

Committee Opinion
March 8, 1988

LEGAL ETHICS OPINION 1047

PAYMENTS TO EXPERT WITNESSES.

You advise that your office represents a medical consulting firm that provides their clients and their clients' attorneys with medical reports and services of expert witnesses who are expected to give sworn testimony in medical malpractice and personal injury cases. The services of the medical consulting firm are available on either a direct fee per service basis or a contingency fee basis. With respect to the 15% contingency contract, expert witnesses are not advised of the terms and conditions of the contingency arrangement; no expert witness is an officer, director, employee or shareholder of the consulting firm; all expert witnesses are paid in full prior to testifying; no payment to any expert witness is contingent either directly or indirectly on the outcome of the case; and no benefit will accrue to any expert witness as a result of favorable disposition of the case. A specific provision of the written contract between the medical consulting firm and the client gives the client's attorney authority to pay all proper items of cost directly to the medical consulting firm from any proceeds recovered.

You wish to know whether or not a lawyer may recommend to a client that their client engage, or represent a client who engages, the medical consulting firm on a contingency fee basis.

Disciplinary Rule 7-108(C) [DR:7-108] states "A lawyer shall not take, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the *outcome of the case*. . . ." In addition, EC:7-25 advises that "Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a nonexpert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingency to any witness."

The contingency fee contract which you included with your inquiry does not appear to violate the above-cited provisions of the Code of Professional Responsibility as long as no payment to any expert witness is contingent either directly or indirectly on the outcome of the case, whether that fee comes from you or the medical consulting firm.

The Committee cautions that you should be certain you do not violate DR:3-102(A) which states that a lawyer or law firm shall not share legal fees with a non-lawyer. That is, no portion of the fee to the medical consulting firm should be derived from that which would otherwise be your fee.

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