

FORMAL OPINION NO. 104

The Ethics Committee of the Idaho State Bar has been requested to issue an opinion on the following:

May a lawyer contract with a person or entity not a lawyer when the person or entity proposes to locate and provide expert witnesses to the lawyer and to charge for its services a fee contingent upon the outcome of the litigation?

Background

An entity (finder) has submitted to an Idaho lawyer a proposed contract in which the finder offers to make available medical expert witnesses. By the terms of the contract the witnesses, if utilized by the lawyer, are paid a fixed fee, the amount of which depends upon the type of services provided, whether it be review of the case, testimony at deposition, or testimony at trial. The finder proposes to charge for its services a fixed fee at the time the identity of the witness is disclosed to the lawyer, and to charge an additional service charge of five percent (5%) of the gross recovery received by settlement, judgment or other successful disposition of the case.

Answer

The proposed contract does not contemplate the division of legal fees with a non-lawyer and would thus not run afoul of DR 3-102. However, DR 7-109(C) provides that 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."

In our opinion, the payment of a contingent fee to a finder is the functional equivalent of payment of a contingent fee to a witness. The purpose of DR 7-109(C) is to insulate witnesses from financial incentives to testify in a particular fashion. The judicial system depends on testimony which is unadulterated by a motive

to do anything other than to testify truthfully. The policy behind this disciplinary rule is articulated by Ethical Consideration 7-28:

"Witnesses should always testify truthfully, and it should be free from any financial inducement which might tempt them to do otherwise."

Here the finder has an incentive to influence the testimony of the witness. Presumably, favorable testimony from the witness will result in a larger fee from the finder. The witness is thus not "free from financial inducement."

Although a contingent fee is not being paid directly to the witness, it is being paid to an entity which has an interest in influencing the testimony of the witness. There is little difference between influencing the witness by direct payment of a contingent fee and paying a contingent fee to an intermediary who, in turn, has a financial incentive to influence the testimony.

There has been some suggestion that DR 7-109(C) offends the equal protection clause of the Fourteenth Amendment to the United States Constitution because it precludes an indigent person from obtaining a hearing on the same basis as a person of more wealth. See, Terson v. Association of the Bar of the City of New York, 414 F.Supp. 139 (1976). However, in the absence of a judicial determination which would be binding on this committee, it is my opinion that DR 7-109(C) condemns the proposed agreement.

DATED this 24th day of February, 1981.