

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-276
Issued: September 1983

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May an attorney ethically arrange for medical expert testimony through an organization that charges a contingent fee for its services?

Answer: No.

References: ABA Opinion 198 (1939); DR 1-102(A); DR 1-103(A); DR 2-106(B); DR 3-101(A); DR 3-102(A); DR 3-103(A); DR 7-109(C); EC 5-1; EC 7-28; Canon 1; Canon 9; Crawfords Adm'r v. Ross, Ky., 186 S.W.2d 797 (1945); Person v. Association of the Bar of the City of New York, 554 F.2d 534 (2nd Cir., 1977); ABA I.O. 1375

OPINION

An organization which proposed to locate medical experts for litigants and charge a contingent fee for its services seeks an opinion declaring the practice ethical and authorized by the Kentucky Bar Association. Whether an attorney may ethically deal with such an agency raises several questions as to the relationships that would be created between the attorney, his client, the search agencies, and the experts they offer to procure.

DR 3-101(A) prohibits attorneys from aiding non-lawyers in the unauthorized practice of law.

“What constitutes unauthorized practice of law in a particular jurisdiction is a matter for determination by the courts of that jurisdiction.” ABA Opinion 198 (1939).

According to Crawfords Adm'r v. Ross, 299 Ky. 699. 186 S.W.2d 797 (1945), in Kentucky “...interviewing and procuring of witnesses to testify in favor of a litigant is a service which may be rendered by a layman ...”, and “...it is not to be considered as practicing law.” (p. 799).

Thus, the mere procurement of witnesses does not constitute the practice of law.

A different question would be presented if a search agency goes beyond procurement and seeks to offer opinions on the value or merits of a case. While no

Kentucky case deals with this specific problem, it is likely that a court could find this to be at the heart of the practice of law. If a Kentucky court so found, then DR 3-101(A) would prohibit an attorney from dealing with such an agency. Until a Kentucky court renders an opinion on the aforementioned question, this Committee cannot say that an attorney who allows a non-lawyer to evaluate the merits of a claim is in violation of DR 3-101(A). We can, however, advise attorneys to be keenly aware of the possibility of such conduct creating an appearance of impropriety and of allowing such opinions to adversely affect their independent professional judgment.

The request for this opinion also noted that this search agency would be made up of attorneys and doctors. DR 3-103(A) forbids an attorney from entering into a partnership with non-lawyers if any of the partnership activities consist of the practice of law. This Committee has made no attempt to ascertain what activities are or could be engaged in by these search agencies, nor do we express an opinion on what is or is not the practice of law. However, if these agencies engage in any activity which involves the practice of law, then those attorneys in the agency would be in violation of DR 3-103. Any attorney dealing with such an agency with knowledge of this infraction or any other violation of such a disciplinary rule would be under a duty per DR 1-103(A) to report such conduct or else be liable himself for violating this section.

DR 7-190(C) precludes attorneys from participating or acquiescing in the payment of a witness contingent upon the outcome of the litigation. Since the arrangement we are considering calls for payments of the expert witnesses by the client or the agency regardless of the outcome neither DR 7-190(C) nor EC 7-28 would be violated. DR 7-109(C) was held constitutional in Person v. Association of the Bar of the City of New York, 554 F. 2d 534 (2nd Cir. 1977). This result would be different if any of the experts obtained by the agency hold any interest in the agency because they would stand to receive some benefit which is dependent on the outcome of the litigation.

The problems set out above are only potential problems. A case by case determination would be necessary to ascertain if an attorney is in violation of any of the sections set forth above. While those potential problems are of great concern to this Committee, taken in the abstract there is no built-in violation which cannot be avoided by self-imposed limitations and careful planning on the part of both the attorney and the search agency. An attorney may not ethically offer or recommend to his client a contingent fee contract with a search agency because of existing problems inherent in the contingent fee arrangement which we feel cannot be cured by any amount of manipulation.

Crawford's Adm'r v. Ross, *supra*, states that "...where (a witness procuring layman's) compensation does not depend upon the outcome of the litigation a contract to render such services does not contravene public policy; ..." (p. 799). A direct corollary to that statement is that contracting with a layman to procure witnesses with the layman's compensation based on the outcome of the litigation does contravene public policy. So, an attorney who recommends or offers such a contract to his client would be encouraging his client to enter into a contract which is contrary to the public policy of the Commonwealth.

Obviously, an attorney offering or recommending such a contract is in violation of DR 1-102(A).

Another inherent problem would be the reasonableness of an attorney's fee. DR 2-106(A) states in part that "a lawyer shall not enter into, charge, or collect an illegal or clearly excessive fee."

DR 2-106(B) states in part that "factors to be considered as guides in determining the reasonableness of a fee include the following: (1) the time and labor required, ..."

Obviously, the agencies are not bound by the disciplinary code of attorneys but the reasonableness of an attorney fee must be reassessed in light of the fee contracted for by the agency.

Finding medical experts and requesting from them medical reports, testimony and advice are part of the services presently being rendered by attorneys for a contingency fee. We see great problems with attorneys contracting for a percentage contingency while at the same time (or later) offering or advising a client to contract with an agency for another contingent percentage. If an attorney contracts with a client to perform services which normally includes those taken over by the agency, then the fee of the attorney must be reduced proportionately. However, if an attorney does reduce the fee according to the services taken over by the agency, the arrangement takes on the characteristics of a subterfuge for fee splitting with non-lawyers. Since an attorney must reduce the contingent fee according to the contingent fee contracted for by the search agency, the search agency/client contract is, for all intent and purposes, a mere subterfuge for fee splitting with the agency in violation of DR 3-102(A) and DR 1-102(A)(2) which forbids an attorney from circumventing disciplinary rules by the actions of others.

On the other hand, if an attorney failed to reduce his fee, this would lead to a conclusion that his fee is now unreasonable in light of his reduced labor or that the agency's services are not in fact worth their contracted-for contingent fee. If the services offered are not in fact worth the contracted-for fee, then the attorney cannot ethically offer such a contract to his client. EC 5-1 states "the professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interest, the interests of other clients, nor the desire of third persons should be permitted to dilute his loyalty to his client."

If these services are not worth their contracted-for contingent fee, it is not in the client's best interest and cannot be recommended. It is true that the final decision to accept the agency's service would be the client's, but it is also true that the client would be relying on the attorney's judgment that such service is necessary or advantageous. After all, it would be the attorney who first brings this service to the client's attention.

With all due respects, we do not agree with the American Bar Association I.O. 1375 that an attorney recommending this contingent fee arrangement, in its purest form,

would violate more than one disciplinary rule. In addition, such an arrangement is fraught with so many inherent potential problems and pitfalls, that even if there was not a direct violation of a disciplinary rule the duty of attorneys to maintain the integrity of the profession and avoid even the appearance of impropriety would preclude attorneys from condoning this type of arrangement.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.