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Trials&TRIBULATIONS

Challenging the credibility of a well-paid subpoenaed fact witness at trial

Have you ever been involved in a case in which you learn that the opposing party has paid a subpoenaed witness a large sum of money (well over the mandated statutory minimum) to provide his testimony at trial and you wondered whether paying that generous sum is fair? After all, will a witness that has received thousands of dollars to appear and provide testimony actually say something disadvantageous about those who have paid him such a generous fee?

The Court of Appeals recently shed some light on the subject in the case of *Caldwell v. Cablevision Systems Corporation*, 20 NY3d 365 (Feb. 7). There, the plaintiff commenced a negligence action against the defendant in connection with an alleged trip-and-fall, and the defendant paid $10,000 to a subpoenaed fact witness to testify at trial on its behalf. Although it was ultimately determined that the $10,000 fee did not result in biased testimony in that particular case, the Court of Appeals provided guidance on what to do if you find yourself in a similar situation.

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Daily Record Columnist

The general rule is that a witness subpoenaed to provide testimony at trial (whether or not they actually end up testifying) is entitled to $15 per day for their attendance under New York Civil Practice Law and Rules (CPLR) 8001. Under that same provision, the witness is entitled to 23 cents per mile as travel expenses, calculated from the place he or she was served with the subpoena to where he or she is to provide the testimony, roundtrip.

Thus, even if the subpoena power could reach to Timbuktu (approximately 4,661 miles from Rochester), you would still only be required to pay that witness $1,086.80 ($15/day for witness fee plus 23 cents per mile). This is not to say that a party cannot offer to pay the witness more than the required fee for incidentals or compensation for lost time at work, but as the Court of Appeals pointed out in *Caldwell*, such compensation must be reasonable.

In *Caldwell*, the plaintiff was walking her dog when she allegedly tripped and fell, injuring her leg allegedly because of a "dip in a trench" located alongside a road nearby where she lived. Prior to that time, the defendant Communications Specialists, Inc. (CSI) had been contracted to install fiber-optic cable under the 3,000 foot long road along which plaintiff had been walking.

To accomplish this, CSI dug a trench running the entire length of the road and also dug numerous smaller pits in an effort to locate any cables previously installed in the same area. Once CSI's duties were complete, it refilled the trenches and holes with dirt, but it had not repaved the area at the time the alleged fall occurred. The plaintiff commenced an action against CSI and others asserting negligence based upon the failure to properly fill the trenches and holes it dug, and failing to repave the road.

During trial, CSI subpoenaed a physician to rebut the plaintiff's testimony that the "dip in the trench" was the cause of her fall. The physician was not subpoenaed as an expert witness, but rather as a fact witness because, in treating the plaintiff in the emergency room after the fall, he had written a note in his records indicating that plaintiff told him that she had actually tripped over a dog.

During cross-examination, the physician testified that CSI paid him $10,000, purportedly to compensate him for his lost time. After learning of the seemingly generous sum paid to the physician, plaintiff's counsel requested that the court either strike the physician's testimony from the record, or issue a jury charge or instruction addressing the potential bias and the mandates of CPLR 8001.

The trial court instead permitted the parties to address the issue in their respective summations, but prohibited any mention of CPLR 8001. The trial court did not provide any other instruction or charge to the jury regarding the fee received by the physician. At the trial's conclusion, the jury determined that CSI was negligent, but that its negligence did not cause the alleged fall, resulting in a dismissal of the complaint as to CSI. The plaintiff made a motion to set aside the verdict, which the court denied. The plaintiff then appealed.

The Appellate Division, Second Department held that the trial court should have instructed the jury that it was to evaluate the

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credibility of the testimony provided by the generously paid fact witness, see *Caldwell v. Cablevision Systems Corporation*, 86 AD3d 46 (2d Dep't 2011). The Appellate Division pointed out (and the Court of Appeals later echoed), that in terms of public policy, the payment of such large fees for minimal testimony is "questionable" and may lead to "potential unconscious bias" on the part of the testifying witness.

The Appellate Division also drew a distinction between the situation where an expert is paid to provide testimony, which involves "special knowledge and skill," and where a fact witness is subpoenaed to, in a sense, do his or her civic duty.

The Appellate Division suggested that in the case of expert testimony, higher levels of compensation are more appropriate because experts are entitled to be reimbursed for his or her efforts. However, due to the particular facts of this case, the Appellate Division determined that the trial court's failure to provide a specific charge to the jury regarding the physician's compensation was harmless error.

This is because the physician was only questioned about the consultation notes he made right after treating the plaintiff and before a trial in this matter was commenced, the physician testified that he had no recollection of talking to plaintiff, and there was no evidence that his testimony was contrived. Therefore, it did not appear that his testimony was improperly influenced by the generous fee he received for that testimony.

The Court of Appeals affirmed the Appellate Division's decision, agreeing with its determination that the trial court's failure to provide a charge to the jury specifically addressing the physician's seemingly excessive fee was harmless error in that specific case. Although the Court of Appeals determined that the physician's fee did not result in biased testimony (thus the ruling of harmless error), there are several take-home messages included in its decision.

As an initial matter, it is important to note that both the Appellate Division and Court of Appeals decisions dealt with a situation in which large fees are paid to fact witnesses, not experts. Therefore, it does not appear that their respective holdings have any bearing on compensation received by experts for trial testimony.

In addition, the Court of Appeals made it clear that a charge regarding the payment of an allegedly excessive fee will be presented to the jury only upon request of opposing counsel. In other words, it appears that if you fail to make a timely request for a submission of that charge to the jury, you are out of luck. The court did not address whether it possesses the power, sua sponte, to provide this jury charge.

Furthermore, the Court of Appeals crafted a two-part jury instruction that can be utilized in instances in which a party believes a generous witness fee unduly influenced the testimony of its recipient. First, a court must inform the jury that a witness is entitled to compensation, but that it is up to the jury to determine whether the compensation received by any given witness was reasonable in view of the witness's missed work or other incidentals. Thereafter, if the jury finds that the compensation was not reasonable, it must then determine whether the fee paid to the witness impacted the truthfulness of that witness's testimony.

It is clear that, even if requested, a court is not required to provide a bias charge or special jury instruction in every case in which the a fee paid to a subpoenaed witness is alleged to be excessive. Rather, it appears that whether the charge is appropriate is to be determined on a case-by-case basis by the court overseeing the trial. *Caldwell* suggests that such a charge may be proper where it appears that a fact witness has received an excessive fee for minimal testimony, and the party paying that witness fee makes no effort to justify the large fee.

This decision provides practitioners with a tool (albeit perhaps only in the context where a fact witness is subpoenaed for the purpose of providing testimony at trial) to at least raise a challenge where it appears as though the testimony of your opponent's fact witness testimony may have been improperly influenced by the payment of a large fee. Just remember that if you suspect impropriety on behalf of a fact witness receiving a generous sum, it is up to you to ensure that the issue can be properly addressed by the jury.

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