

77**PARTICIPATION WITH MEDICAL-LEGAL
CONSULTING FIRM: CONTINGENT FEE**

Adopted March 19, 1988.

Introduction and Scope

The Colorado Bar Association Ethics Committee is aware of concern by members of the bar about the propriety of using medical-legal consulting firms in medical malpractice and personal injury cases on a contingent fee or a modified contingent fee basis. The Committee has received a number of inquiries requesting the Committee's opinion on whether such contingent fee and modified contingent fee contracts are ethically permissible and whether attorneys should enter into such contracts. The Committee is aware that members of the bar are being solicited to use such medical-legal consulting firms on a contingent fee or modified contingent fee basis. The Committee has reviewed several versions of contingent fee and modified contingent fee contracts submitted to members of the bar by such medical-legal consulting firms.

This opinion is offered in order to provide guidance in this area of concern. Whether a lawyer violates the Code of Professional Responsibility by recommending, participating in, or acquiescing in the use of a medical-legal consulting firm on a contingent fee or modified contingent fee basis depends upon all the facts and circumstances of the particular case. This Committee does not undertake to resolve factual disputes. However, the Committee feels that the use of medical-legal consulting firms on a contingent fee or modified contingent fee basis poses a number of ethical considerations and risks for the lawyer.

Syllabus

The use of a medical-legal consulting service on a contingent fee or modified contingent fee basis in a medical malpractice or personal injury case raises serious ethical concerns and may violate the Code of Professional Responsibility in several areas. These areas include: (1) whether the lawyer's fee is excessive, (2) whether expert witnesses are compensated contingent upon the content of their testimony or the outcome of the case, (3) whether restrictions on the selection of expert witnesses in the future affect the lawyer's obligations to future clients, and (4) whether the arrangement erodes the lawyer's exercise of independent professional judgment.

Facts

The several versions of contingent fee and modified contingent fee contracts reviewed by the Ethics Committee vary somewhat in their terms and provisions. However, they contain certain common elements.

The medical-legal consulting firm ("consultant") offers to perform certain technical services for the plaintiff in a medical malpractice or personal injury case. There is a fixed fee for an initial evaluation of the case and, if the case is deemed meritorious, the consultant may perform additional services in return for a certain percentage of the plaintiff's gross recovery.

These additional services, performed by one of the consultant's directors, may include medical research, analysis of medical records, assisting plaintiff's counsel with discovery on the medical issues, formulating questions for the medical experts and defendants to answer, and assisting plaintiff's counsel during depositions and at trial. The director does not testify at any time in the proceeding.

In addition, the consultant agrees to use its best efforts to locate expert witnesses to review plaintiff's case, prepare written reports and, if necessary, testify in deposition and at trial. These expert witnesses are from the consultant's independent consulting staff. According to the consultant, they are not consultant's employees and have no knowledge of the contract between the consultant and the plaintiff.

The plaintiff must pay an hourly rate for the services of the expert witnesses, with certain hourly minimums. Such fees are to be paid in advance and are to be made payable to the expert witnesses.

However, they are to be paid through the consultant. The contracts state that the expert witnesses are not paid contingent on plaintiff's recovery. In addition, the plaintiff must pay all expenses of the expert witnesses and medical director, such as transportation, meals and lodging.

Most of the contracts specify a percentage of 20 percent to be paid to the consultant, although some are higher. They also specify that they are completely unrelated to any contract for services and expenses which the plaintiff may have with the attorney, and they specify that no costs are to be deducted from the consultant's fee. One of the modified contingent fee contracts included the provision that any amounts paid by the defendants and designated as attorney fees would be included in the gross recovery in calculating the consultant's percentage.

The contingency fee or modified contingency fee contract is entered into between the plaintiff and the consultant; however, plaintiff's counsel is also required to sign the contract agreeing to distribute the funds of any recovery pursuant to the contract. In some of the contracts, plaintiff's counsel is also required to agree that each expert witness is a trade secret of the consultant and that plaintiff's counsel will not contact or use that expert witness on any other case without prior written permission of the consultant.

Opinion

The Code of Professional Responsibility provides: "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." DR 2-106(A). Plaintiff's counsel in a medical malpractice or personal injury case usually handles such a case for a contingent fee of at least 30 percent. If the consultant collects a contingent fee of at least 20 percent, and neither the lawyer's fee nor the consultant's fee is reduced by the other, as recited in the contracts reviewed by the Committee, the total contingent fees would be at least 50 percent. This leaves the client at most 50 percent of the total recovery, less reimbursable expenses.

"A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." DR 2-106(B). Factors to consider in determining the reasonableness of a fee include, among others, the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the experience, reputation and ability of the lawyer; and whether the fee is fixed or contingent. DR 2-106(B).

In medical malpractice and personal injury cases, the lawyer customarily selects expert witnesses and works with them in evaluating and preparing the case. When the consultant undertakes to provide services which the lawyer customarily provides, the lawyer's service is reduced. The lawyer's contingent fee, which might otherwise be considered reasonable, may become unreasonable in light of the reduced services provided by the lawyer. *See*, ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 87-354 (1987).

Although a lawyer may advance, guarantee or acquiesce in the payment of a reasonable fee for the professional services of an expert witness, 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. DR 7-109(C). The contingent fee and modified contingent fee contracts reviewed by the Committee state that the expert witnesses are not paid contingent upon the plaintiff's recovery, and are not aware of the contract between the consultant and the plaintiff. However, the plaintiff is to send payment for the expert witnesses to the consultant, who presumably forwards the payment on to the expert witnesses.

It appears that the expert witnesses, who are on the consultant's independent consulting staff, may be used regularly by the consultant and may be substantially dependent on the consultant. This is particularly true in light of a contract provision prohibiting plaintiff's counsel from contacting the same expert witnesses in other cases without the consultant's written consent. Furthermore these expert witnesses may be aware of the fact that the consultant contracts with plaintiffs on a contingent fee basis. The lawyer should be aware that such an arrangement could be construed as payment to an expert witness contingent upon the content of his testimony or the outcome of the case, depending upon the facts and circumstances of the particular arrangement. *See*, ABA Formal Opinion 87-354 (1987). The lawyer would not be able to

avoid responsibility for such payment by claiming that the contract is between the consultant and the plaintiff only. DR 7-109(C) prohibits the lawyer from paying, offering to pay or acquiescing in the payment of such compensation. Furthermore, a lawyer shall not circumvent a disciplinary rule through the action of another. DR 1-102(A)(2).

A lawyer should exercise independent professional judgment on behalf of a client. Code of Professional Responsibility, Canon 5. A lawyer shall decline proffered employment or discontinue employment by multiple clients if the exercise of his independent professional judgment on behalf of a client will be, or is likely to be, adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests. DR 5-105(A) and (B). Some of the contracts reviewed by the Committee require the plaintiff's attorney to agree not to contact or use an expert witness supplied by the consultant on any other case without prior written permission of the consultant. This presents a potential conflict of interest with respect to the lawyer's representation of other clients in medical malpractice or personal injury cases. By agreeing to this condition, the lawyer has restricted the options of other clients with respect to the use of expert witnesses. As a practical matter, by agreeing to this restriction, the lawyer may have forced other clients to contract with the consultant or to not use certain expert witnesses, even though they may be particularly well-qualified or the only experts available on the matters at issue. *See*, ABA Formal Opinion 87-354 (1987).

Furthermore, the lawyer's exercise of independent professional judgment may be eroded by the agreement with the consultant. The consultant retains substantial authority with respect to the choice of experts. The plaintiff is committed to pay the consultant a percentage of any recovery before plaintiff's counsel knows who the experts will be or the substance of their opinions. The interests of the consultant, the substantial authority retained by the consultant, and the financial burden on the plaintiff could influence the lawyer in advising the plaintiff regarding settlement or continued prosecution of the case and may erode the lawyer's independent professional judgment. Furthermore, if the attorney is dissatisfied with the experts provided by the consultant, theoretically the attorney is free to retain other experts unrelated to the consultant. However, this may be impractical when the plaintiff has agreed to pay the consultant a percentage of the total recovery even though experts provided by the consultant are not used. Thus, the contingent fee and modified contingent fee contracts may, as a practical matter, erode the lawyer's exercise of independent professional judgment in the selection and use of experts. *See*, ABA Formal Opinion 87-354 (1987). Ethical Consideration 5-1 states:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Conclusion

In conclusion, whether a lawyer violates the Code of Professional Responsibility by recommending, participating in or acquiescing in the use of a medical-legal consulting firm on a contingent fee or modified contingent fee basis depends upon all the facts and circumstances of the particular case. However, there are substantial risks for the lawyer and possible violations of the Code of Professional Responsibility in any given case. These include questions as to the reasonableness of the lawyer's fee, compensation to expert witnesses contingent upon the content of their testimony or the outcome of the case, restrictions affecting the lawyer's obligations to other clients, and erosion of the lawyer's exercise of independent professional judgment.