NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 698 – 1/23/98 (37-97)

Topic:	Contingent fee for medical consultant as precondition to his bringing medical malpractice case to attorney; size of contingent attorney's fee if there is also a contingent consultant's fee
Digest:	Attorney may not accept medical malpractice case from medical consultant if consultant requires attorney's agreement to contingent consultant's fee as precondition; contingent attorney's fee and contingent consultant's fee combined may be excessive depending on nature of consultant's services
Code:	DR 2-103(B), DR 2-106(A), DR 2-106(D), DR 5-101(A), DR 5-107(B), DR 7-109 (C)(3)

QUESTIONS

1. May an attorney ethically accept a medical malpractice case from a medical consultant, if the consultant requires the attorney's agreement to a contingent consultant's fee as a precondition to the consultant bringing the case to the attorney?

2. May a consultant's contingent fee and an attorney's contingent fee combined exceed the statutory limit for an attorney's contingent fee?

OPINION

The inquirer has been approached by a "medical consultant" who knows of a potential client with a medical malpractice action against a New York facility. The consultant has asked if the inquirer will represent this potential plaintiff for the contingency fee fixed by statute in New York State. The medical consultant has also advised the inquirer that he wants to charge the potential client a "contingent consultant's fee" which would be paid in addition to the attorney's fee.

The inquirer asks whether (i) the existence of two separate contingency fee contracts, one for himself and one for the consultant, is ethical, (ii) whether the

attorney's contingent fee would in any way be diminished by the consultant's contingent fee arrangement and (iii) whether there is any limit to the contingency fee the consultant may charge.

The consultant has advised the inquirer that he customarily charges between 5% and 10% of the award and is likely to charge his maximum in this case. The consultant, who has both M.D. and J.D. degrees, would assist the inquirer in evaluating the case, finding appropriate expert witnesses, preparing those witnesses for depositions and in-court testimony, and preparing for cross-examination of opposing experts. The inquirer's firm regularly uses a different consultant to perform these tasks, who is paid on an hourly basis at less cost to clients than the contingent consultant fee arrangement proposed here.

An attorney may not participate in an arrangement under which a consultant offers a prospective client to an attorney as a "package deal" under which the attorney must accept the arrangement before having the opportunity to evaluate the specific matter and determining the best consultant (if any) to retain and the terms of such retention. An attorney's acquiescence in such a scenario would violate DR 2-103 (B), which provides, in relevant part, that a lawyer "shall not compensate or give anything of value to a person ... to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client...." *See also* DR 5-101 (A). Accordingly, a lawyer may not agree to hire a particular consultant as a precondition to taking on a prospective client brought to him by the consultant.

Even if the lawyer's hiring of a particular consultant is not a precondition, a consultant's strong influence over the selection of counsel presents other concerns. For example, there is the possibility that a consultant with this degree of control over the client may impermissibly direct or regulate the lawyer's professional judgment in rendering legal services, in violation of DR 5-107 (B). *See also* EC 5-21. A lawyer has an obligation "to facilitate the intelligent selection" of counsel, EC 2-1, and to encourage the selection of counsel "on an informed basis," EC 2-8. The prospective client must understand that counsel, not the consultant, must have the unrestricted authority to make all professional judgments in the case.

It is also vital that the prospective client be made fully aware of the proposed fee arrangements before signing a retainer, DR 2-106 (D), including the availability of other consultants at lesser cost. *Cf.* DR 7-109 (C)(3) (lawyer's obligation to pay "reasonable" fee for expert).

As to the propriety of the consultant's contingent fee, in N.Y. State 572 (1985) the Committee considered the case of a "medicolegal consulting service" that charged 20% of the plaintiff's recovery for assisting counsel in connection with medical issues and selecting expert witnesses. We determined that even though such an arrangement does not constitute impermissible fee-splitting under DR 3-102(A), since the consultant does not share a portion of the lawyer's fee, "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." *Id.* at 9. We opined 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 consulting service is getting a contingent fee as high as 20% of the client's recovery in addition to the lawyer's contingent fee. This is especially so where some of the consultant's services may involve work that "the lawyer himself is professionally obligated to do at no extra cost to the client ... [such as] selecting and preparing expert witnesses." *Id.* at 10. Accordingly, we concluded that "it would be improper in the absence of special circumstances, for a lawyer at added cost to the 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 ... the Judiciary Law." *Id.* at 10.

While the Code does not *per se* prohibit attorneys from entering into contingent fee arrangements with consultants, attorneys must use caution in considering such arrangements. An attorney should carefully consider the percentage of the award a consultant proposes to charge the prospective client, and the precise nature of the work he proposes to perform, to determine whether the arrangement would be violative of the criteria described in N.Y. State 572. In addition, we noted in N.Y. State 668 (1994) that although the prohibition of DR 7-109 (C) against contingent witness fees does not apply to individuals not "testifying or attending the trial," a consultant's role must not "serve as a pretext for avoidance of the proscriptions of DR 7-109 (C)." By analogy, a consultant who provides essentially the same services as an attorney should not subject the client to fees exceeding the statutory limit on the "pretext" that he was a consultant.

CONCLUSION

An attorney may not ethically accept a medical malpractice case from a medical consultant if the consultant requires the attorney's agreement to a contingent consultant's fee as a precondition.

An attorney must carefully consider a consultant's proposed percentage fee, in conjunction with the attorney's own contingency fee, and the nature of the work the consultant will perform, to determine whether the attorney's fee is excessive.
