FORMAL ETHICS OPINION
No. 128

The Ethics Committee has been requested to render an opinion on the following question:

> May a client contract with a person or entity, who is not a lawyer to both find and pay an expert witness to testify on behalf of the client, when the person or entity who finds the witness will be paid based upon a contingent fee?

The expert witness will be paid, regardless of the outcome of the litigation by the person or entity, herein the "Finder", who provides the expert witness. However, the Finder will be paid by the client, based upon the outcome of the litigation by receiving a percentage of the monies recovered.

Under the prior Disciplinary Rules, a very similar arrangement was, in the opinion of the Committee, unethical. Formal Opinion No. 104. The basis for the Committee's decision was that the Disciplinary Rules said a lawyer could 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." The Committee's opinion was contrary to two other states which found that such an arrangement was not, per se, unethical. Arizona Opinion 84-9 and California Opinion 84-79. See also, Schackow v. Medical-Legal Consulting Service, Inc., 46 Md. App. 179, 416 A.2d 1303, 15 A.L.R.4th 1239, which held that these types of contracts were not void as against public policy.

The Disciplinary Rules have been supplanted by the Idaho Rules of Professional Conduct and although that does not necessarily mandate a change in the conclusion reached by Formal Opinion No. 104, a reexamination is warranted. The Idaho Rules of Professional Conduct provide 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; . . . ." IRPC 3.4. With this change in the rules, the Committee cannot rely on a stated prohibition against payment of a contingent fee to a witness, as was done in Formal Opinion No. 104. Therefore, the Committee must first decide if the payment of a contingent fee to a witness is prohibited by law. If it is, then the Committee must decide if payment of a contingent fee to the Finder continues to be the "functional equivalent of payment of a contingent fee to a witness." Formal Opinion No. 104.

Idaho has not been called on to decide whether payment of a contingent fee to a witness is unlawful. The only Idaho authority regarding payment of witnesses is found in IRCP 54(d)(1)(C)8 wherein it states that witnesses, other than experts, are to be paid $20 a day and expert witnesses are to be paid a sum not to exceed $500 for all their court appearances. This rule, however, has generally been construed as setting the amount that can be awarded as costs, and not as governing the contracts between the witnesses and the party who has called the witness. Other states which have ruled on this issue have held that a contract for the payment of a witness, based on the

outcome of the case, is void on the grounds that it is contrary to public policy. See, Sherman v. Burton, 165 Mich. 293, 130 N.W. 667, and Griffith v. Harris, 17 Wis.2d 255, 116 N.W.2d 133, cert. denied, 373 U.S. 972, 10 L.Ed.2d 425, 83 Sup. Ct. 1530. Conversely, the Committee is not aware of any authority which has upheld the payment of a witness contingent upon the outcome of the case. Therefore, it is the opinion of the Committee that should this issue be raised in Idaho, there is a substantial possibility that Idaho would also hold that the payment of a contingent fee to a witness would be void as being against public policy. That public policy being that witnesses should be encouraged to testify fully and truthfully, rather than being given an incentive to skew, or even falsify, their testimony in an attempt to achieve an outcome which is more financially rewarding to the witness.

Having decided that it is unlawful to pay a witness a contingent fee, the Committee must decide if it should continue to adhere to the conclusion of Formal Opinion No. 104 that payment of the Finder is equivalent to the payment of the witness. For the reasons set forth below, the Committee has decided to not so adhere.

The gravamen of Opinion No. 104's proscription was twofold: that favorable testimony from the witness might result in a larger fee from the finder; and that the finder had an incentive to influence the testimony of the witness. The Committee views these concerns to have been warranted, but not dispositive. A

properly drafted Finders agreement should be able to counter such, and should provide the necessary insulation from improper financial inducement or financial incentive. In addition, the Committee feels that a more important concern compels a rethinking of Opinion No. 104, that being a concern for providing for every litigant, regardless of financial resources, an avenue for obtaining reputable, independent and effective expert witnesses.

Since the issuance of Formal Opinion No. 104, there has been no Idaho judicial determination upon the narrower question of whether payment of a contingent fee to a Finder is prohibited by law, and thus also violative of IRPC 3.4. Similarly, there has been no Idaho statutory enactment which addresses the issue.

Further, it appears that Schackow v. Medical-Legal Consulting Service, Inc., 46 Md. App. 179, 416 A.2d 1303, 15 A.L.R. 4th 1239 (1980), remains the single case to have thus far considered the issue. Schackow, as noted above, has held that the Finder arrangement reviewed therein does not violate the public policy of Maryland. Given that Arizona Opinion 84-9 and California Opinion 84-79 continue as the current expressions of those states that similar Finder arrangements are not unethical, it would seem that the only definitive authority to date suggests that certain Finder arrangements are not prohibited by law.

The Committee also perceives there to be a substantive distinction between an outright contingent fee to a witness and a

flat fee to a witness with a contingent fee to the Finder. In the latter scenario, the witness, who receives only a flat fee, is arguably as free from influence as he would be if the attorney had hired him directly, without the services of a Finder. The attorney has the same financial incentive to influence the testimony. The introduction of an intermediary, the Finder, does not intensify or lessen the basic incentive. Thus, where it is proper for an attorney to directly hire an expert, it is fiction to suggest that the presence of a Finder somehow, by itself, taints an otherwise standard facet in the assembly of a lawsuit.

As recognized in the Schackow case, the witnesses provided by a Finder must be of independent mind, that is, not overly influenced by either the present employment or thoughts of future employment so as to be inclined to provide testimony which is more likely to result in a Finder receiving the contingent fee. The Committee is of the opinion that the already established procedures for inquiring into the bias of a witness insure such. Moreover, the Committee perceives no distinction between the possibility of a Finder presenting a portfolio of "professional" witnesses, and the possibility of an experienced attorney having groomed a stable of experts over the years who have proved their worth. While neither possibility is countenanced by the Committee, it seems counterproductive to condemn a Finder arrangement when the perils of abuse are as readily apparent in our more traditional scheme for procuring witnesses. Further, why should the legal system perpetrate a bias in favor of those

attorneys who have developed or inherited a list of expert witnesses?

The Committee, therefore, is of the opinion that payment of a contingent fee to an expert witness finder is not generally violative of IRPC 3.4. However, because of the interplay of other rules of professional conduct, and the direction offered by the authority presently available, the Committee is also of the opinion that a Finder arrangement must, at the very least, comply with the following conditions:

1. Neither the Finder nor the witness may engage in the unauthorized practice of law;

2. The attorney may not share legal fees with the Finder;

3. The contingent fee cannot be payable for the testimony of the witness;

4. No witness provided may hold an ownership interest or any other direct or indirect economic interest in the Finder, other than as regards a witness fee, which fee must be non-contingent upon testimony given or the outcome of a case.

5. The attorney must retain full control of the litigation at all times.

DATED this 25 day of September, 1989.

Francis H. Hicks
Committee Chairman

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