

Massachusetts Appeals Court declines to extend prohibition against contingent fee agreements with expert witnesses

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Payment of a contingent fee to an expert witness is prohibited in Massachusetts.¹ The rule supposes that the testimony of an expert witness is the product of improper inducement, and therefore “fatally tainted.”² In a case of first impression, the Massachusetts Appeals Court recently declined to extend that prohibition to the payment of a contingent fee to a consulting firm hired to locate potential experts.

In *Larkin v. Dedham Med. Assocs., Inc.*, No. 17-P-960 (App. Ct. July 31, 2018), a jury returned a verdict for plaintiffs in a medical malpractice suit relying, in part, on opinion testimony from the plaintiffs’ expert that the injuries were caused by the negligence of the defendant medical practice. On appeal, the medical practice argued *inter alia* that it was entitled to a new trial because the judge improperly denied its motion for post-trial discovery regarding plaintiffs’ compensation of its expert witness. The medical practice claimed that the plaintiffs paid a contingent fee to a consulting service to locate plaintiffs’ medical expert, and that such an arrangement undermined the integrity of the judicial process, entitling the medical practice to a new trial.

The Appeals Court disagreed. Whereas an expert witness on a contingent fee would be “improperly induced” to provide “outcome-oriented” testimony, the court felt such concerns were not “directly implicated” by the payment arrangement at issue, which provided for the experts to be paid “flat fees pro rata based on their time spent preparing for and providing testimony.” Importantly, the court noted that, in any event, the medical practice failed to demonstrate the contingent fee paid to the consulting service “had any effect on the independence of the expert witnesses who testified for the plaintiff.” Put another way, the Appeals Court implicitly reasoned that any arguably “improper inducement” attributable to the consulting service by reason of a contingent fee did not extend to the experts located by that service, even though the consulting service had an “outcome-oriented” motive to find a winning expert. In the absence of any binding authority, the court refused to extend the prohibition on contingent fees and rejected the medical practice’s appeal, concluding that it “would not upset the judgment on the basis of how the consultants were paid.”

The Appeals Court acknowledged that other jurisdictions are divided on this issue. And it implied that its holding might have been different if the relief requested was something less severe than vacating a judgment after jury trial. To the extent lawyers continue to hire such consulting services on a contingent fee basis, look for Massachusetts courts to further develop the law in this area.

¹*New England Tel. & Tel. Co. v. Bd. of Assessors of Boston*, 392 Mass. 865, 871-72 (1984); Mass. R. Prof. C. 3.4(b), (g), and Comment 5 (“Compensation of a witness may not be based on . . . the result in the proceeding”).

²*New England Tel. & Tel. Co.*, 392 Mass. at 872.

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