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OPINION

A word to the wise about payments to experts

By Thomas E. Peisch

With a $75 million payment and a deferred prosecution agreement finalized, the tawdry history of the New York-based Milberg Weiss law firm appears at an end. Four Milberg Weiss senior partners now stand convicted of federal fraud charges, and the law firm itself escaped conviction only by agreeing to this significant payment and to a dramatic change in its operations.

Although there has been widespread publicity regarding the seemingly endless crookedness that was Milberg Weiss' operation, one feature of it — paying contingent compensation to expert witnesses — appears to have escaped notice.

This article examines that aspect of the case, summarizes the applicable legal authority and points out practice pitfalls for Massachusetts lawyers who retain expert witnesses.

The Milberg Weiss-Torkelsen arrangement puts into sharp focus the force of Rule 3.4(g)(3), and it should serve as a reminder to all lawyers never to let a relationship with an expert develop into a contingent one.

Background

In its heyday, Milberg Weiss was the leading plaintiffs' class action/securities law firm in the country. Founded in the 1960s, it boasted of having recovered billions of dollars in various forms of securities lawsuits. Along the way, the firm reportedly earned more than $250 million in legal fees.

All this came undone as the result of lengthy grand jury proceedings in California, which began when a Milberg Weiss client, a physician with unrelated criminal problems of his own, in essence turned Milberg Weiss in to the authorities.

As it turned out, Milberg Weiss' operations were infected by corruption at all levels, including:

- Paying individuals to act as so-called "lead" plaintiffs in securities class action proceedings so that Milberg Weiss was able to attain lucrative "lead counsel" status. One Milberg Weiss partner allegedly had a safe full of cash in his office for that purpose.
- Aiding and abetting the making and filing of false statements in those proceedings, filings which denied the illegal payments.
- Maintaining a stable of illegally paid claimants to act as "repeat" plaintiffs.
- Waging a campaign of intimidation against a prominent defense expert, which backfired into a $50 million loss for Milberg Weiss in a case brought against it by the expert.

The amounts of money involved were hardly trifling. One account totaled the illegal payments to the "lead" plaintiffs at $11 million. As noted, Milberg Weiss is alleged to have "earned" $250 million in fees. (For a fuller account of the extent of the corruption, see the Second Superseding Indictment in *United States v. Milberg Weiss LLP*,

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U.S. District Court for the Central District of California, 05-587(D)-JFW.)

Role of expert witness
John Torkelsen

In the course of investigating the misconduct of Milberg Weiss and its "clients," the authorities discovered an additional corrupt relationship — the one between Milberg Weiss and its leading "damages" expert, an individual who rendered "opinions" in dozens, if not hundreds, of Milberg Weiss cases.

John B. Torkelsen is a graduate of Princeton University and Harvard Business School. For many years he provided consulting and technical services to Milberg Weiss in shareholder derivative and securities class actions. He also submitted affidavits and invoices in connection with fee applications in courts all over the country.

It turned out that many of these filings were false and fraudulent in that they failed to disclose that Torkelsen was receiving compensation for expert witness services contingent on the result in that particular case.

Not only was this arrangement covered up from the reviewing courts (and defense counsel, who might have used it as fertile cross-examine fodder), it violated the applicable disciplinary rules.

In February 2008, Torkelsen struck a deal with prosecutors in Pennsylvania and California by the terms of which he agreed to plead guilty to perjury charges and admitted to a variety of other criminal misconduct. It appears that he was poised to testify against Milberg Weiss had that case gone to trial.

Rules of professional conduct

Many attorneys are unaware that entering into contingent payment arrangements with experts violates Rule 3.4 of the Massachusetts Rules of Professional Conduct, which is codified within SJC Rule 3:07.

That rule, which is entitled "Fairness to Opposing Party and Counsel," provides in section (g) that a lawyer may not "pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case."

The rule, which was previously embodied as DR 7-109(C), was explicitly interpreted in *New England Tel. & Tel. Co. v. Bd. of Assessors of Boston*, 392 Mass. 865 (Mass. 1984), to mean that it was an ethical violation to pay a contingent fee to an expert witness. *Id.* at 871.

In recognizing the prohibition, the court noted 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." *Id.* at 872 (citing *Weinberg v. Magid*, 285 Mass. 237, 239 (1932); *Belfonte v. Miller*, 212 Pa. Super. 508, 515, 243 A.2d 150 (1968); Restatement of Contracts §552(2)(1932) 14 S. Williston, Contracts §1716 (3d. 1972)).

The prohibition on paying experts a contingent fee was also recognized in the ABA Commission on Ethics and Professional Responsibility, Formal Opinion 87-354 (1987).

Rule 3.4 contains a couple of important exceptions of which careful lawyers should be mindful.

Lawyers are expressly permitted by the rule to "advance, guarantee or acquiesce in the payment of" the expert's "reasonable" fee for professional services. In the case of a witness (experts and non-experts alike), the lawyer may also advance expenses reasonably incurred by a testifying witness or for "reasonable compensation to a witness for loss of time in attending and testifying."

The ethical underpinning for this rule as it relates to expert witnesses is obvious: Expert witnesses are presented to fact-finders in a materially different way. They are permitted to render opinion testimony, frequently as the ultimate issue in the case. See *Simon v. Solomon*, 385 Mass. 91, 105 (1982) (stating "expert testimony on matters within the witness's field of expertise is admissible whenever it will aid the jury in reaching a decision, even if the expert's opinion touches on the ultimate issues that the jury must decide").

As a practical matter, expert witnesses may be viewed as officers of the tribunal whose credibility may affect the result in a dramatic way. To permit contingent payments not only would destroy their credibility, but also would call into question the entire landscape that permits them to render opinions.

The Milberg Weiss-Torkelsen arrangement puts into sharp focus the force of Rule 3.4(g)(3), and it should serve as a reminder to all lawyers never to let a relationship with an expert develop into a contingent one.

While the misconduct of Milberg Weiss and Torkelsen was worsened by the fact that it was accompanied by perjury in various lawsuits, any rules violation by itself constitutes grounds for professional discipline of the involved lawyers. See Mass. R. Prof. C. 8.4.

No lawyer should permit cash flow or other financial pressures to result in such a disciplinary predicament.

The lesson in all of this is clear: Pay your expert on an ongoing basis or insist that your client do so at the outset of the engagement. That way you will avoid harsh and unpleasant consequences. MLW