



Opinion No. 621, October 2012

QUESTION PRESENTED

Do the Texas Disciplinary Rules of Professional Conduct permit a lawyer to cooperate with his client in paying the client's former lawyer for serving as a witness in a civil proceeding?

Statement of Facts

A Texas lawyer represents the husband in a divorce proceeding in which the validity of a premarital agreement is at issue. The couple signed the agreement while living in another state. The out-of-state lawyer who represented the husband in preparing the premarital agreement is a fact witness regarding the circumstances of the agreement's drafting and signing. This lawyer is also a potential expert witness regarding the agreement's validity

and construction under the laws of the state in which it was signed. The lawyer who represented the husband in drafting the premarital agreement asks to be compensated for testifying in the Texas divorce proceeding. The husband is willing to pay such compensation.

Discussion

Rule 3.04 of the Texas Disciplinary Rules of Professional Conduct addresses the compensation of witnesses and states in relevant part:

"A lawyer shall not:

....

(b) falsify evidence, counsel or assist a witness to testify falsely, or pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness 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."

Rule 3.04(b)(2) permits the client's lawyer in the divorce proceeding to compensate, or to cooperate with his client in compensating, the client's former lawyer for his service as a fact witness, provided that such payment is reasonable compensation for loss of time in attending or testifying in the divorce proceeding. Moreover, under Rule 3.04(b)(3), if the client's former lawyer testifies as an expert witness, "a

reasonable fee" may be paid for the former lawyer's service as an expert. What constitutes "reasonable compensation" paid to a fact witness and what is "a reasonable fee" for an expert witness are questions of fact that will depend on the circumstances.

Because the client's former lawyer is participating in the divorce proceeding as a witness and not as counsel, the restrictions of Rule 3.08 on a lawyer's acting as both advocate and witness in a proceeding would not be implicated. It should be noted that the decision to call the client's former lawyer as a witness could, depending on the circumstances, result in the loss of work product and attorney-client privileges that would otherwise apply to information that the client's former lawyer possesses. These possible consequences would, however, be a matter of strategy for the lawyer and client and not an ethical consideration.

Conclusion

The Texas Disciplinary Rules of Professional Conduct permit a lawyer to cooperate with his client in paying the client's former lawyer to serve as a fact witness in a civil proceeding if the payment is reasonable compensation for the former lawyer's loss of time in attending or testifying in the proceeding. If the client's former lawyer testifies as an expert witness, the compensation with respect to such testimony must be a reasonable fee for the professional services of an expert witness. ❖

The Supreme Court of Texas appoints the nine members of the Professional Ethics Committee from members of the bar and the judiciary. The Court also appoints the committee's chair. According to Section 81.092(c) of the Texas Government Code, "Committee opinions are not binding on the supreme court."

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