

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-394
Issued: November 1996

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question 1: May a lawyer knowingly present testimony of an expert witness when the expert witness is to be compensated on a contingent fee basis, or for a set fee with a “bonus” due if the suit is successful and a recovery is obtained in excess of a certain amount?

Answer: No.

Question 2: May a lawyer contract for other litigation support services on a contingent fee basis, or for a set fee with a “bonus” due if the suit is successful and a recovery is obtained in excess of a certain amount, so long as those services do not include the presentation of expert testimony or the splitting of legal fees with a non-lawyer?

Answer: Yes.

References: KBA E-276 (1983); ABA Formal Op. 87-354 (1987); ABA/BNALaw.Man.Prof.Con. 41:920-41:921.

OPINION

The Committee continues to receive questions about contingent fees for witness services and litigation support. We previously addressed this issue in KBA E-276 (1983), when we opined that a lawyer may not “ethically arrange for medical expert testimony through an organization that charges a contingent fee for its services.” According to a survey of state bar opinions, contingent fee agreements with consultants, consulting services, or litigation support services are improper if (1) the fee for the consultant comes out of the lawyer’s contingent fee, or otherwise involves fee-splitting [Rule 5.4(a)] or if (2) they involve the payment of contingent fees for expert testimony. Expert witnesses may only be paid on an hourly or flat fee basis [Rule 3.4(b)]. The ABA recently revisited this area in Formal Op. 87-345 (1987), and expressed concern about a number of ethical problems, especially the effect of promising a contingent fee or bonus to a service which also provides expert witnesses, even when the portion of the total fee allocated for the witness by the service appears to be flat or hourly. The expert supplied and the service or consultant will have an ongoing relationship, and, depending on the circumstances, the entire arrangement, considered as a whole, [could] raise many of the same questions as direct payment of a contingent fee to an expert witness. *Id.*

The contents of contracts for litigation support services will obviously vary. The Committee is unable to review and approve of individual contracts, or otherwise provide legal and advisory services to companies wishing to provide such services.

In light of the above referenced authorities the Committee is of the view that Question 1 should be answered No in cases in which the support services include the provision of expert witness testimony or in arrangements that involve the splitting of legal fees with a non-lawyer. Otherwise there is no per se rule against contingent fees or bonuses. The lawyer involved may wish to consult ABA Formal Op. 87-354 for additional guidance.

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.