



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in July 2010. Please see the 2010 Illinois Rules of Professional Conduct 3.4(b) with its Comment [3] and 8.4(a) This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

**Opinion No. 86-3
July 7, 1986**

Topic: Payment of Contingency fee to expert witness provider

Digest: It is professionally improper for an attorney to hire, or to recommend or acquiesce in his client hiring, an agency to provide an expert witness where the agency's compensation is contingent upon the outcome of the matter.

Ref.: Rule 7-109(c)
Rule 1-102(a)(2)

FACTS

An attorney representing an injured client needs an expert medical witness to testify on the client's behalf. The attorney contacts a witness service organization, i.e., a finder, for that purpose. The witness service organization presents a contract to be signed by the client wherein its finder's fee is contingent upon the outcome of the case and also obligates the client for the expert's fee. The expert's charge is a set fee, not contingent, and is paid in advance of his testimony. The expert witness is not a party to the finder's contract with the client and allegedly has no knowledge of the contract.

QUESTION

Is it professionally proper for an attorney to recommend to a client that the client contract with a witness procurement agency for the services of an expert witness where the agency's fee is contingent upon the outcome of the case, i.e., a percentage of the client's gross recovery?

OPINION

The retention of an expert witness for testimony purposes by an attorney or the attorney's client is commonplace. The compensation payable to an expert witness is a composite of one or all of the following factors: attendance expenses, loss of time reimbursement or reasonable fee for professional services, as set forth in Rule 7-109(c)(1) through (3). In the query presented, the fee of the expert witness is a set amount and is to be prepaid. Assuming the witness fee is in accordance with these factors, the Committee feels that aspect of the query is well within the parameters of the Rule and poses no ethical problem.

However, Rule 7-109(c) states: "A lawyer shall not pay, 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." Rule 1-102(a)(2) States: "A lawyer shall not circumvent a disciplinary rule through actions of another."

Therefore, the ultimate question presented in this instance is the propriety of entering into such a contingent fee arrangement with a finder agency. Whether the attorney contracts himself or acquiesces in his client doing so does not change our analysis, nor does the "insulation" differential that the finder agency's fee is contingent whereas the expert witness' fee is a fixed amount.

The basic substance of the arrangement, no matter how cloaked, is the outcome of the case. If very favorable, the finder's fee is enlarged; if unfavorable, the fee diminishes. The outcome, of course, is dependent, to a degree in each instance, on the testimony of the expert witness. In some instances the outcome could be wholly dependent on the expert's testimony.

It is the Committee's conclusion that the hiring of an expert witness through a third-party agency where the agency's fee is dependent on the outcome of the matter is an improper circumvention of the meaning and intent of Rule 7-109(c).

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