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New Jersey Supreme Court Sets Clear Conditions That Would Allow a Company to Pay Attorney Fees for Employees Who Are Targets and Potential Witnesses in a Grand Jury Proceeding

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Lawyers for the Profession® Alert

In re State Grand Jury Investigation, 200 N.J. 481, 983 A.2d 1097 (N.J. 2009)

Brief Summary
The Supreme Court of New Jersey held that the corporate target of a grand jury investigation may ethically pay for legal representation of employees who are targets and potential grand jury witnesses, provided six conditions are met.

Complete Summary
During a grand jury investigation of a company that required testimony from the company's employees, the company unilaterally selected and paid for lawyers to represent each of the employees. Some of the employees were also targets of the investigation.

The company told the employees that if they did not accept the appointed lawyer, the employees could choose to pay for their own counsel. The company also told the employees that it reserved the right to stop paying for representation at any time. The state moved to disqualify the employees' counsel, contending that this arrangement violated multiple Rules of Professional Conduct (RPCs). The trial court denied the motion, but modified the arrangement to further protect the employees' interests. The New Jersey Supreme Court affirmed.

The state first argued that a per se conflict exists when the target of a grand jury proceeding retains counsel for the target's employees who are potential grand jury witnesses. The high court noted the appeal of this argument and cited precedent that appeared to directly support the state's position. But those cases preceded New Jersey's adoption of the RPCs. Citing RPCs 1.7(a)(2), 1.8(f) and 5.4(c), and seeking to synthesize those related provisions, the court came up with six conditions that must be met in third-party payer arrangements. Although the court approved the company's arrangement as modified by the trial court, it noted that the arrangement did not perfectly comply with some of the following six conditions:

1. The client must give informed consent to the arrangement;
2. The third-party payer is prohibited from in any way directing, regulating or interfering with the lawyer's professional judgment;

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3. There cannot be a current attorney-client relationship between the lawyer and the third-party payer;
4. The lawyer is prohibited from communicating with the third-party payer concerning the substance of the representation, including careful redaction of billing information;
5. The third-party payer must timely pay for the representation, consistent with how it pays its own counsel;
6. Once the third-party payer commits to pay for representation, it cannot cease paying for representation without leave of court and prior written notice to the attorney and client.

The company's arrangement did not meet the informed consent requirement, the court held, because the company unilaterally selected counsel in a "take it or leave it" manner. But the court chose to approve the underlying arrangement because the employees had certified to the trial court that they were satisfied with their counsel.

The arrangement generally complied with the second condition, but the court opined that future retention letters should use the specific language in condition two.

Regarding the fourth condition, the company's arrangement did not expressly prohibit counsel from sharing confidential information with the company, but the trial court had imposed additional restrictions. Namely, all billings sent to the company had to have any "detail information" redacted. *Id.* at 498. Based on the trial court's modification, the Supreme Court held this aspect of the arrangement complied with the fourth condition. The court noted future retention letters should expressly prohibit lawyers from disclosing the substance of the representation to the third-party payer.

Finally, the court held that leave of court was required before the company could discontinue payment.

Significance of Opinion

This opinion lays out conditions for creating an ethical third-party payer arrangement between a company and its employees in a grand jury investigation. The opinion makes clear the importance of the terms of the retention agreement and recognizes the authority of a trial judge to modify the terms of a retention agreement to make it conform to the requirements of the RPCs. The court also clarifies that these steps apply regardless of whether the third-party payer itself is the target of a grand jury proceeding.