

**DELAWARE STATE BAR ASSOCIATION  
COMMITTEE ON PROFESSIONAL ETHICS**

**OPINION 1994-1**

**February 14, 1994**

Disclaimer: This opinion is merely advisory and is not binding on the inquiring attorney or the courts or any other tribunal.

**Statement of Facts**

Attorney ("Attorney") represents a plaintiff (the "Party") in a pending civil action (the "Litigation") in the Delaware Superior Court. In the course of representing the Party in the Litigation, Attorney has noticed the deposition (the "Deposition") of a former employee (the "Former Employee") of one of the corporations that is a defendant (the "Defendant Corporation") in the Litigation. The Former Employee has expressed a belief that he should be represented at the Deposition by independent counsel chosen by him to advise and protect him with respect to any possible civil or criminal liability on his part relating to subjects into which inquiry may be made at the Deposition. The Former Employee has expressed a reluctance to testify if he is not represented by counsel and has requested that the Party agree to pay the expenses he may reasonably incur in retaining counsel to represent him in connection with the Deposition.

Attorney is considering advising the Party to agree to pay such expenses. If the Party agrees to do so, Attorney would advise counsel for the Defendant Corporation of the Party's intention and would invite the Defendant Corporation to share the expense with the Party on an equal basis. Accordingly, Attorney has requested an opinion whether his advice to the Party and his invitation to the Defendant Corporation would violate the Delaware Rules of Professional Conduct (the "DRPC").

### **Conclusion**

Attorney may (i) advise the Party to agree to pay the reasonable fees and expenses of independent counsel chosen by the Former Employee to represent him at the Deposition, and (ii) invite the Defendant Corporation to share in such expenses, so long as (A) the payment and retention of such fees and expenses would not be in any way contingent upon the outcome of the Former Employee's testimony or the Litigation, and (B) Attorney neither knows nor has any reason to believe that the content of the Former Employee's testimony is in any way contingent upon the payment and retention of such fees and expenses.

### **Discussion**

The question presented is governed by DRPC 3.4(b). That Rule provides in pertinent part as follows:

A lawyer shall not:

(b) . . . pay, offer to pay, or acquiesce in the payment of compensation, or participate in offering any inducement, to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (i) Expenses reasonably incurred by a witness in attending or testifying; (ii) Reasonable compensation to a witness for his loss of time in attending or testifying; (iii) A reasonable fee for the professional services of an expert witness.

DRPC 3.4(b). The first sentence of DRPC 3.4(b) prohibits a lawyer from paying, offering to pay or acquiescing in the payment of compensation, or participating in offering an inducement, to a witness contingent on the content of his testimony or the outcome of the case. The second sentence of DRPC 3.4(b) permits a lawyer to acquiesce in the payment of (i) expenses reasonably incurred by a witness in attending or testifying, (ii) reasonable compensation to a witness for his loss of time in attending or testifying, and (iii) fees for the professional services of an expert witness. Accordingly, the initial inquiry under Rule 3.4(b) is whether the

payment of a witness' attorney's fees would constitute compensation, or offering an inducement, to a witness contingent upon the content of his testimony or the outcome of the case.

Whether or not a payment to a witness is "contingent" is essentially a question of fact. We have been advised that the payment and retention of the independent counsel's fees and expenses would not be in any way contingent upon the outcome of the Former Employee's testimony or the Litigation, and that the Attorney neither knows nor has reason to believe that the content of the Former Employee's testimony is in any way contingent upon the payment and retention of such fees and expenses. Assuming that to be the case, the lawyer's proposed conduct would not violate the provisions of the first sentence of DRPC 3.4(b) prohibiting participation in the payment of compensation, or offering an inducement, to a witness contingent upon the content of the testimony or the outcome of the matter.

Having been advised that the proposed payments to the Former Employee are not in any way contingent on his testimony or the outcome of the Litigation, it is arguable that the Committee need go no further to conclude that the Attorney's proposed conduct is not prohibited under DRPC 3.4(b). However, such a conclusion arguably would render the second sentence of DRPC 3.4(b) meaningless. Accordingly, it is appropriate to consider whether the proposed conduct is permitted by the second sentence of DRPC 3.4(b).

While DRPC 3.4(b) permits a witness to be reimbursed for "expenses" incurred in attending or testifying, neither DRPC 3.4(b) nor the commentary explicitly address whether attorneys' fees are included within the "expenses" permitted to be reimbursed thereunder. Two state bar associations, however, have concluded that payment of a witness' attorneys' fees is permitted under their states' analogs to DRPC 3.4(b). Thus, the Alabama State Bar Association stated in a 1983 opinion that there would be no ethical impropriety in a lawyer permitting his client to pay a "lawyer's fee" to the lawyer of a nonresident witness whose deposition the lawyer proposed to take under DR7-109(c)<sup>1</sup> so long as (i) the lawyer neither knew nor had reason to

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<sup>1</sup> DR7-109(c) is the predecessor to DRPC 3.4(b) and, indeed, contains language virtually identical to DRPC 3.4(b).

believe that the content of the witness' testimony was contingent on the payment of the fee, (ii) the payment and retention of the fee was not contingent on the outcome of the lawsuit, and (iii) the lawyer obtained from the nonresident deponent and/or his lawyer an affidavit setting forth his actual expenses, the amount claimed by his lawyer, and the nature of the lawyer's services rendered.<sup>2</sup> Alabama State Bar Ass'n Opinion, 82-699 (Jan. 5, 1983). Similarly, the Columbus Ohio Bar Association in a 1991 opinion concluded that there would be no ethical impropriety under DR7-109(c) in a lawyer seeking a witness' testimony at trial to arrange an agreement whereby the lawyer's client would pay the witness' legal expenses in the event that the witness was sued for defamation as a result of his testimony, when the payment was not contingent on the testimony or the outcome of the case. See Columbus, Ohio Bar Ass'n Opinion, 91-1 (Feb. 12, 1991).

While the issue was not addressed explicitly, implicit in these state bar opinions is the view that the reimbursement of attorneys' fees incurred by a witness in testifying is not impermissible contingent compensation or an impermissible inducement, and thus is included within reimbursable expenses for purposes of the second sentence of DRPC 3.4(b). While no Delaware court has considered whether attorneys' fees are an element of expenses for purposes of Rule 3.4(b), the issue of whether attorneys' fees are reimbursable "expenses" has arisen in other contexts. In considering the issue in the context of agreements or statutes requiring one party to pay another's "expenses", courts have looked to whether it was reasonably foreseeable that attorneys' fees would be incurred in the context in which the agreement or requirement that expenses would be paid arose. Thus, in State v. Birkins, 78 A.2d 868, 870 (Del. Ch. 1951), the

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<sup>2</sup> The requirement that the lawyer obtain an affidavit from the lawyer for the nonresident whose deposition the lawyer proposed to take appears to have resulted from a concern that the "lawyer's fee" might relate to items other than reasonable attorneys' fees.

Court of Chancery, though recognizing "the tendency in American law to exclude attorneys' fees as an element of costs and expenses unless explicitly otherwise provided," construed the phrase "costs and expenses" in a securities bond to include attorneys' fees, since the Court reasoned that the surety company should have known that a substantial item for recovery on the bond, if recovery were resisted, would be the employment of an attorney. See also Security Am. Corp. v. Walsh, Case, Cole, Brown & Burke, No. 82 C 2953 (E.D. Ill. Jan. 11, 1985)(construing the phrase "expenses" under Section 145(e) of the Delaware General Corporation Law to include attorneys' fees). But see Barber Blue Sea v. Trailer Marine Transport Corp., 725 F. Supp. 1220, 1221 (S.D. Fla. 1989) (holding "expenses" within the meaning of a transshipment contract which required a connecting carrier to indemnify the initial carrier for all expenses and liabilities did not include attorneys' fees under New York or maritime law).

Applying this analysis to Rule 3.4(b), it seems clear that it is reasonably foreseeable that one of the expenses that a witness could incur in "attending" or "testifying" in a legal proceeding is the fees of retaining an attorney to represent the witness' interests. Given the apparent purpose of the second sentence of Rule 3.4(b) to remove the financial burden on a witness from giving testimony (without creating an incentive to testify in a particular manner), it would be odd to interpret Rule 3.4(b) so as to leave the witness responsible for a substantial expense that might be incurred in giving testimony. Moreover, such a rule would discourage a witness from retaining independent counsel to represent his interests.

That attorneys' fees should be included within "expenses" for purposes of DRPC 3.4(b) is also supported by DRPC 1.8(f) (or the analogous provision in another jurisdiction) which requires the attorney for the Former Employee whose fees will be paid by the Party (and

perhaps shared by the Defendant Corporation) to (i) consult with and obtain the consent of the Former Employee with respect to the payment, (ii) ensure that there is no interference with his independence of professional judgment or with the client-lawyer relationship, and (iii) protect information relating to his representation of the Former Employee as required by DRPC 1.6 (or the analogous provision in another jurisdiction). Finally, the fact the Defendant Corporation will be invited to share the costs incurred by the Former Employee further reduces any risk to the integrity of the testimony sought that might otherwise arise by reason of the proposed payments.

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