

OPINION 510

December 1994

Question Presented

May a Texas attorney provide legal services to a client under a contingent-fee arrangement in a litigation matter when the client also enters into a contingent-fee arrangement with a non-attorney investigator to perform investigation services in connection with the matter?

Statement of Facts

A Texas attorney is employed by a client to prosecute a complex personal injury claim. The attorney and the client enter into a written agreement providing that the client will pay to the attorney in certain circumstances specified percentages of the amount recovered plus reimbursement of court costs and expenses and payment of indebtedness incurred on behalf of the client. At the time of employment, the attorney informs the client that an investigator will need to be hired because of the complexity of the case and that hiring an investigator on an hourly basis will be very costly. The attorney recommends that the client hire an investigator on a contingent fee basis and fully explains to the client the implications of such an arrangement. A contingent-fee arrangement with an investigator is expressly permitted by the attorney's written agreement with the client. The client thereafter enters into a written agreement under which the investigator will perform all investigative work for a fee equal to a percentage of the client's recovery on the matter plus the investigator's costs and expenses. There is an additional provision in the contract that states that, if the investigator has to become a fact witness in the matter for any reason in the client's suit, then the contingent-fee contract between them is void and the contract reverts to an hourly fee contract. All investigative information obtained by the investigator is to be turned over to the client's attorney. The investigator is not an employee of the lawyer and the lawyer will not receive any part of the fees paid to the investigator under the contract.

Discussion

This opinion addresses solely the Texas Disciplinary Rules of Professional Conduct as applied to an attorney who might be involved in the proposed arrangement. The Committee expresses no opinion on the legal effect (including the permissibility) of the proposed arrangement under any rule of Texas law other than the disciplinary rules.

Fee arrangements between a lawyer's clients and non-lawyers are not themselves subject to the Disciplinary Rules. However, the disciplinary rules may prohibit a lawyer from involvement in certain arrangements for the payment of fees to non-lawyers.

In [Opinion 458](#) (TBJ, October 1988 at 924), this committee considered the permissibility, under the Texas Code of Professional Responsibility as then in effect, of a lawyer's participating in or recommending that a client enter into a contingency fee agreement with a medical-legal consulting firm. Since in that case the medical-legal consulting firm would provide various services including the provision of expert testimony, Opinion 458 concluded that a lawyer would violate the provision of the Texas Code of Professional Responsibility ([DR 7-109\(C\)](#)) then in effect that prohibited a lawyer from participating in the payment of contingent compensation to a witness. The opinion also noted that the arrangement with the medical-legal consulting firm raised problems under the Texas Code of Professional Responsibility in several other areas including fee splitting and excessive legal fees.

With respect to contingent fees payable to witnesses, [DR 3.04\(b\)](#) of the disciplinary rules as currently in

effect is substantially the same as the provision cited in Opinion 458. DR 3.04(b) provides that a lawyer may not "pay, offer to pay, or acquiesce in the offer or payment of compensation to a witness or other entity contingent upon the content of the testimony of the witness or the outcome of the case." However, unlike the arrangement considered in Opinion 458, there should be no violation of DR 3.04(b) in this case since the contingent-fee arrangement will not apply if the investigator becomes a witness in the proceeding. It should be noted however that DR 3.04(b) also requires the lawyer to take appropriate steps to ensure that the investigator receiving a contingent fee payment does not make any payment to a witness that is contingent on the outcome of the case.

[DR 5.04\(a\)](#) provides, with exceptions not here applicable, that "[a] lawyer or law firm shall not share or promise to share legal fees with a non-lawyer...." The committee is of the opinion that a contingent fee arrangement between a client and a non-lawyer investigator would not involve a lawyer in sharing legal fees with a non-lawyer if the arrangement is a reasonable means of compensating the investigator for the investigator's services and such services are not services that constitute the practice of law. Such a fee arrangement for the investigator should not be viewed as an impermissible sharing of legal fees even though the lawyer's services are directly involved in the outcome that determines the amount of the investigator's fee.

A more serious question is presented with respect to the impact of the investigator's contingent fee arrangement on the lawyer's own contingent fee contract with the client. [DR 1.04\(d\)](#) specifically permits an attorney to enter into a written contract for a contingent fee arrangement for most types of legal services. However, any fee arrangement, whether or not contingent, must comply with DR 1.04(a): "A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable." With respect to the application of this rule, this committee has no authority to pass on the permissibility under DR 1.04(a) of any particular contingent fee arrangement.

Unless a lawyer's contingent-fee percentage is reduced, a lawyer's contingent fee contract when coupled with an investigator's contingent fee arrangement may result in a significantly smaller percentage of a recovery going to the client than if there were no contingent fee arrangement with the investigator. Depending on the circumstances, the lawyer's fee when viewed in conjunction with the investigator's contingent fee may be in excess of the maximum fee permissible under DR 1.04(a). For instance, an excessive fee under DR 1.04(a) could result if, for the particular type of case, the normal contingent fee arrangement for legal services would involve the lawyer's advancing the costs of investigation services under an agreement that repayment to the lawyer would be contingent on the outcome of the case (as permitted by [DR 1.08\(d\)\(1\)](#)). If for such a case a lawyer assisted the client to enter into a contingent fee contract for investigative services while making no reduction in the lawyer's contingent fee percentage from the percentage generally used by other lawyers who advance investigation costs, the lawyer's fee arrangement might be in violation of DR 1.04(a).

Conclusion

Under the Disciplinary Rules, a lawyer may participate in an arrangement under which the lawyer's client enters into a contingent fee contract with a non-lawyer for investigative services provided (1) the lawyer explains to the client the full implications of the arrangement and the lawyer's agreement with the client contemplates such an arrangement, (2) the contingent-fee arrangement with the non-lawyer does not apply if the non-lawyer becomes a witness in the case and the lawyer ensures that no contingent payment is made by the investigator to any witness, (3) the compensation for investigative services is reasonable compensation for investigative services and is not a disguised means of sharing a legal fee with a non-lawyer, and (4) in the circumstances, the lawyer's contingent fee arrangement, viewed in

conjunction with the fee arrangement for investigative services, is not in excess of the maximum permitted under [DR 1.04\(a\)](#).