

ETHICS OPINION

RO-83-77

QUESTION:

"I am one of the attorneys for a defendant in a civil action pending in a Circuit Court in Alabama. I have been approached by an individual, who calls himself an investigator and a consultant, who has offered to provide me with the name and location of two direct witnesses on the merits of the lawsuit along with documentary evidence germane to the case. 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.

These facts were outlined by telephone to Mr. [REDACTED] on yesterday, and the consensus from the General Counsel's Office was that it was not a violation of the canons of ethics to pay for the production of evidence or witnesses under these circumstances.

We would appreciate it if some written response could be obtained from your office in this regard.

I assume, without knowing, that the Disciplinary Commission will meet on Thursday, Friday, or Saturday, May 5, 6, or 7, in Gulf Shores, and if possible, we might receive a response in a short time thereafter. The affected attorneys that represent the defendant are W.D. [REDACTED], Jr., J. S. [REDACTED], Michael M. [REDACTED], M. [REDACTED] M. [REDACTED], and James E. H. [REDACTED].

The attorney that represents the consultant investigator is E. H. [REDACTED].

The attorney for the Plaintiff, who obviously knows nothing about this evidence or these proceedings, is a member of the Board of Bar Commissioners, although he is not on the Disciplinary Commission; therefore, it would be necessary to confine any response or even discussion of the problem to the members of the Disciplinary Commission."

ANSWER:

There would be no ethical impropriety in your paying the sum of money demanded by 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.

DISCUSSION:

Ethical Consideration 7-28 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 this 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."

Disciplinary Rule 7-109(C) provides:

"A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case."

Disciplinary Rule 7-109(C), Code of Professional Responsibility of the American Bar Association provides:

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"A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer 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 his loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness."

Former Canon 39, Canons of Professional Ethics of the American Bar Association, contained no reference to payment of witness fees. In Informal Opinion 847 (1965) however, the Committee on Ethics and Professional Responsibility of the American Bar Association held that it was not unethical to pay a witness for lost wages or actual out-of-pocket expenses, so long as the line was drawn between mere reimbursement and payment for testimony itself. Current DR 7-109(C), Code of Professional Responsibility of the American Bar Association, now codifies this principle.

Although DR 7-109(C) does not spell out the permissible payments to a witness as does the corresponding DR or the Code of Professional

Responsibility of the American Bar Association, in Ethics Opinion 81-549 the office of General Counsel and the Disciplinary Commission approved of those payments as detailed in DR 7-109(C), Code of Professional Responsibility of the American Bar Association.

Our research reveals no opinions of courts or ethics committees dealing with the precise question which you pose. The payment by attorneys to investigators or detectives who locate and interview witnesses is so commonplace that there are few if any opinions dealing directly with such practice.

An opinion of the New York County Lawyer's Association (1912) held that it is improper for a law firm to hire a detective agency to investigate an alienation of affections situation for a client on a contingent fee basis. The Ethics Committee of the Oregon State Bar (1977) held that a lawyer who hires an investigator to work on a particular case may absorb the cost of the investigator as part of his overhead expense. The Committee also held that the lawyer may enter into an employment contract with his client whereby the client would pay a fixed hourly rate for the investigation expenses.

In Informal Opinion 1375 (1976) the American Bar Association Committee on Ethics and Professional Responsibility approved the action of an attorney in paying certain monies to a "medical legal consulting service" for technical medical research, investigation, evaluation analysis of medical records, hospital records, medical literature, interrogatories, depositions, expert witnesses' testimony and assisting the attorney in the prosecution of a law suit. See also opinion of the Ethics Committee of the Oregon State Bar (opinion 223 1972), opinion of the Ethics Committee of the Los Angeles County Bar Association (No. 1968-4), Informal Opinion 1333 (1975), American Bar Association Committee on Ethics and Professional Responsibility and opinion of the Ethics Committee of the West Virginia State Bar Association (76-7, 1977).

Since there is no ethical impropriety in an attorney employing and paying a sum of money to an investigator to search for, locate and interview witnesses, we can perceive no ethical impropriety in the payment of a sum of money to an investigator for the production of documents and witnesses that he has already discovered.

We express no opinion as to the reasonableness of such payments. However, such payment would, of course, have to be made with the consent of the client after a full disclosure.