

# ETHICS ADVISORY OPINION

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## FROM THE STATE BAR OF NEW MEXICO'S ETHICS ADVISORY COMMITTEE

### Formal Opinion 2008-01

#### Topic: Paying an Expert Witness on a Contingency Fee Basis

**Rules Implicated:** Rule 16-304 NMRA 2008, Fairness to opposing party and counsel; Rule 16-804 (H) NMRA 2008, Misconduct.

At the time of publication of this opinion, the New Mexico Supreme Court is considering substantial revisions to the New Mexico Rules of Professional Conduct which may affect the analysis and conclusions expressed herein.

#### Question Presented:

May a lawyer pay an expert witness on a contingency fee basis?

#### Short Answer:

Whether the Rules of Professional Conduct prohibit a lawyer from paying an expert witness on a contingency fee basis depends on substantive law, law which has not yet been developed in New Mexico. The Ethics Advisory Committee recommends adoption of section 117 of *The Restatement (Third) of the Law Governing Lawyers* (2000) which prohibits payment of an expert witness on a contingency fee basis.

#### Scope Of Opinion:

A lawyer's obligation under a letter of protection is not addressed in this opinion.

#### Factual Background:

The inquiring lawyer posed the question in the abstract and did not reveal any facts concerning the circumstances under which the question arose.

#### Analysis:

Rule 16-304 (B) of the Rules of Professional Conduct is the applicable rule. It states that

**"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."**

The predecessor to Rule 16-304 (former Rule 7-109(C)) stated explicitly that "A lawyer shall not pay . . . compensation to a witness contingent upon the content of his testimony or the outcome of the case." The explicit prohibition of a contingency payment to a witness is conspicuously absent in the current rule. The requesting lawyer questions whether the absence of the explicit prohibition means that it is permissible to pay a witness on a contingency fee basis. The Committee believes that the rule change does not support such a conclusion because the current rule is clear that substantive law is to be consulted. California's Standing Committee on Professional Responsibility and Conduct

concluded that the wording, taken from the American Bar Associations' model rule 3.4 (b), leaves the matter up to individual states. See Cal. State Bar Formal Opn. No. 1997-149. In *Legal Ethics: The Lawyer's Deskbook On Professional Responsibility*, Chapter 3.4 (2007-2008) authors Ronald D. Rotunda and John S. Dzienkowski agreed, concluding that a state's substantive law concerning contingency payment is "incorporated by reference" in Rule 16-304 (B). The authors arrived at their conclusion by relying on the comment that accompanies the rule, a comment that also appears with New Mexico's Rule 16-304. It states that "the common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee." This Committee agrees that because the comment was adopted in New Mexico along with the rule itself, lawyers are to look to the substantive law of New Mexico to determine whether the "inducement" of a contingency fee is "prohibited by law."

Turning to substantive law in New Mexico, it is clear that paying a fact witness on a contingency basis is prohibited because NMSA 1978 §38-6-4 expressly states that a fact witness "shall be allowed no fees for services." To do so, therefore, would violate Rule 16-304 (B). Case law also specifically has declared that paying a fact witness contingent upon the content of the witness's testimony constitutes professional misconduct as defined in Rule 16-804 (H) of the Rules of Professional Conduct. Rule 16-804 (H) defines one type of misconduct as conduct "that adversely reflects on [the lawyer's] fitness to practice law." The New Mexico Supreme Court stated in *Matter of Anthony J. Ayala*, 102 N.M. 214, 216 (1985), that "by offering compensation to a witness contingent upon the content of the witness's testimony," the lawyer in that case had "engaged in conduct which adversely reflects upon his fitness to practice law." Consequently, to pay a fact witness contingent upon the content of the testimony is to engage in professional misconduct under Rule 16-804 (H).

On the other hand, payment of an expert witness on a contingency basis is not explicitly addressed in NMSA 1978 §38-6-4 inasmuch as the statute is open to differing interpretations. There has been no case law clarifying this aspect of the statute. Consequently, it is currently unknown whether paying an expert witness on a contingency fee basis violates Rule 16-304 (B) of the Rules of Professional Conduct.

The Committee's review of the literature reveals that a number of other jurisdictions have decided in their case law to prohibit the practice.<sup>1</sup> In Massachusetts, an expert may not be paid a fee contingent on the outcome of a case because it might improperly induce the expert to testify falsely in order to earn a higher fee. (See *New England Tel. & Tel. Co. v. Bd. of Assessors*, 468 N.E. 2d 263 (Mass. 1984)). The Massachusetts court averred in 1984 that "[t]he majority rule in this country is that an expert witness may not collect compensation which by agreement was contingent on the outcome of a controversy." In Tennessee, a contingency fee contract for services of a physician acting as a medical-legal expert is void as against public policy. (See *Swafford v. Harris*,

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<sup>1</sup> Jurisdictions that have maintained the wording of former Rule 7-109(C) in their rules of professional conduct do not have case law concerning the issue because the issue does not arise. Rule 7-109 (C) clearly prohibits the payment of any witness, fact or expert, on a contingency fee basis obviating the need for clarifying substantive law.

967 S.W.2d 319 (Tenn. 1998)). In 1997, the Colorado Supreme Court declared that it is “a settled principle of American law [that] expert witnesses should not receive contingent fees.” That court went on to say, noting a lack of case law regarding the question, that “case law on the subject is sparse because this precept has such wide acceptance.” (*City and County of Denver, Colo. v. Board of Assessment Appeals of State of Colo.*, 947 P.2d 1373 (Colo. 1997)). Similarly, the practice is prohibited by case law or rule in New York, Montana, Michigan, Florida, Maine and Pennsylvania. Washington D.C. divides the line more finely. Its rule allows an expert witness to be paid a fee contingent on the outcome of the litigation, but not as a percentage of the amount actually recovered.

The Ethics Advisory Committee agrees that contingency fee payments to an expert witness should be prohibited for the same reasons expressed by other states. The Committee agrees with the Colorado Supreme Court when it said that “[i]f the expert’s payment is contingent on the ultimate outcome of the case, the witness’ own interest will become intensified, and the reliability of the testimony and impartiality of the expert’s position will be significantly weakened.” (*City and County of Denver, Colo. v. Board of Assessment Appeals of State of Colo.*, 947 P.2d at 1379.)

In the absence of substantive law in New Mexico, the Ethics Advisory Committee therefore recommends adoption of *The Restatement (Third) of the Law Governing Lawyers* (2000) which forbids payment of a contingency fee to any witness. Section 117 states:

**Compensating a Witness**

A lawyer may not offer or pay to a witness any consideration:

- (1) in excess of the reasonable expenses of the witness incurred and the reasonable value of the witness’s time spent in providing evidence, except that an expert witness may be offered and paid a noncontingent fee;
- (2) contingent on the content of the witness’s testimony or the outcome of the litigation; or
- (3) otherwise prohibited by law.

While New Mexico’s substantive law already clearly prohibits payment of a fact witness on a contingency fee basis, adoption of *The Restatement (Third) of the Law Governing Lawyers* (2000) §117 would make it clear that paying an expert witness on a contingency fee basis is also prohibited as a matter of substantive law. In turn, because the practice would be prohibited by law, it would also be clear that to do so would also violate Rule 16-304 (B) of the Rules of Professional Conduct.

**Conclusion**

To pay a fact witness on a contingency fee basis violates Rule 16-304 (B), and Rule 16-804 (H) as interpreted. Whether paying an expert witness on a contingency fee basis violates Rule 16-304 (B) is currently unknown because New Mexico has not yet declared in its substantive law whether the practice is permitted or prohibited. It is the considered formal opinion of the State Bar’s Ethics Advisory Committee that New Mexico should adopt section 117 of *The Restatement (Third) of the Law Governing Lawyers* (2000) as its substantive law to fill that void. By doing so, lawyers practicing in New Mexico will have clear guidance that to pay an expert witness on a contingency fee basis would be to violate Rule 16-304 (B) of the Rules of Professional Conduct.