

**ALASKA BAR ASSOCIATION  
ETHICS OPINION 93-2**

**Ethical Restraints on the Compensation of Witnesses**

The Committee has been asked to consider the circumstances under which it would be unethical to compensate a witness for his or her testimony.

Rule 3.4(b) of the Alaska Rules of Professional Conduct ("ARPC") prohibits a lawyer from "offer[ing] an inducement to a witness that is prohibited by law." The Comment to this rule observes that "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."<sup>1</sup>

The Committee's task is complicated by several factors. First, the distinction between a lay witness and an expert is not always clear. Lay witnesses may be permitted to offer opinions if "rationally based on the perception of the witness" and if it would assist in the "determination of a fact in issue." See Alaska Evidence Rule 701. 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. See n.2 *infra*.

Secondly, Alaska is generally a liberal jurisdiction with respect to the admissibility of expert testimony. *Norris v. Gatts*, 738 P.2d 344 (Alaska 1987); *Hilburn v. State*, 756 P.2d 1382 (Alaska App. 1988). 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. *Leavitt v. Gillaspie*, 443 P.2d 61 (Alaska 1968). The issue of admissibility is committed to the broad discretion of the trial judge. *New v. State*, 714 P.2d 378 (Alaska App. 1986).

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<sup>1</sup> This is generally consistent with the former Disciplinary Rule 7-109(C). See also former Ethical Consideration 7-28.

Finally, the issue of compensation does not necessarily hinge on whether the witness is properly characterized as an expert. Most experts command high fees because of their professional training, education, skill or experience. However, 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."

Notwithstanding, the Committee believes that it is appropriate to evaluate certain factors in determining the ethical constraints on the compensation or fees which a witness might receive.

1. How does the fee or compensation paid to the witness compare to the wage or salary in his or her normal trade or occupation. Again, this issue is not clear cut. For instance, a highly skilled auto mechanic may command \$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." By the same token, 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.

2. 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.

3. Is the "expert" testifying based upon firsthand observations or experience, or based upon after-the-fact independent analysis and evaluation? For instance, 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 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.

4. Related to the above, what services does the witness provide in return for his or her compensation? If it is 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.<sup>2</sup>

Given the wide variety of litigation and the complexity of issues which are involved, categorizing a person as an expert or a lay witness defies an easy solution. The Committee believes the above factors can assist in making that determination. We emphasize that this issue should not be taken lightly by the practicing bar. The payment of a sum of money 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 re Porcelli*, 397 N.E.2d 830 (Ill. App. 1979); *People v. Belfor*, 591 P.2d 585 (Colo. App. 1979). 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.

Approved by the Alaska Bar Association Ethics Committee on September 2, 1993.

Adopted by the Board of Governors on September 11, 1993.

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<sup>2</sup> The Committee espouses the view set forth in former EC 7-28 to the effect that a lawyer may, if necessary, reimburse a non-expert witness "for expenses and financial loss incident to his being a witness." 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 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.