

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Opinion No. 2011-01
Issued March 16, 2011**

FACTS

The inquiring attorney represents a proponent of a will in a contested probate matter. The inquiring attorney intends to call the treating physician of the testator as a fact witness at the trial. The inquiring attorney will also seek the expert opinion of the treating physician on the issue of the testator's competency. The inquiring attorney proposes to compensate the physician for the physician's expert testimony.

ISSUE PRESENTED

Is it a violation of the Rules of Professional Conduct to compensate a treating physician for his or her expert testimony at trial where the physician will also provide factual testimony?

OPINION

No. Compensating a treating physician for his or her expert opinion at trial is not an inducement to a witness which is prohibited by Rule 3.4(b) of the Rules of Professional Conduct, where the treating physician will also testify as a fact witness.

REASONING

Rule 3.4 (b) of the Rules of Professional Conduct states that a lawyer shall not

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

The commentary to Rule 3.4 explains:

[3]With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. 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.

In the instant inquiry, the inquiring attorney plans to call the testator's treating physician as a fact witness and also as an expert witness. The inquiring attorney proposes to compensate the physician for his opinion testimony. The Panel is of the opinion that the inquiring attorney may properly compensate the treating physician for his expert opinion. A non-party expert cannot be compelled to provide opinion testimony against his or her will. See Sousa v. Chaset, 519 A.2d 1132, 1136 (R.I. 1987); Ondis v. Pion, 497 A.2d 13, 18 (R.I. 1985). In Sousa, the plaintiff sought to subpoena a urological expert who did not want to testify. Affirming the trial court who sustained the defendant's objection, the Rhode Island Supreme Court stated that "[a]n expert who has not been engaged, but only subpoenaed, cannot be compelled to give opinion testimony against his or her will". Souza at 1136.

In Ondis, the plaintiff subpoenaed a plastic surgeon who testified factually about the plaintiff's injuries that he had observed and had treated. Ondis at 18. The surgeon declined to offer any opinions about the medical prognosis relating to the injuries. Id. Holding that the trial court did not err in refusing to compel the physician to testify, the Court stated:

It is the obligation of a party who desires expert testimony to obtain the services of a qualified person on a voluntary basis. We believe that compelling expert testimony would in essence involve a form of involuntary servitude that should normally not be inflicted upon a person merely because of his professional expertise.

The substantive law permits the inquiring attorney to compensate a treating physician for his or her opinion testimony. Accordingly, the Panel concludes that compensating a treating physician for his or her expert opinion at trial is not an inducement to a witness which is prohibited by Rule 3.4(b), where the treating physician will also testify as a fact witness.