

**ETHICS OPINION NUMBER 145
OF THE MISSISSIPPI BAR
RENDERED MARCH 11, 1988
AMENDED APRIL 6, 2013**

WITNESSES - Where a psychiatrist has been subpoenaed to testify as a witness at a trial for the purpose of giving fact testimony, and not an expert opinion, and he does attend the trial, the lawyer for the party causing the subpoena to be issued may properly advance to the witness the statutory witness fee and the expenses necessarily incurred by the witness in attending the trial, provided the party has previously agreed to repay such fee and expenses to his lawyer.

The Ethics Committee of The Mississippi Bar has been requested to render an opinion on the following facts:

The lawyer in question represented the husband in a divorce action. The husband wished to subpoena the wife's psychiatrist for the purpose of obtaining fact testimony, and not an expert opinion. Prior to trial, the husband's lawyer attempted unsuccessfully to reach the psychiatrist by telephone, in order to coordinate his appearance in court. A subpoena was served on the witness, but he failed to appear at the trial. An attachment was then issued for him, and the sheriff brought the witness to the courthouse. However, by the time the witness appeared in court, the issues requiring his testimony had been settled between the parties, and he was excused without ever having testified. Subsequently, the witness sent a bill to the husband's lawyer for "court appearance" in the sum of \$300.00. The trial was held in Pascagoula, and the witness's office was in Gulfport. The husband's lawyer wants to know how to advise his client with regard to the bill, and what obligations the lawyer has to the witness.

At the outset it should be stated that this committee does not render opinions on questions of law. The Committee is of the opinion that whatever liability the client in this case may have to the witness in question would be a question of law, and, therefore, outside of our jurisdiction. We are further of the opinion that whatever legal obligation the lawyer in this case may have to the witness with regard to the bill for the court appearance is also a legal question, which we decline to address. However, the narrower question of what course of action the lawyer may ethically be

allowed to take concerning the witness's bill for services is, we believe, a question that we are authorized to deal with, and this opinion will, therefore, be limited to that one issue.

There is an abundance of authority empowering the Mississippi courts to issue subpoenas requiring the attendance of witnesses. Subpoenas shall be served personally, and the person so subpoenaed shall appear. Mississippi Code of 1972, Ann. Section 13-3-101. The Chancery Court has the power to issue subpoenas for witnesses, which witnesses have the duty to attend court according to the command of the process. Mississippi Code of 1972, Ann. Section 9-5-85.

The pertinent provision, in the Rules of Professional Conduct reads as follows:

A lawyer shall not:

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

Rule 3.4(b) M.R.P.C. The Comment to this rule states the following:

With regard to paragraph (b), 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.

Comment to Rule 3.4(b) M.R.P.C.

It will be noted in the aforesaid comment that occurrence witnesses and expert witnesses are treated differently, as far as the payment of fees and compensation is concerned. Therefore, it becomes necessary to determine whether the witness in this case is an occurrence witness or an expert. The factual summary states that the witness is a psychiatrist, who, being a graduate of medical school, could probably be qualified as an expert. However, we are also advised that the psychiatrist was to be used only for the presentation of factual testimony, and he was not to give an expert opinion. Where a witness is a professional or skilled person, but he only gives factual testimony, he is limited to the statutory fee allowed to ordinary occurrence witnesses. 31 Am.Jur.2d Expert & Opinion Evidence, Section 10. The right of a witness to compensation is purely statutory, and he may receive no compensation beyond that

provided by statute. 81 Am.Jur.2d Witnesses, Section 23. Based on the above, the Committee is of the opinion that the psychiatrist in this case should be considered to be an occurrence witness, and that the husband's lawyer may be allowed to pay to the witness his expenses and any statutory fee allowed for such witnesses.

We now consider the nature of the expenses and the amount of the statutory fee, if any, that the lawyer may pay to this witness. In Mississippi witnesses in the county, circuit and chancery courts shall receive \$1.50 per day and \$.05 per mile for traveling from their homes to the courthouse and back again. Mississippi Code of 1972, Ann. Section 25-7-47. The party causing the subpoena to be served on the witness is liable for the payment of such fee and mileage to the witness. Mississippi Code of 1972, Ann. Section 25-7-51. In view of the fact that the statute providing for a mileage allowance of \$.05 per mile was adopted a number of years ago when the cost of transportation was much lower than it is today, and in view of the Comment to Rule 3.4(b) M.R.P.C. allowing the payment of a "witness's expenses", the Committee is of the opinion that the payment of a mileage figure more realistic for today's economy is permissible. The Committee is also of the opinion that any reasonable costs incurred by the witness for meals and lodging are considered to be expenses of a nature that the lawyer may pay to the witness. The Committee further believes that a witness's loss of time because of attending or testifying is an expense for which he may be paid by the lawyer. In summary, the lawyer may pay to this witness the statutory witness fee, plus reasonable expenses incurred for mileage, meals and lodging, plus reasonable compensation for his loss of time in attending or testifying.

Finally, we come to the question of whether the client must ultimately be responsible for the payment of the witness's fee and expenses. Rule 1.8(e) provides that:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, or administrative proceedings, except that:

(1) a lawyer may advance court costs and expenses of litigation, including but not limited to reasonable medical expenses necessary to the preparation of the litigation for hearing or trial, the repayment of which may be contingent on the outcome of the matter.

Therefore, the lawyer may advance the payment of the witness's fee and expenses.