

Lawyer May Not, on Behalf of Client, Provide a Fact Witness with a Benefit in Exchange for Testimony

A lawyer has a mortgage lender client. After discovery of a structural problem on a mortgaged property, the mortgage lender client and the borrower/guarantors entered into a deed in lieu of foreclosure agreement and settlement agreements for payment of certain amounts owed on the mortgage. One of the settlement agreements provides that one of the loan guarantors (“the Guarantor”) will make payments over a few years, and as of now about one-quarter of the payments have been made.

The mortgage lender client is now engaged in litigation with the appraiser of the property with the structural problem. The lawyer has asked the Guarantor for an affidavit relevant to the litigation, and the Guarantor has indicated a willingness to help. But the Guarantor insists upon some form of forbearance, reduction, or forgiveness of some or all of the remaining settlement payments owed to the lender client before he willingly cooperates.

The lawyer asks whether he may, on behalf of the lender client, agree to provide such payment plan forgiveness, debt reduction, or forbearance in exchange for

the Guarantor voluntarily providing his testimony.

The Committee concludes that Rules 3.4(2) and 8.4(1) and (4) of the Rules of Professional Conduct prohibit any such payment plan forgiveness, debt reduction, or forbearance in exchange for the Guarantor’s testimony.

Rule 3.4(2) provides, in relevant part: “A lawyer shall not...offer an inducement to a witness that is prohibited by law.” The Official Commentary to Rule 3.4 adds the following: “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....”¹

While the Committee generally avoids addressing questions of law, any analysis of Rule 3.4(2) necessarily requires reference to substantive law. The law in Connecticut quite clearly prohibits giving a witness a financial inducement to provide testimony. As Section 53a-149 of the General Statutes provides: “A person is guilty of bribery of a witness if he



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offers, confers or agrees to confer upon a witness any benefit to influence the testimony or conduct of such witness in, or in relation to, an official proceeding.... Bribery of a witness is a class C felony.”² The Connecticut Appellate Court has held that the statute is to be broadly interpreted. *State v. Davis*, 160 Conn. App. 251, 258–59, cert. denied 320 Conn. 901 (2015) (“Thus, the statute defines an official proceeding as broadly covering presently instituted proceedings, as well as future proceedings that ‘may be held.’ Accordingly, the definition of a witness includes those who have already been summoned to testify, as well as those who may be called to testify in the future. This is consistent with the purpose of the bribery and tampering statutes, which are purposely broad and general. Their purpose is to prohibit all forms of corruption of the governmental process. ... They broaden the field of corruption of witnesses and tampering with evidence.” [internal quotation marks and citation omitted]).

The statutory prohibition of bribery does not preclude only payments made to a witness. It precludes conferring any

■ Formal and informal opinions are drafted by the Committee on Professional Ethics in response to inquiries from CBA members. For instructions on how to seek an informal opinion and to read the most recent informal opinions, see the CBA webpage for the Committee on Professional Ethics at ctbar.org/EthicsCommittee. CBA members may also research and review formal and informal opinions in Casemaker.

The Rules of Professional Conduct have the force of law on attorneys. The Formal and Informal Opinions are advisory opinions. Although the Connecticut Supreme Court has on occasion referred to them as well reasoned, the advisory opinions are not authoritative and are not binding on the Statewide Grievance Committee or the courts.

benefit on the witness, and a reduction in debt would certainly be a benefit to the Guarantor. In addition, the statute addresses more than efforts to influence the content of testimony. The statute prohibits conferring a benefit to influence conduct—for example, appearing or not appearing as a witness.

Payment plan forgiveness or debt reduction could not properly be characterized as consideration for settlement of the Guarantor’s resistance to a subpoena. Regardless of how it is characterized, payment forgiveness or debt reduction would amount to the conferring of a benefit on a witness in order to influence the conduct of the witness.

In light of Conn. Gen. Stat. § 53a-149, forgiveness or reduction of a payment obligation in exchange for providing testimony would amount to “an inducement to a witness that is prohibited by law,”

and is thus prohibited under Rule 3.4(2).³ Such conduct also may be “prejudicial to the administration of justice,” in violation of Rule 8.4(4). See CBA Informal Opinion 92-30, Payment to Attorney as Fact Witness (“The payment of money to a witness to “tell the truth” is as clearly subversive to the administration of justice as to pay him to testify to what is not true.” Quoting *In re Robinson*, 136 N.Y.S. 548, 556 [1912]).

It is not pertinent that, under the facts presented, it would be the client, not the lawyer, who confers the benefit. Pursuant to Rule 8.4(1), it is misconduct for a lawyer to violate the Rules “through the acts of another.” Put another way, the lawyer may not avoid his responsibilities under the Rules of Professional Conduct by having the client engage in conduct prohibited for the lawyer under the Rules. Indeed, Rule 1.1 provides that “[a] lawyer shall not counsel a client to en-

gage...in conduct that the lawyer knows is criminal....”

Accordingly, consistent with Rules 1.1, 3.4(2), 8.4(1), and 8.4(4), a lawyer may not, on behalf of a client, agree to provide payment plan forgiveness, debt reduction, or forbearance in exchange for an obligor’s agreement to voluntarily provide testimony. ■

NOTES

1. This Committee and the American Bar Association Committee on Ethics and Professional Responsibility have previously opined that it is not improper to pay a fact witness for his or her time and expenses, provided that such payments do not amount to inducements to testify in particular ways and the amount of the payment is reasonably related to the actual costs of the witness’s time and expenses. ABA Formal Opinion 96-403, *Propriety of Payments to Occurrence Witnesses* (“So long as it is made clear to the witness that the payment is not being made for the substance or efficacy of

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For more information, please contact:

Robert L. Holzberg, Chair
860.424.4381 • rholzberg@pullcom.com

David P. Atkins
203.330.2103 • datkins@pullcom.com

Anne C. Dranginis
203.330.2246 • adranginis@pullcom.com

Andrew C. Glassman
860.541.3316 • aglassman@pullcom.com

Joshua A. Hawks-Ladds
860.541.3306 • jhawks-ladds@pullcom.com

Frederic L. Klein
860.424.4354 • fklein@pullcom.com

Lynda B. Munro
203.330.2065 • lmunro@pullcom.com

Michael E. Riley
860.424.4333 • mriley@pullcom.com

Gregory F. Servodidio
860.424.4332 • gservodidio@pullcom.com

James T. Shearin
203.330.2240 • jtshearain@pullcom.com

pullcom.com

@pullmancomley

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President's Message

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office, and watch him figure out how to get on YouTube on my cellphone, as he spins around in my office chair, I realize that this is not the end of the story. This is simply the beginning of another chapter. To survive in this fast-changing world, we must learn from the past, and continue to adapt and progress as a profession that recognizes current market trends. We must leave our old predispositions and refrain from blindly following the practices of law that were relevant almost three decades ago. That world no longer exists. The time for meaningful change is now. The work must begin today.

As the president of the CBA, I pledge to ensure we continue to transform the organization to ensure we are serving the needs of our members and addressing the market trends. I also look forward to working to help improve the viability of law firms and ensure our community members can access justice. If you are interested in joining the CBA on this histor-

ic journey to protect the rule of law, please reach out to us at msc@ctbar.org to discuss how you can get more involved. ■

NOTES

1. Berners-Lee, Tim (March 1989). "Information Management: A Proposal". World Wide Web Consortium. Retrieved July 11, 2019, from <https://govbooktalk.gpo.gov/tag/history-of-the-world-wide-web>.
2. Cambridge University Press. (2008). Cambridge online dictionary, Cambridge Dictionary online. Retrieved July 11, 2019, from <https://dictionary.cambridge.org/dictionary/english/tablet>.
3. Henderson, Bill (January 2018). Legal Services and the Consumer Price Index (CPI). Retrieved July 11, 2019, from www.legalevolution.org/2018/01/legal-services-consumer-price-index-cpi-cost-going-up-wallet-share-going-down-042.
4. *Id.*
5. *Id.*
6. *Id.*; Law and More (May 2012). "Solo Practices: Your competition is DIY, e.g. LegalZoom, not other law firms." Retrieved July 11, 2019 from lawandmore.typepad.com/law_and_more/2012/05/solo-practices-your-competition-is-diy-eg-legalzoom.html.
7. National Center for State Courts (2015). "the Landscape of Civil Litigation in State Courts." Retrieved July 11, 2019 from www.ncsc.org/~/

[media/Files/PDF/Research/CivilJusticeReport-2015.ashx](https://www.ctbar.org/media/Files/PDF/Research/CivilJusticeReport-2015.ashx).

8. *Id.*
9. *Id.*
10. *Id.*
11. Georgetown Law Center for the Study of the Legal Profession (2018). "Report on the State of the Legal Market." p. 14. Retrieved July 11, 2019 from www.legalexecutiveinstitute.com/wp-content/uploads/2018/01/2018-Report-on-the-State-of-the-Legal-Market.pdf.
12. *Id.*
13. *Id.* at p.3
14. *Id.*
15. *Id.* at p. 14.
16. *Id.* at p.15
17. *Id.* at p.15.
18. Storm, Roy (December 2017). "Big Law Looks On as 'New Law' Gets Closer to Clients," The Am Law Daily. Retrieved July 11, 2019 from www.law.com/americanlawyer/sites/americanlawyer/2017/12/07/big-law-looks-on-as-new-law-gets-closer-to-clients.
19. Koch, Adrienne B. (February 2019). "The case for bar associations: Why they matter." Retrieved July 11, 2019 from www.abajournal.com/voice/article/the-case-for-bar-associations.
20. *Id.*
21. *Id.*
22. *Id.*

Informal Opinions

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the witness's testimony, and is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony in litigation in which the witness is not a party ... such payments do not violate the Model Rules."); CBA Informal Opinion 92-30, *Payment to Attorney as Fact Witness* ("Compensation for income lost in order to be a witness is permitted for both payor and payee, as long as the payment neither affects nor is intended to affect the content of the testimony.").

The financial inducement at issue in the facts presented here is not described as payment for a witness's time and expenses, nor may it reasonably be characterized as such.

2. Along similar lines, Conn. Gen. Stat. § 53a-150 makes it a Class C felony to "solicit[], accept[] or agree[] to accept any benefit from another person upon an agreement or understanding that such benefit will influence his testimony or conduct in, or in relation to, any official proceeding."
3. On the surface, Rule 3.4(2) would appear not to apply where it is the witness demanding the inducement, rather than the lawyer offering the inducement. But of course, if the lawyer were to agree to the witness's demand, the lawyer would then be in the position of offering an inducement.

Highlights

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affidavit. *Commissioner of Administrative Services v. Mulcahy*, 67 CLR 274 (Noble, Cesar A., J.).

Workers' Compensation Law

Fuller v. Western Connecticut Health Network, Inc., 67 CLR 802 (Krumeich, Edward T., J.), holds that the provision of the Connecticut Workers' Compensation Act that authorizes an employer to intervene in an employee's personal injury action against a third party tortfeasor arising out of a work-related accident to recover paid workers' compensation benefits from the employee's recovery, Conn. Gen. Stat. § 31-293, applies only to benefits paid under the Connecticut Compensation Act and not to benefits paid under the compensation laws of any other state. Therefore, an employer who has paid benefits pursuant to another state's compensation laws cannot intervene as a matter of right in an action brought by an employee in Connecticut.

An employer's lack of workers' compensation insurance causes the loss not only of the employer's immunity from common-law liability for injuries to employees, but also (a) loss by the employer's employees of immunity from common-law liability claims by co-employees, and (b) loss of the employer's immunity from loss of consortium claims by employee spouses. *Wilson v. Hopkins*, 67 CLR 766 (Moukawsher, Thomas G., J.).

Zoning

188 Westmont Lot B, LLC v. West Hartford PZC, 68 CLR 208 (Berger, Marshall K., J.T.R.), holds that alternate proposals for IWC applications that preserve existing wetlands should be given preference over alternatives that modify, enhance, or create wetlands. The opinion vacates a commission decision to approve an application to locate a home directly over an existing wetland while authorizing the creation of a larger wetland area on another portion of the lot. ■