



ETHICS ADVISORY OPINION

08-05

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

Factual Background:

Lawyer A represents Defendant in a pending criminal action in South Carolina. Defendant is a former employee of Company and is accused of fraud in connection with Defendant's employment with Company. Company is cooperating with law enforcement in connection with the investigation. Witness B is also a former employee of Company who possesses information regarding material facts relating to the case. Witness B is also expected to testify at the trial at the request of the government.

Witness B requested and obtained counsel (Lawyer B) to represent Witness B in connection with the investigation. Witness B was interviewed by law enforcement officers. Company previously paid Lawyer A's fees and expenses for representing Witness during the interview with law enforcement.

Lawyer A contacted Lawyer B to arrange for an interview with Lawyer A and Lawyer's A's investigator. Lawyer B advised Lawyer A that Witness B is reluctant to be interviewed without representation of counsel and that Witness is not willing to pay for Lawyer B to represent Witness during the interview. Lawyer A has requested that Company pay Lawyer B to represent Witness during the interview, and Company has refused.

Lawyer A is considering advising Defendant to pay Lawyer B's reasonable fees and expenses for representing Witness B during the interview. Lawyer A would pay the fees and expenses from Lawyer A's trust account directly to Lawyer B's trust account solely for the purpose of providing Witness B's legal advice in connection with the interview. Lawyer A is further unaware of any law which prohibits payment of Witness B's lawyer under these circumstances.

Question Presented:

May one firm advance or pay the fees of another firm that represents a witness during an interview prior to a criminal trial in which the witness is expected to testify as a government

witness?

Summary:

To the extent that payment of witness fees for representing a client from another may be legally permissible, there would appear to be no ethical prohibition upon such payment being made under the facts presented provided the provisions of Rules 1.8(e), 1.8(f) and 3.4 (b) are followed.

Opinion:

SC Rules of Professional Conduct Rule 1.8(e) allows for the advancement of expenses of litigation and Rule 1.8(f) provides that a lawyer may accept compensation for representing a client from another as long as: (1) the client consents; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to the client is protected as required by Rule 1.6.

Rule 3.4(b) states a lawyer shall not counsel or assist another person to falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. Rule 45(b)(1) of the South Carolina Rules of Civil Procedure governs the amount of fees which are to be paid to witnesses. Considering all of these rules, it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law.

The American Bar Association (ABA) in its Formal Opinion 96-402 also considered an inquiry relating to the payment of witness fees. The ABA committee found that, as long as it is made clear to the witness that the payment is not being made for the substance or the efficacy of the witness's testimony, and 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, there was no violation of the ethical rules.

Therefore, to the extent that payment of witness fees for representing a client from another may be legally permissible, there would appear to be no ethical prohibition upon such payment being made under the facts presented provided the provisions of Rules 1.8(e), 1.8(f) and 3.4 (b) are followed.