



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in July 2010. Please see the 2010 Illinois Rule of Professional Conduct 3.4(b) with its Comment [3]. See also ISBA Ethics Advisory Opinions 88-9 and 91-1. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion No. 87-5
January 29, 1988

Topic: Compensation and Reimbursement of Witnesses

Digest: An attorney may acquiesce in the reimbursement of expenses incurred by a witness or the payment of reasonable compensation to a witness for time lost.

Ref.: Rule 7-109(c)

In re Howard, 69 Ill.2d 343, 372 N.E.2d 371 (1977)

In re Rosen, 438 A.2d 316(N.J. 1981)

In re Robinson, 136 N.Y.S. 548 (1912).

FACTS

A witness subpoenaed to appear at trial canceled a preplanned vacation to do so, thereby forfeiting a \$75 nonrefundable deposit. Other witnesses whom an attorney seeks to interview have demanded that they be paid for their time.

QUESTIONS

1. Can the subpoenaed witness be reimbursed for the amount of the forfeited vacation deposit?
2. Can a reasonable sum for time spent in being interviewed be paid to witnesses?

OPINION

Rule 7-109(c) of the Code of Professional Responsibility provides, in relevant part:

- (c)...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 loss of time in attending or testifying.

It appears that the above provisions permit reimbursement to a subpoenaed witness for sums lost by reason of being required to appear at trial.

To the same effect, we believe such provisions to permit the payment of reasonable compensation to a witness for time spent in being interviewed. The provisions of Rule 7-109 are not on their face limited to attendance at trial or for purposes of deposition. Nor are they limited to permitting compensation only for time lost from a job or profession. Rather, they are written generally to permit compensation to a witness for loss of time in attending or testifying. We believe such provisions to be broad enough to permit, although certainly not mandate, the payment of reasonable compensation to a witness for time spent in being interviewed. However, to the extent that such 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. See In re Howard, 69 Ill.2d 343, 372 N.E.2d 371 (1977); In re Rosen, 438 A.2d 316 (N.J. 1981); In re Robinson, 136 N.Y.S. 548 (1912). Thus, an attorney must be wary in instances where the true purpose of payments made may be subject to question.

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