



Payment for serving as a witness in court

Question: I’ve been subpoenaed to appear as a witness in court. May I be paid more than the \$25 fee offered, plus 20 cents per mile for transportation? This low fee seems insulting to me as a professional, especially because I’m in private practice and may lose an entire day’s fees.

Answer: You and many of your counselor colleagues are understandably frustrated with this low payment structure for witnesses, but you need to think through the issue carefully.

First, you should understand who has issued the subpoena. Is it your client’s attorney or the attorney representing the other side in the lawsuit? This is important because you should not overlook the issue of privileged communication. If you do not have your client’s written permission to witness, you may need to take steps to seek a court order or otherwise follow the procedures in your own state. (See pages 117-119 of the seventh edition of *The Counselor and the Law: A Guide to Legal and Ethical Practice*, a book I co-authored with Burt Bertram that is published by the American Counseling Association.) Additionally, the determination of who issued the subpoena is important because you want to avoid any possible accusation that you are being paid to testify against the interests of your client.

Next, if you are being subpoenaed as a *fact* witness (also sometimes called an *ordinary*, *percipient* or *occurrence* witness), whether you may be reimbursed more than the \$25 fee you quoted will depend on your state law. That fee may be the reimbursement rate set by statute in your state, and it may have been set many years ago, when the cost of living was much lower. The common-law rule in

many jurisdictions is that it is improper to pay a fact witness a fee for testimony, just as it is improper to pay an “expert” witness a fee that is contingent on the outcome of the case.

Also relevant are the rules governing attorney conduct. Many states have adopted the American Bar Association (ABA) Model Rules of Professional Conduct or some variation of the model rules. Rule 3.4 of the ABA model rules prohibits a lawyer from offering an inducement to a witness that is prohibited by law. It does not necessarily prohibit an attorney from paying a fact witness for *expenses* or *loss of time* in attending, testifying or preparation, however.

So, what’s the bottom line? The bottom line is that whether you can be paid more than the low sum offered depends on state law. If you have cleared the privilege issue mentioned earlier, ask the attorney who issued the subpoena whether you might be compensated at your normal hourly rate for the time spent away from your professional office. For example, if your normal hourly rate is \$100 and you’ll need to cancel eight clients, it may be reasonable to ask for \$800 to compensate you for your time. (If you requested \$8,000 per day as a fact witness, that fee may be difficult to justify.) If the attorney refuses to pay anything beyond the \$25 fee, you may want to seek advice from your own local attorney on what is legal and customary in your state. If the attorney opposite your client is the one who issued the subpoena, it may be advisable for you to discuss, with your client’s attorney, any potential fee payment beyond the \$25 offered so that it is clear you are not acting in a manner adverse to your client’s interests.

Also keep in mind that, typically, you should not agree to act as an expert witness for your clients. This is a role that should be reserved for unbiased professionals who are truly independent and qualified by virtue of education, training and experience. If you are, or have been, in a counseling role with a client, it typically would be difficult to claim that you are unbiased because you owe duties of loyalty and care to your client. Furthermore, don’t forget your ethics code. Standard E.13.c. of the 2014 *ACA Code of Ethics* cautions counselors against performing forensic evaluations of current or former clients, or counseling individuals whom they are evaluating.



The question addressed in this column was developed from a de-identified composite of calls made to the Risk Management Helpline sponsored by the American Counseling Association. This information is presented solely for educational purposes. For specific legal advice, please consult your own local attorney. ♦

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