

Ethics Opinion No. 76-9

Unethical for Attorney to Instigate or Participate in the Employment of an Investigator on a Contingent Fee.

The Committee has been asked the following question:

Assume that an individual is involved in an automobile accident. Further assume that the individual believes that the other party was at fault in causing the accident and wishes to pursue recovery of damages through litigation. Assume further that the party then contacts counsel and after having the hourly fee versus contingent fee situation thoroughly explained, the party elects to enter into a contingent fee professional employment contract with the attorney, for an appropriate percentage of the recovery which is reasonable and just. Now, then assume further that the party who has now taken the posture of being a prospective plaintiff in litigation is without sufficient funds or inclination to pay for an hourly fashion or flat fee basis for investigative services. Assume further then that either at the suggestion of counsel or independently, the party then enters into a contingent fee contract with an investigating firm; said contract providing that the investigating firm will do investigation of the incident itself and supply reports to counsel (and theoretically testify as to their investigation or the work product thereof) in return for a percentage of the ultimate recovery, said percentage being reasonable and just.

The question I wish to present to the Ethics Committee is whether or not the investigator's contingent fee agreement directly with the client is violative of any canon of ethics. I am of course aware that it is unethical to retain the services of an expert witness on a contingent fee basis and can readily understand the reasoning behind such a view. My query thus is aimed at the concept of contracting on a contingent fee basis for services to be performed where it is possible although not planned that the other parties to the contract, *to-wit*, the investigator, will ultimately be paid a fixed percentage from the proceeds of the litigation or settlement.

In the Committee's opinion, it would be ethically improper for an attorney to instigate or participate in an arrangement such as the one described. In the Committee's opinion, this creates an undue opportunity for overreaching a client with respect to the costs of litigation, and has an inherent potential for abuse as a subterfuge to avoid the clear prohibition of the lawyer himself employing an investigator or other expert witness on a contingent fee. In addition, the Committee is persuaded by previous formal and informal opinions of the American Bar Association prohibiting similar fee arrangements on the basis that they constitute dividing legal fees with a non-lawyer.

Thus, it is the Committee's opinion that arrangements such as that described are not ethically permissible.

Dated: October 15, 1976.

Adopted by the Board of Governors on October 15, 1976.

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