

Using Trial Consultants On A Contingent-Fee Basis

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The value of complex personal injury cases, such as medical malpractice or products liability, can be enhanced by the services of a wide range of modern legal experts: medical, forensic, biomechanical, engineering, graphics development and jury selection, to name a few. Some defendants may have the resources to finance these sophisticated and high-priced consultants, but few plaintiffs can afford them. The plaintiff's attorney is in a similarly difficult position, having to decide whether to front the cost of her client's consultants or feed her family.

But if the consultants' fees in these high-risk, high-payoff cases could be deferred to the successful outcome of the case, plaintiffs would benefit from obtaining the best experts and the plaintiffs' attorneys would benefit in sharing some of the risk of financing personal injury litigation.[Ftn 1](#)

According to several state ethics committees outside Minnesota, whether a lawyer may use this scheme depends on the type of consultant the lawyer seeks to employ.

Experts Excluded

The Code of Professional Responsibility, the predecessor to Minnesota's current rules of ethics, specifically prohibited payments to witnesses which were contingent upon either the content of the testimony or the outcome of the case.[Ftn 2](#) When Minnesota adopted the Minnesota Rules of Professional Conduct in 1985, this provision was replaced with Rule 3.4(b), which more broadly prohibited offering any "inducement to a witness that is prohibited by law." This change left the rule on contingent fees to experts somewhat unclear because, unlike other states, Minnesota has no statute or court decision that prohibits such payments to experts.[Ftn 3](#) To make matters worse, the American Bar Association glossed over the discrepancy when it issued a formal opinion on the subject in 1987.[Ftn 4](#) The ABA opinion merely noted the discrepancy in the rules and recited, from the comment to the new rule, the observation that the law in most jurisdictions prohibits paying an expert witness a contingent fee.

Most state ethics authorities, however, have come out strongly opposed to contingent payments to expert witnesses under both the Code and the Rules.

In Pennsylvania, authorities noted that "the purpose of [Rule 3.4(b)] is to assure that a court and jury will hear the honest conclusions of the expert unvarnished by the temptation to share in the recovery."[Ftn 5](#) Other states, in rejecting contingent fee payments to expert witnesses, note additional problems with improper fee splitting, excessive fees, and loss of attorney control over negotiation and litigation strategy.[Ftn 6](#)

Flawed Finesse

Not to be outdone by the rules, consulting firms have tried to secure contingent fees by offering a package

of services that includes analyzing a case, locating and hiring an appropriate expert and performing other services, but agreeing to pay the expert witness solely on a per diem basis. These proposals have met with skepticism. Many, if not most, states view the consulting entity as an artifice that does little to resolve the underlying problems with excessive fees and fee splitting, lawyer independence and the search for truth in civil litigation.[Ftn 7](#)

Several jurisdictions, however, find the consultant scheme acceptable. As long as the client approves and the consultant receiving the contingent fee does not testify, the arrangement passes muster.[Ftn 8](#) In Mississippi, for example, there is no issue of an attorney sharing fees with a nonlawyer as long as the medical consultant's fees are separate and distinct from the attorney's fees and are not paid from the attorney's fees.[Ftn 9](#) One state places so many caveats on the contingent fee to the medical legal consultant – including that the client contract directly with the consultant, the fee be reasonable, the expert witness be completely neutral, detached and independent of the consulting service and the consultant not interfere with the attorney's independent professional judgment – that it is difficult to envision a workable arrangement.[Ftn 10](#)

MDP Maneuvers

There are a number of consulting services, many outside the personal injury arena, who provide specialized services to attorneys and their clients that do not involve expert witnesses. For instance, as those watching the debate regarding multidisciplinary practice are aware, lawyers handling tax cases may find the services of tax consultants particularly valuable in reducing clients' tax liability. In an area in which both law and accounting firms may provide similar services to clients and both can appear before tax tribunals, it seems logical that a law firm contracting with a tax consulting service could provide the same manner of compensation to that service as the service could achieve if it worked for the client on its own. Confronted with this situation, Michigan approved a contingent fee payment to a tax consulting service, as long as the service did not furnish any witness testimony.[Ftn 11](#)

In the District of Columbia, the most liberal of American jurisdictions regarding multidisciplinary practice, the ethics committee approved a proposal for a construction law firm and a consulting firm of professional engineers to share a "success fee" based on the outcome of a project.[Ftn 12](#) D.C., unlike the bar outside the beltway, specifically allows fee sharing with nonlawyers as long as the controlling entity is a law firm and the managers of the firm enforce and take responsibility for nonlawyer compliance with the Rules of Professional Conduct.[Ftn 13](#) Nevertheless, even in D.C., an expert witness cannot be paid a contingent fee based on a percentage of the ultimate recovery.

Minnesota's Method

The Lawyers Board has not yet confronted contingent fee payments to consulting firms, but certain rules clearly apply. Lawyers may not share fees with nonlawyers in Minnesota, so the client must directly contract for the consulting service.[Ftn 14](#) The overall fee must be reasonable under Rule 1.5; if the lawyer reduces her risk of not recovering costs that she would otherwise finance, the lawyer should probably reduce her own contingent fee. Finally, the lawyer must maintain her independence by denying the consultant any role in the settlement or litigation strategy of the case.[Ftn 15](#)

¹ Some commentators assert that the financing of a portfolio of contingency cases presents a significant risk that an attorney must factor into the decision to take any individual case. See Herbert M. Kritzer, "The Wages of Risk: The Returns of Contingency Fee Legal Practice," 47 DePaul U. L. R. 267, 270-71 (1998).

2 See DR 7-109(C), ABA Model Code of Professional Responsibility.

3 In Michigan, for example, contingency fees for expert witnesses violate public policy because witnesses should not be given "a powerful motive for exaggeration, suppression, and misrepresentation" which would be "inimical to the pure administration of justice." *Dupree v. Malpractice Research, Inc.*, 179 Mich. App. 254, 265 (1989).

4 ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 87-354 (Nov. 7, 1987).

5 Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Informal Opinion 95-79 (1995).

6 See *Texas Professional Ethics Committee Opinion 458* (1988); *Ethics Committee of the Kentucky Bar Association, Opinion E-394* (Nov. 1996) (prohibiting bonus payments to expert witnesses based on the amount of recovery). See also *Dupree*, 179 Mich. App. at 264-265.

7 See Florida Professional Ethics Committee Opinion 98-1 (Mar. 27, 1998). See also Pennsylvania Opinion 95-79.

8 *Mississippi State Bar Opinion No. 91* (Mar. 23, 1984). See *Schackow v. Medical-Legal Consulting Service, Inc.*, 416 A.2d 1303, 1313 (Md. 1980) (enforcing contract for payment to consulting service of 10 percent of jury award).

9 *Miss. Op. 91*. But see *People v. Easley*, 956 P.2d 1257 (Colo. 1998) (offer to pay investigator and sexual harassment counselor 7.5 percent of lawyer's fee if there was a recovery violated fee sharing provisions of Rule 5.4(a), Colorado Rules of Professional Conduct).

10 *George Bar Committee on Ethics Opinion 48*.

11 Committee on Professional and Judicial Ethics of the State Bar of Michigan, *Informal Opinion RI-104* (Oct. 31, 1991).

12 *District of Columbia Ethics Opinion No. 233*.

13 *Id.*

14 Rule 5.4, MRPC.

15 See Rule 5.4(c), MRPC.