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BLOGS

Practice of Franchise Law

Franchisee's Attorney Disqualified for Paying a Fact Witness

In *Patel v. 7-Eleven, Inc.*, Bus. Franchise Guide (CCH) 9115,492 (C.D. Cal. Apr. 14, 2015), a former franchisee alleged that 7-Eleven unlawfully terminated its franchise. While preparing to file the case, Patel's counsel was contacted by a disgruntled employee in 7-Eleven's Asset Protection Department, Kurt McCord, who offered his services as a "Loss Prevention Consultant." Patel hired McCord. He drafted a document specifying how 7-Eleven's Asset Protection Department operated, a summary of proper interview techniques, and an analysis of 7-Eleven's loss prevention interview with Patel. From that document, Patel's counsel drafted a "Certification of Kurt McCord," which was later signed by McCord and filed in the case.

7-Eleven argued that Patel's counsel, Gerard Marks of Marks & Klein, LLP, improperly paid McCord for fact testimony and moved to disqualify him. The court agreed and granted 7-Eleven's motion. It found that Patel's counsel violated California Rule of Professional Conduct 5-310, which states that an attorney shall not "directly or indirectly pay . . . compensation to a witness contingent upon the content of the witness's testimony." The court rejected Patel's argument that McCord was an expert witness. McCord did not have significant experience in the industry, his purported certifications were never explained, and the bulk of his testimony concerned 7-Eleven's specific interactions with Patel, which was fact testimony and not expert testimony. The court also found that the payment was not acceptable compensation for "preparation time" because McCord was paid a flat fee. Even if McCord's testimony were truthful, that would not be a defense to the rule violation. McCord indicated the sort of factual testimony he could provide, for a fee, and Patel's counsel hired him to provide that testimony. That arrangement was deemed a quid pro quo payment for testimony that the ethical rules prohibit. Because it found that no lesser sanction would be effective, the court disqualified Patel's counsel.

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