

**Professional Ethics Committee
For The State Bar of Texas
Opinion Number 553**

August 2004

QUESTION PRESENTED

Is a lawyer prohibited from offering the testimony of an expert witness whose employer has entered into a contingent fee contract with the lawyer's client regarding the subject matter of the litigation?

STATEMENT OF FACTS

A property tax consulting company (the "Company") represents owners of real property in protesting and appealing ad valorem tax assessments on their property. The contract entered into between the Company and a property owner provides that the Company will file a notice of protest and appeal of the tax assessment and prepare and present appeals to county appraisal district and administrative review boards. For this service the Company's written compensation agreement with property owners provides that it is to receive a fee of \$500, plus a contingency fee in an amount equal to 12% of all property taxes saved by the property owner. If the protest is not successful or does not achieve an acceptable reduction in taxes, the property owner may agree with the Company to the filing of a lawsuit. If a lawsuit is filed, the property owner agrees to pay the Company a contingent fee in an amount equal to 50% of the property taxes saved as a result of the lawsuit. The Company agrees to pay all expenses associated with the litigation, including court costs, appraisals, engineering reports, expert witness fees and legal fees. The Company informs the lawyer handling the lawsuit on behalf of the property owner that one of the Company's employees, who is a licensed real estate appraiser, can serve as an expert witness to provide testimony in the case as to the value of the property for tax assessment purposes.

DISCUSSION

Rule 3.04 of the Texas Disciplinary Rules of Professional Conduct provides in pertinent part:

"A lawyer shall not:

...

(b) ... 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. But a lawyer may advance, guarantee, or acquiesce in the payment of:

- (1) expenses reasonably incurred by a witness in attending or testifying;
- (2) reasonable compensation to a witness for his loss of time in attending or testifying;
- (3) a reasonable fee for the professional services of an expert witness."

It is clear under Rule 3.04(b) that a lawyer cannot acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or upon the outcome of the case. An expert witness can be paid a reasonable fee for his or her services under Rule 3.04(b)(3), but Rule 3.04(b) prohibits use of an expert witness who has a contingent interest in the outcome of the case. Experts provide specialized knowledge to assist the trier of fact in understanding the evidence or determining a fact in issue. An expert witness who is paid based on a percentage of the recovery in a litigated matter would have an obvious stake in the outcome of the litigation, which is inconsistent with an expert's role.

In the circumstances presented, the contingent payment is not made directly to the expert witness but rather is made to the Company, which is the employer of the expert witness. Rule 3.04(b) expressly prohibits a lawyer from paying, or acquiescing in the 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." (emphasis added) The payment of a contingent fee to an entity that is the employer of an expert witness clearly comes within the prohibition of Rule 3.04(b), particularly in view of the fact that the employing entity could itself be a witness only through an employee or other agent. Accordingly, it would be a violation of Rule 3.04(b) for a lawyer to use an employee of the Company as an expert witness in the property owner's lawsuit when the Company has a contingent fee interest in the outcome of the case.

The result reached under Rule 3.04(b) is consistent with the result reached in Professional Ethics Committee Opinion 458 (March 1988), which was issued prior to the adoption of the current Texas Disciplinary Rules of Professional Conduct. In that opinion, a medical-legal consulting firm entered into contingent fee contracts with plaintiffs and, in return, provided services including expert testimony. The issue presented was whether a lawyer was prohibited from participating in or recommending that a client enter into such an agreement with the consulting firm. The Committee ruled, citing Disciplinary Rule 7-109(C) of the Texas Code of Professional Responsibility then in effect, that the payment of a fee based on a percentage of the recovery to a consulting firm providing expert witnesses would necessarily involve paying for testimony in violation of that rule. Disciplinary Rule 7-109(C) of the Texas Code of Professional Responsibility is the predecessor of the provisions of Rule 3.04(b) of the Texas Disciplinary Rules of Professional Conduct quoted above. It should be noted that the result that was reached under the old Texas Code of Professional Responsibility is even clearer under current Rule 3.04(b) because the current Rule makes explicit that the prohibition of the Rule applies to payments of contingent compensation to an "other entity" as well as directly to a witness.

CONCLUSION

It is a violation of the Texas Disciplinary Rules of Professional Conduct for a lawyer to use in a case as an expert witness an employee of a business entity that has a contingent fee interest in the outcome of the case.