

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion 1992-93/10
Reimbursement of Litigation Consultant's Attorney's Fees
July 14, 1993

RULE REFERENCES:

*Rule 1.5
*Rule 3.4(b)

SUBJECTS:

*Trial Conduct
*Witnesses

ANNOTATIONS:

A lawyer may reimburse the out-of-pocket costs of a fact witness or an expert witness, provided those costs are reasonably related to the litigations. (Rule 3.4(b))

A per diem fee for a fact witness (as opposed to an expert witness) may potentially violate Rule 3.4(b), unless such per diem was reasonably related to the witness's lost time. (Rule 3.4(b))

FACTS:

The inquiring attorney retained an individual, a former employee of the opposing party, as a consultant for a particular case because that individual possessed "valuable" information pertaining to the litigation. The attorney agreed to pay the consultant a per diem, plus expenses, while testifying. Opposing counsel unsuccessfully petitioned the trial court to hold the consultant in contempt for an alleged failure to comply with a subpoena. The consultant retained counsel to defend against the contempt claim and is seeking reimbursement of the out-of-pocket costs related to that defense.

QUESTION:

May an attorney reimburse an expert/consultant for attorney's fees the expert/consultant incurred in defending a contempt action arising out of the expert/consultant's involvement in the litigation?

RESPONSE:

In the main, this issue was addressed in a *Practical Ethics* article published in the *New Hampshire Bar News* on 8/20/92: "Compensation of Fact Witnesses: Rule 3.4(b) of the New Hampshire Rules of Professional Conduct." The article presented an excellent analysis of those circumstances when an attorney can compensate a fact witness. Therefore, that analysis will not be repeated here. However, it is clear that it is permissible, under Rule 3.4(b), to reimburse *any* witness for *out-of-pocket* expenses. The question then is whether the expert/consultant's attorney's fees were expenses which were reasonable in terms of the scope of the expert/consultant's employment in connection with the litigation.

The attorney should carefully review the attorney's fees presented by the expert/consultant for reimbursement and determine if they are reasonable in light of Rule 1.5. Given the Court's refusal to find the expert/consultant did not engage in misconduct, it appears that the attorney's fees are expenses which are reasonably related to the expert/consultant's efforts in the litigation.

The conclusion reached here is the same whether the witness is involved as a fact or occurrence witness or as an expert witness. See Rule 3.4(b).

Finally, although the question was not presented by the inquiring attorney, the payment of a per diem to a former employee of the opposing party raises a question as to whether the consultant retained by the attorney was an expert or a fact witness. If the consultant was fact or occurrence witness there is a potential violation of Rule 3.4(b) unless the per diem was reasonable compensation for the loss of the witness' time. See the analysis and conclusion contained in the above-referenced *Practical Ethics* article.