Ethical Issues and Witnesses

How would you resolve the following issues? Which Rules of Professional Conduct are controlling or persuasive?

Consider the following:

Rules 3.4; 4.3-4.4

Morgan & Rotunda, pages 326, 333-338, 388-391

Brill, pages 184-187; 214-216

A. l) Attorney says to occurrence witness: "Thanks for talking to me informally. How would you like to spend the next 3 months in the Carribean?"

2) Same as (1), except "Have you thought of disappearing into Newton County for the next month?"

3) Same as (1), except "I would appreciate it very much if you would not talk to the other side. They can always subpoena you for a deposition."

B. 4) Attorney is interviewing an occurrence witness informally and the witness says, "Can I tell you something off the record?"

5) Attorney is interviewing an occurrence witness informally and secretly tape records the interview without telling the witness. Formal Opinion 01-422; pages 473-476 of Morgan.

6) Same as (5), but the interview is conducted via the telephone.

C. 7) Attorney says to occurrence witness: "I need your cooperation. If you refuse, my client will go to the prosecutor with those hot checks of yours." Formal Opinion

92-363, page 214 of Brill and page 343 of Morgan.

D. 8) Occurrence witness calls and says to attorney, "I received the subpoena for the deposition and the $30 witness fee. But I make $100 a day and I really need the extra money. Can you just give me the difference?" Formal Opinion 96-402, page 185 of Brill and page 472 of Morgan.

9) Same as (8), except "I'm a dentist. I will have to close my office and will lose $1000 by coming to the deposition."

10) Occurrence witness calls and says "I'm more than willing to come and visit with you informally, but I will be collecting materials and traveling and spending other time in the interview. Can you reimburse me for those expenses and the lost time?"

11) Occurrence witness calls and says "I'm living here in California now and I know I cannot be subpoenaed for trial, but I am willing to come. Can you pay air fare and expenses and reasonable compensation for the three days that I will be out of my office?”

E. 12) Attorney hires a chemist to be an expert witness. On what basis does the attorney pay the expert? Page 472, 605-606 of Morgan, and page 186 of Brill.

F. 13) In a custody dispute, wife's attorney calls as a witness a counselor to describe the

treatment given the child during the past six months. How does the attorney compensate the counselor for her testimony? Is she an occurrence witness or an expert witness?

G. 14) What are the ethical guidelines for “wood-shedding” or preparing a witness for trial? See page 448 of Morgan. See Bayless, page 185 of Brill.

H. 15) At trial a witness testifies truthfully. Are there ethical limits on the opposing attorney's cross-examination of that witness? Page 400 of Morgan.

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