

Utah Ethics Opinions

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UTAH STATE BAR

Ethics Advisory Opinion Committee

Opinion No. 02-09

Issued September 24, 2002

¶ 1 **Issue:** Is it ethical for an attorney to enter into a contingency-fee agreement, under which all fees, expenses and costs of litigation are unconditionally assumed by the attorney?

¶ 2 **Opinion:** Within broad limitations, the Utah Rules of Professional Conduct permit an attorney and a client to determine the terms of the lawyer's compensation, and there is no per se restriction prohibiting the attorney from assuming all litigation costs and expenses under a contingency-fee agreement. Such fee agreements, however, must comply with all other applicable provisions of the Utah Rules of Professional Conduct concerning fees.

¶ 3 **Analysis:** We have received a request for an opinion as to the propriety of a lawyer's entering into a contingency-fee agreement with a commercial client on collection matters that contains the following paragraph:

All fees, expenses and costs, such as filing fees, court disbursements, photocopy costs, telephone expenses, travel, postage, storage, office supplies, and miscellaneous expenses associated with the collection shall be the sole responsibility of the attorney and will not be billed or reimbursed by client.

The issue requires a determination of whether a fee arrangement of this kind is consistent with Rules 1.5, 1.7, and 1.8(e) of the Utah Rules of Professional Conduct ("The Rules"). (fn1)

¶ 4 Lawyers are generally free to determine the terms of their representation with their clients, consistent with the Rules. The Ethics Advisory Opinion Committee has recently addressed this issue in Opinion No. 02-03, reaching a conclusion that a flat-fee agreement between a defense lawyer and an insurance company is not per se unethical and cautioning:

A lawyer who enters into any type of flat-fee arrangement with an insurer must use caution to assure that she exercises

independent professional judgment on behalf of the insured. This is particularly important in situations where the scope of the case has unexpectedly increased beyond the attorney's original expectations in agreeing to a fixed fee. (fn2)

¶ 6 Our Opinion No. 136 also addressed the issue of whether a client's advance payment, made as a fixed fee or non-refundable retainer, was unethical. The opinion concluded that fixed-fee contracts or non-refundable retainers are not expressly prohibited by Rule 1.5. (fn3)

¶ 7 Rule 1.5(c) addresses certain requirements related to contingent-fee arrangements, including the requirement that the fee agreement must be in writing, and it must state the method by which the fee is to be determined and how expenses are to be handled. (fn4) While Rule 1.5(c) anticipates that expenses will be deducted either before or after the contingent fee is calculated, nothing in the rule prohibits the attorney from agreeing to assume those costs and expenses within her contingent fee, or, if no judgment or settlement is obtained, to assume responsibility for those costs and expenses.

¶ 8 As was extensively addressed in Opinion 02-03, a lawyer must ensure that her agreement relating to fees will not require her improperly to curtail services provided to the client that would normally be within the scope of the representation.

¶ 9 Rule 1.7(b) requires a lawyer to decline representation if the representation of the client may be limited, among other things, by the lawyer's own interest. As we pointed out in Opinion No. 02-03, the economics of any agreement between the lawyer and her client is not the Committee's business. In the context of our discussion of fee arrangements between lawyers and insurers, we noted:

Lawyers and insurance companies are free to negotiate fee arrangements that suit their respective economic interests so long as no lawyer on either side violates the Utah Rules of Professional Conduct. . . . We emphasize, however, that lawyers entering into such arrangements must use care to assure that their representation complies with all applicable ethical standards, even if the fee arrangement requires the lawyer to perform services for reduced rate or even without compensation. (fn5)

¶ 10 We conclude that there is no material difference between the proposed arrangement and a "standard" contingency fee-arrangement under which the attorney essentially "advances" her own services with the potential that she will not be "reimbursed" for her costs of operation (office, overhead, staff, library, etc.). We can see no

distinction between a lawyer's providing all the ancillary services that make up her normal operations in connection with a contingent-fee agreement and the lawyer's undertaking to pay the costs and expenses directly connected to the representation as part of the bargained-for quid pro quo of the contingent-fee agreement.

¶ 11 An argument has been advanced that the lawyer who undertakes to pay all costs associated with the pursuit of the case is providing financial assistance to the client in connection with pending or contemplated litigation, which is prohibited under Rule 1.8(e). This argument fails because it is subject to the exception under Rule 1.8(e)(1). The exception states: "[E]xcept [a] lawyer may advance court costs and expenses of litigation the repayment of which may be contingent on the outcome of the matter." In the proposed arrangement the lawyer is simply advancing court costs and expenses of litigation. If the lawyer is unsuccessful with a case, she is not compensated for costs and expenses; if successful, she is compensated for the costs and expenses as an implicit part of the percentage-fee retained from the recovery. That is, the lawyer's right to recover costs can be made as contingent as her right to a fee." (fn6)

¶ 12 Additionally, some have argued that the proposed arrangement may create a prohibited "proprietary interest" under Rule 1.8(j). Even if it does, we conclude that it falls under the contingent-fee exclusion of Rule 1.8(j)(2). (fn7)

¶ 13 Finally, we observe that there have been decisions in other jurisdictions that find the arrangement we address here to be an ethical violation. (fn8) Those decisions can generally be distinguished as having been decided under more stringent versions of a rule similar to Utah's Rule 1.8(e). In any event, we decline to adopt such a result, as we can identify no substantial public policy that is served by prohibiting this kind of arm's-length agreement between attorney and client, (fn9) so long as it otherwise complies with the our Rules of Professional Conduct concerning fees. (fn10)

Footnotes

1. Our opinion here is not limited to contingent fees in commercial collection situations, but has general applicability to contingent-fee arrangements.

2. Utah Ethics Advisory Op. 02-03, at ¶ 30, 2002 WL 340262 (Utah St. Bar).

3. Utah Ethics Advisory Op. 136, 1993 WL 755253 (Utah St. Bar).

4. "A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to

the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated." Rule 1.5(c).

5. Opinion No.02-03, at ¶ 32 (emphasis added).

6. We also note that we obtain no guidance from the official comment to Rule 1.8, as it does not address Rule 1.8(e). However, the ABA's Annotated Model Rules of Professional Conduct (4th ed. 1999), citing Charles W. Wolfram, Model Legal Ethics § 9.2.3 (1986), states: "Rule 1.8 does not require that the client guarantee repayment of the advances; repayment may be made contingent on the outcome of the matter."

7. "[T]he lawyer may [c]ontract with a client for a reasonable contingent fee in a civil case."

8. *See, e.g.*, Arizona Comm. on the Rules of Professional Conduct, Op. 95-01, decided under a version of 1.8(e) that reads: "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, provided the client remains ultimately liable for such costs and expenses"

9. Indeed, there are the same beneficial public-policy attributes of the proposed arrangement as are often articulated for "standard" contingent-fee arrangements; namely, that it provides access to the judicial system for aggrieved persons for whom access would otherwise not be economic or practicable.

10. For example: "A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee," Rule 1.5(a).

Rules Cited:

1.51.71.8(e)