NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion 875 (7/20/11)

Topic: Non-testifying expert compensation; percentage of recovery

Digest: Lawyer may ethically agree to handle a case on a contingent fee basis even if the client already has separately retained a non-testifying expert on a contingent fee basis.

Rules: 1.5(a), 5.4(a)

QUESTION

1. May a lawyer ethically agree to handle a case on a contingent fee basis if the client already has signed a retainer with a non-testifying expert providing that the expert is to be compensated based on a percentage of the recovery in the action?

OPINION

2. An out-of-state lawyer (the "out-of-state lawyer") has asked a lawyer admitted to practice in New York State (the "New York lawyer") to handle a case in New York as co-counsel to the out-of-state lawyer. The out-of-state lawyer's client has already signed a contract with a non-testifying expert in the case. The contract calls for the expert to be compensated by a percentage of the recovery in the case (*i.e.,* on a contingent fee basis). The out-of-state lawyer has signed a separate retainer agreement with the client by which the out-of-state lawyer is to be compensated at one-third of any recovery.

3. The proposed fee-splitting arrangements between the out-of-state lawyer and the New York lawyer have not been disclosed, but we assume that the New York lawyer's fee would also be contingent on recovery, and would either be a share of the out-of-state lawyer's fee or would be a separate fee that, when combined with the out-of-state lawyer's fee, would not to exceed one-third of the total recovery.

4. The role of the non-testifying expert is not specified in the inquiry, so we do not know whether and to what extent the role of that expert and services that expert is expected to provide overlap with the services to be provided by the lawyers.

5. There also is no indication that the engagement of the out-of-state lawyer was procured by the non-testifying expert. Nor is there any indication that the out-of-state lawyer will take a reduced fee to facilitate the client's payment of a separate contingent fee to the non-testifying expert (in a percentage matching the percentage by which the out-of-state reduced his fee) as a way of compensating the expert for a referral.

6. Because the New York lawyer is being retained by the client after the client has already entered into separate contingent fee engagements with the non-testifying expert and the out-of-state lawyer, we have no concern as to fee splitting with a non-lawyer, and we have no concern regarding the professional independence of the lawyer and the lawyer's duty of loyalty to the client.

7. This situation does not implicate Rule 5.4(a), which prohibits a lawyer from sharing legal fees with a nonlawyer (except in certain situations not applicable here). The purpose of Rule 5.4(a) is to promote the professional independence of the lawyer and help to ensure that the professional responsibility of the lawyer to the client is direct and not compromised by external influences. *See* Rule 5.4, cmt. [1]. These policies are not implicated here because the lawyer's relationship with the client remains direct, and the lawyer is not sharing fees with the non-testifying expert.

8. Nor does the present situation raise the concerns addressed in N.Y. State 698 (1998), which concluded that it would be improper for a lawyer to accept referral of a medical malpractice case on a contingent fee basis from a "medicolegal consulting service" that would also be paid on a contingent basis. That opinion noted the potential influence of the consultant on the lawyer, possibly compromising the lawyer's professional independence, and also recognized the risk that the combination of the contingent legal fee and contingent consulting fee could result in an excessive fee. An excessive fee would violate Rule 1.5(a) ("lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee").

9. The present situation, unlike that in N.Y. State 698, does not create risk of confusion as to the respective responsibilities of the lawyer and the non-testifying expert. The New York lawyer is separately engaged by the client, and the attorney-client relationship is defined by the engagement letter between the client and the New York lawyer.

10. The concerns discussed in N.Y. State 727 (2000) also are not implicated in the present case. That opinion involved separate contingent fees charged by a lawyer and by an accounting firm that would refer cases to the lawyer. In effect, the lawyer there was splitting the lawyer's contingent fee with the accounting firm, which is improper.

CONCLUSION

11. There is no ethical barrier to a lawyer entering into a contingent fee arrangement with a client where the client already has retained a non-testifying expert to work on the same case on a contingent fee basis.

(49-10)