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Committee on Professional Ethics

NYSBA

Opinion #572 - 11/29/85 (9-85)

Topic: Medical malpractice; reasonableness of expense disbursements; medicolegal consulting service used on contingent fee basis; guarantee by lawyer of contingent fee of medicolegal consulting service; fee splitting with nonlawyer.

Digest: Improper for lawyer in medical malpractice or personal injury litigation to use or recommend employment of medicolegal consulting service on a contingent fee basis or guarantee payment of a contingent fee for consulting services, unless specified conditions are met.

Code: Canon 5 and 6; EC 2-17; 2-18, 5-8, 5-21, 7-28; DR 2-106(A), 2-107(A)(3), 3-101, 3-102(A), 5-103(B), 6-101, 7-101(A)(2), 7-109(C), 9-102(A) and (B)

QUESTION

A medicolegal consulting service offers to assist lawyers who represent plaintiffs in medical malpractice suits, in connection with any medical issues and in selecting expert witnesses. The proposed contract under which the services are to be provided is with the client and not with the lawyer. The contract provides, inter alia, for specified fixed fees and disbursements payable in advance to both the consulting service and to all expert

witnesses, plus an additional 20% contingent fee to the consulting service, the payment of which the lawyer must guarantee. This contingency fee is payable from plaintiff's gross recovery prior to deduction of costs. Under the circumstances stated may a lawyer properly recommend employment of the consulting service or guarantee payment of the contingent fee?

OPINION

This inquiry raises substantial issues of law which are beyond the jurisdiction of this Committee to resolve. Among these issues are the following: (1) Is the proposed arrangement valid as a matter of New York law? (2) Would the medicolegal service, by undertaking at its own expense part of the cost of prosecuting a malpractice action in exchange for a share of the proceeds, be engaged in champerty? (3) Is the proposed contingent fee "a proper disbursement or is [it] a payment for services which should be performed by the attorney and for which he is receiving a contingent fee?" N.Y. County 663 (1985), which identified several of these issues and called attention to 22 NYCRR § 603.7(e); see also Judiciary Law § 474-a(3). Judiciary Law § 474-a(3) provides (emphasis added) that the lawyer's contingent fee shall be computed "after deducting from the amount recovered expenses and disbursements for expert testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action."

While we cannot decide such legal issues, we believe it appropriate, as have other ethics committees, to consider whether there is anything in the Code of Professional Responsibility that prohibits the proposed contingent fee arrangement, assuming arguendo that this type of agreement is otherwise valid.

ABA Inf. 1375 (1976) conditionally accepted as not violative of the Code, if otherwise lawful, an agreement between a medical malpractice claimant and a medicolegal consulting service that had been entered into on the recommendation of the claimant's lawyer. The contract with the service called for payment by the client of specified costs and expenses plus a 10% contingent fee from any recovery, and included the client's authorization to the lawyer to make the agreed payments, and the lawyer's agreement to make such payments to the service "upon any receipt" of funds. The

opinion states, in pertinent part:

> Nothing in the Code of Professional Responsibility proscribes a lawyer from recommending that a client contract with a lay person on a contingent fee basis so long as: (1) the lay person or agency is not to engage in the unauthorized practice of law, DR 3-101(A); (2) the lawyer does not share legal fees with the lay person, or agency, DR 3-102(A)(1)-(3); and (3) the contingent fee is not payable for the testimony of the lay person or agency, DR 7-109(C)(1)-(3).
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> Assuming that M's services do not constitute the unauthorized practice of law and that no testimony from M's employees or agents was contemplated in the contract for M's services, we perceive no obvious violation of the Code by L in cooperating with M in connection with C's claim.
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> However, a lawyer who recommends such an arrangement to a client must at all times retain full control of the litigation which has been entrusted to him by the client and may not abdicate to another his ultimate professional responsibility for evaluating the case or the course to be followed, EC 5-21. In addition, under such an arrangement the lawyer obviously owes a corresponding duty to the client to exercise reasonable control over expenses incurred by the lay agency so that neither expenses unauthorized by the lawyer or client nor those of dubious value to the client's cause are expended by the lay agency for the client's account.
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> It would be unethical for a lawyer to sign the Assignment which is part of the contract between M and C if, in fact, the arrangement were merely a subterfuge for fee-splitting between a lawyer and lay person. If, however, the Assignment by L is made with the knowledge and understanding of C and is merely to assure payment to M for proper services and authorized expenses in connection with C's cause, L's signing the Assignment would not violate a disciplinary rule. This, of course, is a factual question and, like

> any question of whether M was engaged in unauthorized practice of law, we do not undertake to determine it.

New York City 81-25 and 81-26 (1982), noting that a similar inquiry also involved legal questions that the opinion did not address, concluded that the use of such a service, on a 6% contingent fee basis in addition to specified flat fees, would not violate the Code if otherwise lawful, "provided that the lawyer avoids undue restraints on his obligation to supervise the litigation." In addition the opinion called attention to various Appellate Division Rules, stating:

> These rules provide a percentage limitation for counsel fees and require that any expenses and disbursements for expert testimony, investigative or other services be deducted from the amount recovered before applying the contingent fee percentage. The attorney therefore, should consider whether the fee of the referral service is the type of expense and disbursement for expert testimony contemplated by these rules, and if so, whether the attorney must deduct the fee from the amount of recovery before the attorney may apply his contingent fee percentage.

District of Columbia Opinions 55 and 56 (1978), indexed in Maru's Digest 10752, 10753 (1980 Supp.), expressed limited acceptance from an ethical standpoint of contingent fee arrangements with this type of organization (assuming the arrangements are otherwise lawful) subject to two important caveats. Opinion 55 cautions lawyers that when the organization's "services . . . displace lawyer work . . . through its analysis of records, finding and interviewing witnesses, preparing factual statements for experts, and similar services, the reasonableness of the lawyer's contingent fee percentage may be affected." Opinion 56 states that "the lawyer should keep always in mind that he has an obligation to preserve the client's right to object to bills that seem too high to the client."

Since ABA Inf. 1375 (1976), a number of ethics committees have similarly found nothing in the Code of Professional Responsibility that prohibits the lawyer's use, recommendation, or guarantee of contingent fee arrangements

with a medicolegal consulting service, subject, however, to meeting a number of specific conditions. Among the necessary conditions, in addition to no violation of state statute or public policy, have been no interference with the lawyer's control over the litigation, EC 5-21; terms that are reasonable under the circumstances, EC 2-17 and EC 2-18; no involvement with unauthorized law practice by a non-lawyer, DR 3-101; no fee sharing with a non-lawyer nor fee splitting subterfuge, DR 3-102(A); all funds must be handled in accordance with DR 9-102(A) and (B); and no contingent fee payments to expert witnesses, EC 7-28, DR 7-109(C). Opinions concluding that there would be no per se violation of the Code if all required conditions are met, include Alabama Opinion 83-135 (1983); Connecticut Inf. Opinion 82-7 (1981); Georgia Inf. letter response (Nov. 2, 1982); Indiana Opinion 1 (1981); Louisiana Inf. letter response (May 9, 1984); Maryland letter response 83-40 (1983); Michigan Inf. Opinions CI-409 (1979) and CI-566 (1980); Mississippi Opinion 91 (1984); New Hampshire Opinion 1984-5/7 (1984); Tennessee Opinion 82-A-170 (1982); and Virginia Inf. Opinion 508 (n.d.).

We further note that the validity of such contingent fee arrangements has been upheld in two court decisions in other jurisdictions. Schackow v. Medical-Legal Consulting Services, Inc., 46 Md. App. 179, 416 A.2d 1303, 15 A.L.R. 4th 1239 (1980), upheld a Florida court-approved 10% contingency fee consulting agreement with a medicolegal service, holding that there was no proof in the record of solicitation, barratry, champerty or maintenance, and that there was no public policy violation as all experts were to be paid a flat fee by the client. In Pluvinage v. Commings, Civ. Action No. 2264-71 (D.D.C. 1974), digested in 30 Citation 118 (1975), the court approved a 10% contingent fee contract payment to a medicolegal service, relying on ethics committee advice that the arrangement was "not objectionable provided that the fee was not excessive."

Three significant ethics opinions, however, reach a contrary conclusion. These are Idaho Inf.Opinion 104 (1981); California Opinion 1984-79 (1984); and New Jersey Opinion 562 (1985).

Idaho Inf. Opinion 104 squarely disapproved this type of contingent fee arrangement, and held that "payment of a contingent fee to a finder is the functional equivalent of a contingent fee to a witness", and thus violative of DR 7-109(C):

> 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."
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> 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.

California Opinion 1984-79 (1984), while holding that under certain circumstances such agreements would be valid, concluded that in view of Section 6146(a) of the California Business and Professional Code, "a contingent fee arrangement with the Consulting Service would be improper in medical injury cases, the very type of case where the services sought to be rendered are likely to be the most useful."

N.J. Opinion 562 (1985) concluded that it would be improper for a lawyer to utilize the services of a medical consulting service under a contingent fee agreement between the service and the lawyer's client. The opinion rests upon state policy considerations both statutory and judicial. The opinion states:

> As is clear from R. 1:21-7(e) and RPC 1.5(a), it is the policy of our Supreme Court to protect the injured party and to ensure that the injured party realize the maximum amount of his recovery. The situation posited of a contingent fee for obtaining medical expertise to assist in prosecuting the litigation would result in the plaintiff not getting the majority of the proceeds of his litigation, and is contrary to the spirit of these rules.

* * * *

> We would call to the attention of the inquirers N.J.S.A. 45:9-27.8 entitled "Contingent Fees; Prohibition" which statute precludes a physician or surgeon from contracting for, charging or collecting a contingent fee where medical services rendered to a client forms any part of the basis of a legal claim for damages. To the extent that a physician is involved as a principal in a consulting service locating medical experts and/or providing additional services with respect to evaluation of the medical reports utilized or to be utilized in the prosecution of the plaintiff's claim, we view that conduct as violative of the statute and find that it is unethical and improper for an attorney to solicit, enforce or otherwise become involved with a contract of that nature.

In analyzing the form of contract submitted to our Committee, we conclude that it would not on its face necessarily involve any improper fee splitting violative of DR 3-102(A), since the consulting service is charging the client separately and is not receiving a share of or a sum dependent upon the lawyer's fee. Likewise, the contract does not appear on its face to involve the consulting service in the unauthorized practice of law and thus present the lawyer with a problem under DR 3-101. Nor does there appear on the face of the contract to be any improper interference with the lawyer's exercise of independent professional judgment that would be violative of Canon 5 or EC 5-21. N.Y. City 81-25 and 81-26 (1982).

In medical malpractice and other litigation it is wholly proper for a lawyer to employ qualified non-lawyers to provide investigative or other services appropriate to the conduct of the action. The lawyer may also properly "advance or guarantee the expenses of litigation including court costs, expenses of medical examination and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses." DR 5-103(B); EC 5-8. At the same time, as emphasized in ABA Inf. 1375 (1976), it is the lawyer's duty to the client to "exercise reasonable control over expenses incurred . . . so that neither [unauthorized] expenses . . . nor those of dubious value to the client's cause are expended . . . for the client's account."

The principal ethical problems that we have with the proposed agreement relate to the reasonableness of the 20% contingent fee component in the event of recovery and also its close relationship to services customarily provided by personal injury and malpractice lawyers under their contingent fee retainers. Since contingent fee agreements between lawyers and their clients in this state in medical malpractice cases are subject to the recently amended provisions of Judiciary Law § 474-a,* the lawyer who recommends or guarantees the payment specified in this agreement would involve his client in paying a substantially higher fee than contemplated by the statute for services that are normally provided by the lawyer in competent representation.

In the contract under consideration, assuming a 30% contingent fee for the lawyer and a 20% contingent fee to the consulting service, the client winds up paying out either 44% (if the consulting service's fee is first deducted as a disbursement) or 50% (if it is not so deducted) of the net recovery. Since the contract also calls for fixed fees payable in advance for an initial medical evaluation and for all services of experts, the client may be getting little more than what the lawyer would normally be obliged to provide for a fee that does not exceed the statutory percentage of the recovery - i.e., competent legal representation. In a personal injury or malpractice case, such representation necessarily includes obtaining the necessary medical records, selecting competent experts, working with the experts to analyze the merits of the case and to prepare for trial, obtaining necessary experts' reports, and so on. As emphasized in District of Columbia Opinion 55 (1978), when the organization's "services . . . displace lawyer work . . . through its analysis of records, finding and interviewing witnesses, preparing factual statements for experts, and similar services, the reasonableness of the lawyer's contingent fee percentage may be affected."

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* In cases for personal injuries other than for medical or dental malpractice, Appellate Division rules prescribe the maximum contingent fees. 22 NYCRR §§ 603.7(e)(1st Dep't), 691.20(e)(2d Dep't), 806.13(3d Dep't), and 1022.31(4th Dep't).

Thus the lawyer who recommends that a client enter into this kind of agreement may have an ethical obligation to reduce his own fee, so as to avoid an arrangement that could be violative of the prohibition of DR 2-106(A) against a fee that is clearly excessive. Unless this were done, the client would be paying well more than the statutory percentage of the recovery for what lawyers have customarily performed as part of their legal services. In our opinion, such a fee would be clearly excessive in violation of DR 2-106, at least in the absence of special circumstances, when a lawyer does not provide those services that lawyers normally provide to earn the statutorily permitted maximum contingent fee. Instead, he is shifting some of his work to the medical consulting service at substantial additional cost to his client.

We conclude, therefore, that there could be a serious ethical problem involving either the reasonableness of the expenses incurred or the reasonableness of the lawyer's contingent fee contract, at least where the contract calls for a contingent fee for the consulting service as high as 20%. It would be a highly unusual case that would ethically permit a lawyer to advise a client to expend an additional percentage of this magnitude for non-legal services in addition to the fixed fees and disbursements payable for all expert testimony. In ABA Inf. 1375 (1976), there was no statutory limit on the lawyer's contingent fee and the service's contingent fee was 10%. In New York City 81-25 and 81-26, at a time when applicable court rules limited the lawyer's contingent fee, the percentage payable to the service was 6%.

Other provisions of the Code also support our conclusion. DR 2-107(A)(3) provides that, where several lawyers charge or divide fees, the total fees to the client must be reasonable for the services rendered. The result should not be different where the lawyer and the consulting service are charging separate fees for what the lawyer would normally do.

Canon 6 requires the lawyer to represent a client competently. DR 6-101 more specifically provides:

> (A) A lawyer shall not:
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> > (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

In a medical malpractice case, competent representation includes the lawyer's duty to render the customary services in selecting and working with appropriate expert witnesses. Engagement of a medicolegal consulting service by a lawyer who personally is not otherwise qualified to handle a particular malpractice claim would not satisfy that lawyer's ethical obligation to associate another "lawyer" who is competent to handle it. Similarly, engagement of such a service does not relieve the lawyer of the lawyer's own duty of adequate preparation.

Further, the lawyer's duty of competent representation includes an obligation to advise the client against incurring the substantial additional contingent expenditure that would be involved in hiring the consulting service to do what the lawyer himself is professionally obligated to do at no extra cost to the client. DR 7-101(A)(2) requires a lawyer to carry out his contract of employment which, again, includes the services associated with selecting and preparing expert witnesses at no cost to the client other than the normal contingent fee.

We conclude that it would be improper in the absence of special circumstances, for a lawyer at added cost to a client to shift work normally performed by lawyers in earning a contingent fee to a medicolegal consulting service, unless, without fee splitting, the client's total contingent fee obligation to the lawyer and to the service would not exceed the statutory maximum mandated by § 474-a(2) of the Judiciary Law as amended in 1985. A lawyer may, however, recommend to a client use of a medicolegal consulting service on a reasonable contingent fee basis, and guarantee payment, for work not normally performed by lawyers, provided specified conditions are met. What constitutes a reasonable contingent fee for such services depends on the circumstances involved in any particular case.

For the reasons stated, we conditionally answer the question posed in the negative.
