expert)

Section 92.142, Fla. Stat. (2004), entitled “**Witnesses; pay**” provides for witness fees and mileage as follows: “(1) Witnesses in all cases, civil and criminal, in all courts, now or hereafter created, and witnesses summoned before any arbitrator or general or special magistrate appointed by the court *shall receive for each day's actual attendance \$ 5 and also 6 cents per mile* for actual distance traveled to and from the courts.” (Emphasis added). Those rates have not changed in almost thirty years. See § 90.14, Fla. Stat.

(1975). A witness (lay or expert) may not insist on additional compensation as a condition for obeying a subpoena, and the courts may not, in a typical civil case, order payment of higher fee amounts to witnesses.

Section 92.151, Fla. Stat. (2004) makes it clear that the only sum which a witness may demand as a precondition to obeying a subpoena is the five-dollar fee for one day of service, plus mileage expense at ten cents per mile:

Compensation shall be paid to the witness by the party in whose behalf the witness is summoned, and the prevailing party may tax the same as costs against the prevailing party's adversary; but ***no person shall be compelled to attend court as a witness in any civil cause unless the party in whose behalf the person is summoned shall first pay the person the amount of compensation to which he or she would be entitled for mileage and per diem for 1 day***, or the same is deposited with the executive officer of said court, and the person shall not be compelled to attend thereafter unless paid in advance.

(Emphasis added). There is no statutory provision allowing experts to charge a higher prepayment amount than lay witnesses are entitled to receive.

A witness—either lay or expert—can be compelled to obey a subpoena and appear to testify without requiring the party calling the witness to advance any sum to the witness over and above the \$5 statutory fee and 6 cents per mile travel expense, even if those amounts are plainly insufficient. “Every citizen has a duty to respond to a subpoena regardless of statutory provisions for compensation or expenses.” *Rose v. Palm Beach County*, 361 So. 2d 135, 138 (Fla. 1978). Trial courts may not order payment of witness fees to non-experts in excess of the outdated sums under § 92.142, except in criminal cases where the accused is denied due process of law by such low witness fees. *Id.* at 138-39 (approving criminal trial court’s grant of witness fee of \$9.25 per day and 10 cents per mile under its inherent authority, noting the “most unusual situation where a group of indigent witnesses had to travel three

hundred miles and back and be lodged in a large metropolitan area”).

Absent such a denial of a litigant’s constitutional rights, by virtue of the witness fees being too low to enable witnesses to reach their destination court, judges have no power under the common law to set witnesses’ compensation above that of the statute. “At common law no witness fees were paid, therefore the right of a witness to compensation is purely statutory. 81 Am.Jur.2d, Witnesses, § 23.” *Palm Beach County v. Rose*, 347 So. 2d 127, 128 (Fla. 4th DCA 1977), *quashed on other grounds, Rose v. Palm Beach County*, 361 So. 2d 135 (Fla. 1978). *Accord, e.g., 97 C.J.S. Witnesses § 35* (1987)(“Witnesses are entitled to compensation only under statutes proving therefor. They are not entitled thereto at common law, or in cases for which the statute does not provide [compensation.]”)(footnotes deleted).

The Third DCA has held that criminal defendants and those subject to license forfeiture proceedings may not be required to advance the opposing party’s experts’ witness fees as a condition of subpoenaing those experts to testify. *Engel v. Rigot*, 434 So. 2d 954 (Fla. 3d DCA 1983)(reversing lower tribunal’s order quashing subpoenas served by respondent dentist upon DPR’s experts, and noting lack of any legal authority for compelling prepayment of expert witness fees). In his concurrence in *Engel*, the late Judge Dan Pearson explained that the court’s holding applied with equal force to any type of case:

The issues before us are whether subpoenas directed to four dentists were invalid because not accompanied by expert witness fees and whether such subpoenas, even if invalid, were subject to being quashed on motion of the Department of Professional Regulation, Board of Dentistry.

Under Section 120.58(1)(c), Florida Statutes (1981), the subpoenaed witnesses, who are not public employees, are entitled to be "paid such fees and mileage for their attendance as is provided in civil actions in circuit courts of this state," such payment to accompany the subpoena. A witness in a civil case is entitled to receive \$5.00 for each day's actual

attendance and \$.06 per mile for actual distance traveled to and from the courts. § 92.142, Fla.Stat. (1981). The only statutory requirement for payment in advance to a witness is that "no person shall be compelled to attend court as a witness in any civil cause unless the party in whose behalf he is summoned shall first pay him the amount of compensation to which he would be entitled for mileage and per diem for one day. . . and he shall not be compelled to attend thereafter unless paid in advance." § 92.151, Fla.Stat. (1981). There is simply no requirement that an expert witness fee accompany a subpoena and, accordingly, no law that renders a subpoena invalid when not accompanied by an expert witness fee.

Id. at 956 (emphasis added).

Further support for the position that a party who deposes an adverse expert need not pre-pay that expert's fee is contained in *Pevsner v. Frederick*, 656 So. 2d 262 (Fla. 4th DCA 1995). In discussing the fee-shifting provision of Rule 1.280(b)(4)(C), Judge Farmer in a specially concurring opinion explained the timing of payments for expert depositions as follows: "The premise is that the party designating the expert is responsible for paying the expert, and ***the deposing party then pays the designating party.***" *Id.* at 265 (emphasis added). Obviously, if the party who retained the expert is going to first pay her own expert for the deposition, and then seek reimbursement from the party who took the deposition, the party taking the deposition will not be paying the expert in advance of the deposition.

Judge Farmer's *Pevsner* opinion then goes on to analyze another expert witness fee provision: Rule 1.390(c). That rule provides a mechanism for the parties and the trial court, ***after an expert's deposition has concluded***, to agree upon or otherwise decide the amount of the fee to be paid by the deposing party to the party who retained the expert. Judge Farmer notes: "This rule meshes with rule 1.280(b)(4) by providing a procedure to determine the amount of the expert's deposition fee that the ***one party must pay the other party.***" 656 So. 2d at 265 (emphasis added). The

deposing party is not required—in advance of a deposition of uncertain length and scope—to divine the amount of fees which his or her opposing expert will earn in that deposition. No prepayment is required when you take the defense expert's deposition, because after the deposition is over the trial court will decide the amount which you “must pay the other party.”

Thus, you may want to try deposing the DA's experts by serving them with subpoenas accompanied only by the nominal fees allowed under § 92.142, Fla. Stat. (2004). If the experts ignore the subpoena, move to strike them as witnesses. If they attend the deposition you have set without insisting on their expert fees being prepaid², your cash flow will have improved, and you will be fully ready to see those defense experts again at trial.

The *Engel* approach should work to compel the attendance of lay witnesses who have asked you for additional fees as compensation, but whom you would prefer to not reward with a bonus. If a qualified expert has not right to claim prepayment of witness fees over and above those provided for by statute, then surely a non-expert seeking additional compensation for service as a witness cannot claim entitlement to payment in advance. A subpoena to any witness—lay or expert—served along with a check for \$5.00 plus mileage is all you really need to obtain the presence of that witness for deposition or trial.

Of course, fact some witnesses who expected a larger check with the subpoena may turn on you in the courtroom, if they are forced to comply with the subpoena under the analysis of *Engel*. The decision will have to be made on a case-by-case basis whether you would prefer to make a larger voluntary advance payment to such witnesses, under the authority discussed in the next section, or

²As noted above, Fla. R. Civ. P. 1.280(b)(4)(C) does not require the side deposing an opponent's expert to advance some share of the costs of the deposition. That rule contemplates calculation of the fee after the deposition and other discovery have been performed; otherwise no one would know how much time was required for the expert's services.

prefer to drag those witnesses unwillingly into the courtroom, where anything can happen.

Proper and Improper Methods of Calculating Witness Fees

It is uncommon and disfavored for litigants or their attorneys to make payment of any amount to non-expert witnesses, above the nominal statutory witness fee and mileage allowance. On the other hand, expert witnesses are almost always compensated for their services. A party who engages an expert witness may contract with the expert for a fee to be calculated in a variety of methods. The most common approaches include a flat fee approach in which the expert is paid a set amount, regardless of how long or short the amount of time which he or she expends on the case. The other common approach is the hourly fee, similar to the lodestar method for calculating attorneys' fees.

Problems arise when the contracting parties include conditions which can increase the expert's recovery, based on events which transpire such as the amount of recovery from a defendant. "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.*" Fla. R. Prof. C. 4-3.4 (Commentary) (emphasis added).

Witnesses who are asked to meet with lawyers about a case, and to testify if they possess useful information, frequently complain that they will lose income in the process because they must take the time away from their jobs or professions. Rule 4-3.4(b) of the Rules Regulating the Florida Bar provides in pertinent part that "*a lawyer may pay a witness* reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and *reasonable compensation to reimburse a witness for the loss of compensation* incurred by reason of preparing for, attending, or testifying at proceedings." (Emphasis added).

Notwithstanding that clear grant of a right to a lawyer to reimburse a witness for earnings lost when the witness appears to testify, one line out of a Supreme Court case decided after Rule 4-3.4(b) was enacted illustrates the disfavor with which payments to

witnesses are regarded. In *Florida Bar v. Wohl*, 842 So. 2d 811 (Fla. 2003), the Court suspended a lawyer for 90 days for agreeing to pay compensation to someone determined to be a fact witness, when the arrangement included a “bonus” for providing more valuable information. The Supreme Court found that the bonus provision violated the spirit of the prohibition against contingency fees to witnesses and punished the offending attorney with a ninety-day suspension.

Thus, attorneys who agree to compensate witnesses should use great care to make sure that any variables in the measure of those fees does not transform the agreement into an impermissible contingency fee arrangement. The witnesses cannot have a vested interest in the outcome of the proceedings. Lawyers also should use care when witnesses have dual roles, such as consultants to one of the litigants, lest a payment for consulting services be viewed as a result-oriented improper payment to a witness.

Witness Tampering Versus Paying for Truthful Testimony

It is professional misconduct worthy of suspension from practice for a lawyer to provide witnesses with compensation beyond reimbursement for normal expenses incurred in testifying, and to make such payment conditioned upon the witness’ testimony or the outcome of the case. *E.g.*, *The Florida Bar v. Huggett*, 626 So. 2d 1304 (Fla. 1991); *The Florida Bar v. Cilio*, 606 So. 2d 1161 (Fla. 1992). Where payment or a promise of payment is made with the intent to induce false testimony, or to withhold testimony, the attorney is guilty of felony witness tampering as well as being subject to disbarment. See § 914.22, Fla. Stat. (2004).

Surprisingly, the Florida Supreme Court has held that the Florida Bar did not establish professional misconduct when it pursued a grievance proceeding against a lawyer who made payments to a witness for the purpose of obtaining truthful testimony. In *The Florida Bar v. Cilio*, 606 So. 2d 1161 (Fla. 1992), the court approved the referee’s report which found no sanctionable misconduct for paying off a witness so he would testify truthfully, holding: “Clearly to induce a witness to testify falsely would be misconduct and more[,] but this is not the issue here. . . . Is it

misconduct to induce a witness to tell the truth by offering and giving money or some other valuable consideration? I think not . . .” *Id.* at 1162.

The danger it would seem from the *Cilio* holding is that the lawyer who is allowed to bribe witnesses to testify truthfully may honestly view the “truth” differently from the way the witness did before the bribe occurred. If a lawyer pays a witness to give testimony which would have been different, but-for the payment, the adversary system is harmed. A well-meaning lawyer who uses the *Clio* approach might well guess wrong about what the “truth” really is and be found guilty of witness tampering based on arguable differences of opinion about what is true and what is false.

The Supreme Court later decided *The Florida Bar v. Wohl*, 842 So. 2d 811 (Fla. 2003). That case returns to the approach that compensating a witness to influence his or her testimony is conduct warranting suspension from the practice of law, with no need for the court to embark on a hunt for the elusive absolute of “truth.” The act is wrong regardless of the effect:

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.

Id. at 816.

None of us should risk a felony conviction and loss of our license by even a well-meaning attempt to assist the jury’s search for truth through payments of any sort to witnesses. If a case cannot be won in the courtroom with compensating witnesses, it is not worth trying to salvage with questionable tactics of witness coaching with money.

Fees for Defense Experts and Treating Doctors in Federal Court

Being the eternal optimist that I am, I can even see the bright side of having a case removed to federal court. In Florida's state court system, the defense experts' fees are taxable costs, the plaintiff can be compelled to advance some or most of defense experts' fees when deposing defense experts. See Fla. R. Civ. P. 1.380(b)(4)(C). In federal courts, on the other hand, expert witness fees are not taxable as costs, except as limited by the statutory per diem maximum of \$40 per day. See, e.g., *Cronin v. Washington Nat'l Ins. Co.*, 980 F.2d 663, 672 (11th Cir. 1993) ("it is settled that expert witness fees may not exceed the statutory per diem fee provided in 28 U.S.C. § 1821. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987); *Kivi v. Nationwide Mutual Insurance Co.*, 695 F.2d 1285 (11th Cir. 1983). The per diem is \$ 30.00 [now \$40] per day for the time the witness was in court or traveling to court.").

The Federal Rules of Civil Procedure share Florida's provision whereby the trial court is to assess the payment of expert fees for deposition against the party taking the deposition. See Fed. R. Civ. P. 26(b)(4)(C). But there is no federal rule or statutory provision requiring prepayment of expert fees for trial testimony, and the ultimate expense of such experts cannot be recovered from the non-prevailing party as taxable costs.

Finally, because under many federal cases, treating doctors are deemed to be fact witnesses and not experts under the Federal Rules, the prepayment provision of Rule 26(b)(4)(C) do not necessarily apply to depositions of treating doctors. For a discussion of the two conflicting lines of cases on the treater-as-expert issue, see *Lamere v. New York State Office for the Aging*, 223 F.R.D. 85 (N.D.N.Y. 2004).

Conclusion

Payments to witnesses of any sort are highly risky propositions. Those who tempt fate with such payments risk losing the case you are working on, through sanctions like dismissal. You would risk a lifelong scar on your criminal record and Florida Bar standing. The only sort of compensation you should ever consider

providing to a witness is just enough to restore the status quo, by reimbursing earnings losses caused by the witness' visit to court instead of his or her job site. There can be no contingency on the gift to the witness, and certainly no payment based on the testimony given or the verdict in the case.

Witnesses in Florida must comply with subpoenas without any payment or promise of payment beyond the \$5 per diem and dime per mile travel allowance. Both lay and expert witnesses must appear and give truthful testimony without regard to the prospect of compensation. Further, we officers of the court must presume that the witnesses we summon to testify do just that—truthfully testify without being paid to do so.

As tough as things get out there, keep the faith in our system of justice. We cannot win them all, but we will win enough to make a difference, if we only:

Keep Tryin!

Roy