

**DELAWARE STATE BAR ASSOCIATION COMMITTEE ON
PROFESSIONAL ETHICS OPINION 2003-3
August 14, 2003**

**THIS OPINION IS MERELY ADVISORY AND IS NOT BINDING ON THE INQUIRING
ATTORNEY OR THE COURTS OR ANY OTHER TRIBUNAL**

A member of the Delaware Bar is preparing for trial and has requested an opinion from the Delaware State Bar Association Committee on Professional Ethics (the "Committee") as to whether the client may reimburse each of two witnesses for their respective out of pocket expenses, and for the reasonable value of their lost time.

I. **FACTS**

The inquiring attorney (the "Attorney") practices law at a private law firm in Delaware. The Attorney represents a Delaware corporation (the "Client Company") in a Delaware state trial court in a dispute that is going to trial (the "Delaware Trial"). Most of the events underlying the dispute occurred outside the United States. At the Delaware Trial, the Attorney intends to use two witnesses of relevance to this ethical inquiry. Both are fact witnesses. Both witnesses are foreign nationals and currently reside outside the United States. Both will have to travel to the United States for the Delaware Trial, and both will have to spend considerable time in meeting with attorneys in preparation for their testimony, and while in the United States during the Delaware Trial.

Witness A is a retired former employee of the Client Company, has been retired for over three years and one half years and is presently unemployed. Witness B is retired from another unrelated company and currently operates an independent consulting business. The Committee assumes that the current business of Witness B is a full time or substantially full time endeavor.

The Attorney desires to have the Client Company reimburse Witness A for his out of pocket

expenses, and for the reasonable value of his lost time while Witness A is prepared by the Attorney and his law firm for the Delaware Trial. That value would be calculated by paying him at the same rate as he was paid when he was last an employee of the Client Company, more than three and one half years ago.

The Attorney further desires to have the Client Company reimburse Witness B for his out of pocket expenses, and for the reasonable value of his lost time. That value would be calculated by paying him at the same rate as he would be paid when he is retained as a consultant by others.

The Attorney intends to advise each witness that the reimbursement is to compensate them for time that would otherwise be lost to them, and that the payments are not contingent upon the content, truth, or nature of their testimony. The Committee further assumes that the Attorney neither knows nor has any reason to believe that the content of either of the witness's testimony is in any way contingent upon the payment of such fees and expenses. As proposed by the Attorney, each witness would submit an invoice to outside counsel who would review it for hours spent and expenses incurred. The invoice would be reviewed for reasonableness, and, if approved, sent on to the Client Company for payment to the witness. The terms and conditions of the compensation and reimbursement of expenses would be memorialized in a letter.

II. **CONCLUSION OF OPINION.**

Based on the facts presented, it is the Committee's opinion that: (1) Witness B may be reimbursed for his out of pocket expenses, and for the reasonable value of his lost time; and (2) Witness A may be reimbursed for his out of pocket expenses. However, insufficient facts have been presented to the Committee to conclude that Witness A may be compensated for the loss of his time or to determine what rate of compensation would be appropriate under the circumstances.

III.

ISSUES PRESENTED

- Whether the proposed reimbursement arrangement with respect to either (1) Witness A; or (2) Witness B violates Rule 3.4 of the Delaware Lawyers' Rules of Professional Conduct?
- Whether the proposed compensation arrangement with respect to either (1) Witness A; or (2) Witness B violates Rule 3.4 of the Delaware Lawyers' Rules of Professional Conduct?

IV.

DISCUSSION

Effective July 1, 2003, Rule 3.4 (b) (Fairness to Opposing Party and Counsel) provides in relevant part:

A lawyer shall not:

falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

Delaware Lawyers' Rules of Professional Conduct 3.4(b) (the "Present Rule 3.4(b)").

The language of the former Rule 3.4(b) was changed in connection with comprehensive changes adopted by the Supreme Court of Delaware effective July 1, 2003. Prior to this date, Rule 3.4 (b) (Fairness to Opposing Party and Counsel) provided in relevant part:

A lawyer shall not:

falsify evidence, counsel or assist a witness to testify falsely, or 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.

Delaware Lawyers' Rules of Professional Conduct 3.4(b) (effective October 1, 1985, superseded July 1, 2003 by) (hereinafter, the "Prior Rule 3.4(b)").

An initial question arises concerning whether the Present Rule 3.4(b) should be construed differently than the Prior Rule 3.4(b). The Committee has reviewed the history of the language of the Prior Rule 3.4(b) and Present Rule 3.4(b). As analyzed below, the language of Present Rule 3.4(b) is verbatim ABA Model Rule 3.4(b), and the July 1, 2003 change appears to be nothing more than a change in the language of Rule 3.4(b) to conform it to the language of ABA Model Rule 3.4(b).

Prior to October 1, 1985, the Delaware Lawyers' Code of Professional Responsibility (the "Code") governed the conduct of Delaware Lawyers. The Code contained DR 7-109, which provided that:

A lawyer shall not 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: (1) Expenses reasonably incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for his loss of time in attending or testifying; or (3) a reasonable fee for the professional services of an expert witness.

Prior Rule 3.4(b), Code Comparison. The Code further provided in EC 7-28 that "witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise." Id.

In August 1983, the House of Delegates of the American Bar Association (the "ABA")

adopted The Model Rules of Professional Conduct (the “ABA Model Rules”).¹ The Delaware Lawyers’ Rules of Professional Conduct (the “DRPC”) adopted in 1985 by the Supreme Court of Delaware were based in large part upon the ABA Model Rules. There were some differences between the language of the DRPC and the language of the ABA Model Rules.

One such difference was the text of Prior Rule 3.4(b). The language of Prior Rule 3.4(b), quoted above, included the language from DR 7-109 of the Code. Thus it appears that in 1985, the Supreme Court of Delaware determined to retain some of the language from the Code in the Prior Rule 3.4(b).

Effective July 1, 2003, the Supreme Court of Delaware eliminated all the language differences between the Prior Rule 3.4(b) and the language of Rule 3.4 of the ABA Model Rules. The language of the Present Rule 3.4(b) is identical to the language of ABA Model Rule 3.4. There is nothing in the comments to the Present Rule 3.4 or any reported history to the changes to Prior Rule 3.4(b) to suggest that when the Supreme Court of Delaware eliminated all the language differences, it intended any substantive change in the application of Present Rule 3.4(b). The Committee believes that the change in the language from the Prior Rule 3.4(b) to the Present Rule 3.4(b) was merely intended to conform the language to that of the ABA Model Rule 3.4(b). The Committee concludes that in the absence of any evidence of any intent by the Supreme Court of Delaware to effect a substantive change, and based upon the above history of the language of Rule 3.4(b), that the Present Rule 3.4(b) should be construed in conformity with the Prior Rule 3.4(b).

¹The complete text of the ABA Model Rules, along with the official comment, is available among other places, at <http://www.bsu.edu/web/bfrankel/myweb1/ABA%20model%20rules.htm>.

A. DISCUSSION RELATING TO PROPOSED REIMBURSEMENT OF EXPENSES

The Committee is not aware of any Delaware case law discussing the scope of the reimbursement of expenses, or compensation for a fact witness that may be allowed by Rule 3.4(b) (either the present or the prior version).

An advisory opinion issued by this Committee discusses our view of the flexibility of reimbursement of expenses of a fact witness. In Opinion 1994-1 of this Committee (“Opinion 1994-1”),² an attorney that represented a plaintiff in a pending civil action in the Delaware Superior Court noticed the deposition of a former employee of one of the corporations that was a defendant in the litigation. The former employee expressed a concern about not having counsel. He wished to be represented at the deposition by an 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 an inquiry could be made at the deposition. The former employee also expressed reluctance to testify without independent counsel and requested that the plaintiff agree to pay the expenses he may reasonably incur in retaining that counsel in connection with the deposition. The plaintiff’s attorney was considering advising his client to pay such expenses and requested an opinion on whether his advice to the client and his invitation to the defendant to share such expense on an equal basis would violate the Delaware Rules of Professional Conduct.

In Opinion 1994-1, this Committee determined that the plaintiff’s attorney may advise his client to pay the reasonable fees and expenses of independent counsel so long as "(A) the payment and retention of such fees and expenses would not be in any way contingent upon the outcome of

²The complete text of this Opinion, as are all Opinions of the Committee, is available at www.dsba.org.ethics.htm.

the Former Employee's testimony or the Litigation, and (B) [the] 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.” Id. at 2.

One focus of the Committee's analysis was a factual inquiry whether "payment of a witness's 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." Id. at 3. The contingency of the testimony was a factor that would make witness compensation violate the Delaware Rules. Because the facts were void of any sign of contingency, the Committee decided that the attorney's fees fall within the reasonably foreseeable expenses that a witness could incur in "attending" or "testifying" in a legal proceeding. Id. at 5.

Additionally, the Committee noted that “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 uncured in giving testimony.” Id. at *5.

Utilizing this analytic framework in connection with the present Attorney inquiry, the Committee concludes that both Witnesses A and B may be reimbursed for their respective out of pocket expenses related to their preparation and testimony as witnesses in the Delaware Trial.

B. DISCUSSION RELATING TO PROPOSED COMPENSATION FOR REASONABLE VALUE OF LOST TIME FOR WITNESS B

While the Committee’s review of the language of Delaware Rule 3.4(b) and the above Opinion 1994-1 answers the inquiries of the Attorney concerning reimbursement of the expenses,

it does not answer the ethical inquiry concerning the proposed compensation for the reasonable value of the lost time of fact Witness B. To the Committee's knowledge, this issue has not been addressed by a Delaware Court. The Comment to DRPC Rule 3.4 (both the present and the prior version) states that "the common law rule in most jurisdictions is that it is improper to pay [a fact] witness any fee for testifying." While not critical to analysis of the present Attorney inquiry, the Committee questions the continuing accuracy of this statement.

The issue of compensation for the reasonable value of the lost time of fact witness B has been addressed by Courts of other jurisdictions and Ethics Committees of other jurisdictions. The American Bar Association Standing Committee on Ethics and Professional Responsibility ("ABA Committee") has examined this issue, and has concluded that a fact witness may be compensated for loss of time as long the testimony "is not conditioned on the content of the testimony and . . . the payment does not violate the law of the jurisdiction." ABA Ethics Formal Op. 96-402 at 1 (Aug. 2, 1996). The ABA Committee specifically concluded that the compensation may address time spent by the fact witness in review and research of records that are germane to his or her testimony, pretrial interviews in preparation for testifying, as well as in deposition or at trial. *Id.* at 2.³ The majority view accords with the reasoning and result of the ABA Committee. See generally, Paying Fact Witnesses' Expenses Raises Ethical Concerns, Product Liability Law and Strategy, May 1999 ("Fact Witnesses Article") (surveying majority law and citing five state ethics opinions in accord with ABA Committee); see also New York v. Solvent Chemical Co., 166 F.R.D. 284, 289-90 (W.D.N.Y. 1996) (payment of a reasonable hourly fee to fact witness not improper in and of itself).

This view is not uniformly held. Several court decisions have held under particular

³Further discussion of this ABA Opinion is contained in Section IV. C., *infra*.

circumstances that a party may not pay a fact witness for time expended in the preparation of his testimony. Fact Witnesses Article (citing inter alia Hamilton v. General Motors Corp., 490 F.2d 223 (7th Cir. 1973) and Alexander v. Watson, 128 F.2d 627 (1942)).⁴ The primary concern expressed by the courts and bar associations that espouse the minority view is that compensation may effectively buy the witness' cooperation and could subvert the administration of justice, and that testimony should be considered a civic obligation. The minority view has been criticized for failing to grasp the realities of modern day civil litigation. See Elizabeth J. Sher & Ronald D. Coleman, Court Nixes Fees for Fact Witnesses, THE NATIONAL L.J., vol. 20, no. 4 (Sept. 22, 1997).

This Committee believes that the reasoning of the majority view as illustrated by the ABA Committee's opinion in Ethics Formal Op. 96-402 at 1 (Aug. 2, 1996) is sound, and should apply in connection with the present inquiry. The minority view ignores the economic reality of asking a fact witness such as Witness B to direct and devote a substantial amount of his time to the Delaware litigation. The Committee believes the concept of compensating a witness for the reasonable value of his lost time includes a concept of lost economic opportunity. With respect to Witness B, the facts presented assume his participation as a fact witness in the Delaware Trial will result in a substantial lost economic opportunity, and, moreover, that loss can be reasonably measured. The Committee believes that compensating Witness B for the reasonable value of his lost time, and at his normal rate for consulting work, is well within the proper scope of Rule 3.4(b). The Attorney may advise the Client Company to compensate Witness B at his normal rate for consulting work without violating the DRPC.

⁴At least some of this decisional case law presents not a minority view, but merely a different result based upon the particular facts of those cases.

C. DISCUSSION RELATING TO PROPOSED COMPENSATION FOR
REASONABLE VALUE OF LOST TIME FOR WITNESS A

The issue of compensation for Witness A presents a much more difficult situation. Witness A is retired, has been for more than three and one half years, and is presently unemployed. The Attorney desires to have the Client Company reimburse Witness A for the reasonable value of his lost time while Witness A is prepared by the Attorney and his law firm for the Delaware Trial. That value would be calculated by paying him at the same rate as he was paid when he was last an employee of the Client Company.

The ABA Committee has considered, in general, the issue of compensating a witness who is currently retired as follows:

As long as it is made clear to the witness that the payment . . . is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony in litigation in which the witness is not a party, the Committee is of the view that such payments do not violate the Model Rules.

Nevertheless, the amount of such compensation must be reasonable, so as to avoid affecting, even unintentionally, the content of a witness's testimony. What is a reasonable amount is relatively easy to determine in situations where the witness can demonstrate to the lawyer that he has sustained a direct loss of income because of his time away from work - as, for example, loss of hourly wages or professional fees. In situations, however, where the witness has not sustained any direct loss of income in connection with giving, or preparing to give, testimony - as, for example, where the witness is retired or unemployed - the lawyer must determine the reasonable value of the witness's time based on all relevant circumstances.

ABA Ethics Formal Op. 96-402, at 3.

The Committee again agrees with these principles stated by the ABA Committee above. Applying those principles to the facts presented by the Attorney with respect to Witness A, the Committee has been presented with no facts to suggest that Witness A will lose an economic opportunity in spending time preparing for his testimony and testifying at the Delaware Trial. The

Committee has not been informed as to Witness A's present source(s) of income, and/or how taking the considerable time to assist the Client Company in the Delaware Trial would affect those source(s) of income. Moreover, even if the Committee were presented with facts to support a conclusion that Witness A's present source(s) of income would be prejudiced, the Committee has been presented with insufficient facts to determine what the reasonable value of Witness A's lost time should be. For instance, no facts have been presented concerning the extent of any economic loss, or that if Witness A re-entered the market, he would command the same rate of compensation that he did when he retired over three years ago.

While certainly the travel to the United States, and time away from his retirement is a material inconvenience to Witness A, he will be reimbursed for all related expenses, and the inconvenience should not in and of itself be deemed a special circumstance justifying compensation at the same rate of compensation he earned before he retired.⁵

Under these circumstances, the Committee shares the concern of the ABA Committee that Witness A will not sustain any direct loss of income in connection with giving, or preparing to give, testimony, and that compensation of Witness A at his former (over three years ago) rate of compensation may be inappropriate. See also, Goldstein v. Exxon Research & Eng'g Co., 1997 WL 580599 at *3 (D.N.J. 1997) (corporate defendant could not pay a retired employee for time spent preparing to testify on facts within his personal knowledge); Colorado Bar Association Ethics Committee Formal Op. 103, at *5-6 (Dec. 19, 1998) (compensation should not make the witness "better off" than if he/she pursued other business opportunities). Therefore, based upon the facts

⁵It may be that Witness A should receive some reduced rate of compensation for the burden of devoting his time to prepare for the Delaware Trial rather than enjoying his retirement; however, that inquiry is not before the Committee.

presented, the Committee cannot conclude that compensation of Witness A at the same rate as he was paid when he was last an employee of the Client Company would not violate the DRPC.