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Standing Committee on Professional Ethics

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Informal Opinion 19-01

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]

[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*

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 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 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

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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 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."

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 engage . . . in conduct that the lawyer knows is criminal . . . ."

Accordingly, consistent with Rules 1.1, 3.4(2), 8.4(1), 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.

THE COMMITTEE ON PROFESSIONAL ETHICS

BY _____
Marcy Tench Stovall, Chair

[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.