

**CONTINGENT FEE CONTRACTS WITH ORGANIZATIONS
OR INDIVIDUALS OBTAINING EXPERT WITNESSES**

The Lawyer Disciplinary Board has been asked to determine whether Rule 1.8(k) of the Rules of Professional Conduct prohibits a lawyer from using, or having his client use, the services of an organization which obtains a medical expert, generally in personal injury cases. The organization enters into a 15% contingency fee contract with the client. The organization then pays the medical expert a noncontingent fee for his or her work.

Rule 1.8(k) of the Rules of Professional Conduct states:

Rule 1.8. Conflict of interest: Prohibited transactions.

(k) A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness or to anyone referring a lawyer to a witness, contingent upon the content of the witness's testimony or the outcome of the case. But a lawyer may advance, guarantee, 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.
- (3) a reasonable fee for the professional services of an expert witness.
[emphasis supplied]

The specific wording of this Rule appears to be unique among those jurisdictions which have adopted the American Bar Association's Model Rules of Professional Conduct.

Prior to adoption of the Model Rules by West Virginia, DR7-109(C) of the West Virginia Code of Responsibility provided:

A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation 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.
- (3) a reasonable fee for the professional services of an expert witness.

The ABA's Model Rules replaced DR7-109(C) with Rule 3.4(b), which provides:

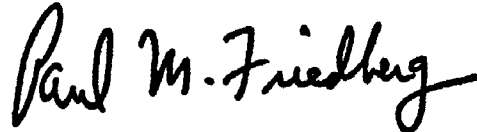
A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

The Comment to Rule 3.4(b) states, in pertinent part: "The common law rule in most jurisdictions is that it is improper . . . to pay an expert witness a contingent fee."

West Virginia's Rule 1.8(k) not only specifically retained the language of DR7-109(C) of the Code of Professional Responsibility, it broadened the prohibition to include anyone referring a lawyer to a witness. The Lawyer Disciplinary Board knows of no other jurisdiction which has this specific language. Nevertheless, both Pennsylvania and South Dakota do not permit such arrangements for expert testimony, even under the Model Rules. Other jurisdictions permit such arrangements because the organization or individual obtaining the expert witness would not actually be testifying and the client would contract directly with the organization so that the lawyer would not be sharing his or her legal fees with a non-lawyer. *See e.g., North Carolina Opinion 340 (10/18/83); Idaho Opinion 128 (9/23/89).*

Although the service provided by such organizations may be beneficial to those who cannot otherwise afford to obtain an expert witness, the arrangement violates the literal language of Rule 1.8(k) of the Rules of Professional Conduct. Any lawyer arranging or acquiescing in such an arrangement will be in violation of the Rules of Professional Conduct.

APPROVED this 17th day of October, 1997.



Paul M. Friedberg, Chairperson
Lawyer Disciplinary Board
State of West Virginia