

16-03

**Opinion No. 16-03**

**Utah Ethics Opinion**

**Utah State Bar Ethics Advisory Opinion Committee**

**September 13, 2016**

*ISSUE*

1. When a client asks a lawyer to modify a fee arrangement, what Utah Rules of Professional Conduct ("URPC") apply?

*OPINION*

2. The particular rules of the URPC concerning conflicts of interest govern this issue. Rule 1.5 of the URPC applies to all modifications of fee arrangements, which requires that clients be charged a reasonable fee throughout the representation. It governs when the fee modification is clearly beneficial to the client. Rule 1.7(a) provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." URPC 1.7(a). Rule 1.7(a) of the URPC may also apply to a fee modification if the modification is not clearly beneficial to the client and/or is the result of a fee dispute with the client. In addition, Rule 1.8 applies in two situations: (1) the lawyer enters into a "business transaction" with the client; or (2) the lawyer "acquires an ownership, possessory, security or other pecuniary interest adverse to a client." URPC 1.8(a). A situation that implicates Rule 1.8 is permissible so long as the lawyer complies with all of the safeguards of Rule 1.8(a)(1) through (a)(3), complies with Rule 1.7, and the modified arrangement satisfies Rule 1.5(a)'s reasonableness requirement.

*ANALYSIS*

3. When a client asks a lawyer to modify a fee arrangement, how do the Utah Rules of Professional Conduct apply to the following scenarios:

(A) client requests that the lawyer defer payment of earned fees

(i) with a security interest, either in

[a] the anticipated property division or judgment award in the case; or

[b] in the client's business or other nonmonetary property

as payment of all or part of her fee; or

(ii) without a security interest;

(B) client requests that the lawyer change a contingency fee arrangement to a flat fee arrangement;

(C) client requests that the lawyer modify a flat fee or contingency percentage that the Client has agreed to pay;

(D) client owes X to the lawyer, which is a reasonable fee and not disputed as such by the client, and the lawyer agrees to take less than that amount and consider the account is paid current;

(E) client owes X amount and the lawyer agrees to take less than that amount and consider the account paid current, but wants the full amount of X if case is successful; and

(F) client and attorney have a dispute as to the fees charged, but they agree on a compromise number, which the client pays?

4. A fee arrangement is a contract and subject to contract law. But because a lawyer has a fiduciary relationship with her client, a change in the fee arrangement during the course of the lawyer's representation of the client is subject to heightened scrutiny. Hazard, Geoffrey C. & W. William Hodes, *The Law of Lawyering*, § 9.14, at 9-51 ("**Hazard & Hodes**"). Rule 1.5 of the Utah Rules of Professional Conduct ("URPC") applies to *all* modifications of fee arrangements. It provides, in pertinent part:

(a) A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship

with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

URPC 1.5(a) & (b). A lawyer must ensure that any modification of a fee agreement complies with Rule 1.5(a)'s reasonableness requirement and that the client is being charged a reasonable fee throughout the representation. *See Dahl v. Dahl*, 2015 UT 23, ¶ 198, 345 P.3d 566 (recognizing that Rule 1.5(a) "prohibits an attorney from making arrangement for, charging, or collecting unreasonable fees or unreasonable expenses."). In addition, the lawyer must always communicate the changes in the scope of the representation and the basis and rate of the fees and expenses to the client, and preferably in writing, for the lawyer's own as well as the client's protection. *See* URPC 1.5(b).

5. There are some modifications of fee agreements that are beneficial to the client, such as in Scenario (A)(ii) above, where the client requests that the lawyer defer payment of earned fees where the lawyer does not have a security interest adverse to the client; Scenario (C) above, where the client requests that the lawyer modify a flat fee or contingency percentage (presumably downwards) that the client has agreed to pay; and Scenario (D) above, where the client owes a certain amount to the lawyer and the lawyer agrees to take less than that amount and consider the account is paid. Other examples of modifications of fee agreements that benefit the client occur when the lawyer agrees to reduce the billing rate or agrees to expand the scope of the current representation in flat or fixed fee arrangements where there is no concomitant agreement for an additional fee or an increase in fees. These types of arrangements require the lawyer to comply with Rule 1.5(a) and (b).

6. Other situations present more challenges and potential for ethics violations. "[E]ven for routine modification, a modified fee that would not have been considered unreasonable *ab initio* might well be considered violative of either Rule 1.5(a) or Rule 1.5(b) if it was imposed without warning or under circumstances giving the client little choice but to acquiesce in what was 'communicated' by

fiat." Hazard & Hodes, § 9.14, at 9-51. Along these lines, the Comment to Rule 1.5 states that

a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction.

URPC 1.5 cmt. [5]. It is therefore important for any lawyer contemplating a change to a fee agreement to keep in mind that

an agreement or modification that is not made roughly contemporaneously with the formation of the lawyer-client relationship will bear an extra burden of justification. The client will be able to avoid the agreement unless the lawyer affirmatively demonstrates its fairness, including the fairness of the circumstances surrounding its formation or modification. Presumably, this would include a justification for not arriving at an agreement sooner, and proof that the lawyer did not use the cost of services already provided or the inconvenience of changing lawyers in mid-case as leverage in the negotiations....

Hazard & Hodes, § 9.14, at 9-51 to 9-52.

7. Once a lawyer has assumed the fiduciary duties involved with representing a client, Scenario (B), in which a client requests that the lawyer change a contingency fee arrangement to a flat fee arrangement; Scenario (E), in which a client owes a sum certain and the lawyer agrees to take less than that amount and consider the account paid current, but wants to be paid the full amount of the originally agreed upon fees if the case is successful; and Scenario (F), which involves a compromise of a fee dispute between a lawyer and a client over the reasonableness of the fees charged; all require the lawyer to take additional measures to ensure that the lawyer deals with the client in good faith, that the terms of any compromise are fair and reasonable to the client, that the basis for the modified amount is fully explained to the client, and that the client gives informed consent.

8. Rule 1.7(a) of the URPC may apply in circumstances where there is a fee modification. Rule 1.7(a) provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." A concurrent conflict of interest exists if "[t]here is a significant risk that the representation of one ... client[] will be materially limited ... by a personal interest of the lawyer." Rule 1.7(a)(2). Each of Scenarios (B), (E), and (F) involving fee modifications may, depending upon the circumstances, present a concurrent conflict of interest because the lawyer's

financial interest in maximizing and collecting her fees could have an adverse effect on her representation of the client and make it difficult for the lawyer to give the client detached advice in each circumstance. *See* URPC 1.7 cmt. [10].

9. With regard to the fee dispute described in Scenario (F) above, for the client to give informed consent to a compromise of the fee dispute, the lawyer must fully disclose and explain to the client the basis for the proposed compromise amount, the terms of the modified agreement, and any other information that the client would need to make an informed decision about whether it would be advantageous for the client to consent to the modified amount and any accompanying new terms of the proposed modified agreement. *See* URPC 1.8(a).

10. The client's proposal in Scenario (B) for the lawyer to change a contingency fee arrangement to a flat fee arrangement requires the lawyer to consider whether either arrangement would be unreasonable at that stage of the representation and, if not, what form of fee arrangement would be more advantageous for the client. Hazard & Hodes, § 9.15, at 9-52. One issue that would have to be resolved would be how the costs incurred up to that time under the contingency fee arrangement should be handled.

11. Likewise, in Scenario (E), in which the lawyer agrees to take less than the amount owed by the client and consider the account paid current but wants the full amount of the originally agreed upon fees if the case is successful, the lawyer must first consider if such an arrangement would be prohibited under Rule 1.5 or unreasonable at that stage of the proceedings. *See Id.* For example, a lawyer may not enter into a contingency fee agreement in a domestic relations matter or to represent a defendant in a criminal case. URPC 1.5(d)(1) & (d)(2). The lawyer would also need to consider what would constitute a "successful" outcome triggering the contingency of full fees that would be fair and reasonable to the client. The lawyer would also have to make an honest assessment of the potential for recovery and fully explain her opinion and the basis for it to the client. In addition, the modified fee agreement would have to comply with Rule 1.5(c) governing contingency fee agreements. URPC 1.5(c) (providing that contingency fee agreements must be in writing, state, among other things, the method by which the fee is to be determined, and be signed by the client).

12. If a concurrent conflict of interest exists, as it would in Scenarios (B), (E), and (F), then the lawyer may only represent the client if: (1) "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to" the client; and (2) the client "gives informed consent, confirmed in writing." URPC 1.7(b)(1) & (b)(4). Rule 1.0(f) defines "informed consent"

as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." URPC 1.0(f). For a client to give informed consent,

The lawyer must make reasonable efforts to ensure that the client ... possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's ... options and alternatives. *In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel.*

URPC 1.0 cmt. [6] (emphasis added). Even then, in Scenarios (B), (E), and (F), the lawyer may need to advise the client to consult with independent counsel about any proposed modification or compromise. It should be noted that "a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent." *Id.*

13. In addition, with regard to fee disputes in particular, the Comment to Rule 1.5 provides:

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

URPC 1.5 cmt. [9].

14. In addition to Rules 1.5 and 1.7 of the URPC, the safeguards of Rule 1.8 apply in two situations: (1) the lawyer enters into a "business transaction" with the client; [1] or (2) the lawyer "acquires an ownership, possessory, security or other pecuniary interest adverse to a client." URPC 1.8(a); *see* EAO Op. No. 98-13 (Dec. 4, 1998) (addressing the ethical obligations and considerations that govern a law firm's acceptance of a financial interest such as stock in a client company in return for legal services). The Comment to Rule 1.8 state that Rule 1.8 "does not apply to ordinary fee arrangements between client

and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee." URPC 1.8 cmt. [1].

15. Rule 1.8(a) provides that a lawyer may not participate in a business, property, or financial transaction (such as making a loan) with a client, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

URPC 1.8(a). Thus, if in Scenario A(i)(b) the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of her fee, then the arrangement would be permissible so long as the lawyer complied with all of the safeguards of Rule 1.8(a)(1) through (a)(3) above, complied with Rule 1.7, and the modified arrangement satisfied Rule 1.5(a)'s reasonableness requirement.

16. Scenario (A)(i)(a) above involves the modification of a fee agreement in the form of deferred payments of earned fees where the lawyer has a security interest in the anticipated property division or judgment award in the case. Other than a statutory lien for attorney's fees as allowed by Section 38-2-7 of the Utah Code Annotated or a contingency fee in a civil case, Rule 1.8(i) expressly forbids a lawyer to acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for the client. The purpose of 1.8(i) is "to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires." URPC 1.8 cmt. [16]. Thus, the fee agreement in Scenario (A)(i)(a)—even in its unmodified form—is prohibited by and violates Rule 1.8(i) unless it falls under Section 38-2-7(2) and does not run afoul of Section 38-2-7(11) of the Utah Code Annotated.[2]

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Notes:

[1] There is some ambiguity—and resulting disagreement—about whether a modification of a fee agreement should be considered a "business transaction" between the lawyer and client such that Rule 1.8(a) should apply. Hazard & Hodes opines that "if the proposed modification is more than merely a routine increase in hourly rates on an annual or other regular basis, the case for application of Rule 1.8(a) is strong." Hazard & Hodes, § 9.14, at 9-51. By contrast, both California and Oregon have taken the position that the safeguards set forth in their equivalents of Rule 1.8(a) of the URPC only apply to modification of fee agreements in which the lawyer acquires an ownership, possessory, security or other pecuniary interest adverse to a client. See Cal. Rules of Prof. Conduct R. 3-300 & cmt; *Welsh v. Case*, 43 P.3d 445, 452-53 (Ore Ct. App. 2002); *In re Spencer*, 330 P.3d 538, 543 (Ore. 2014).

[2] Section 38-2-7 provides, in pertinent part:

(2) An attorney shall have a lien for the balance of compensation due from a client on any money or property owned by the client that is the subject of or connected with work performed for the client, including:

(a) any real, personal, or intangible property that is the subject of or connected with the work performed for the client;

(b) any funds held by the attorney for the client, including any amounts paid as a retainer to the attorney by the client; and

(c) any settlement, verdict, report, decision, or judgment in the client's favor in any matter or action in which the attorney assisted, including any proceeds derived from the matter or action, whether or not the attorney is employed by the client at the time the settlement, verdict, report, decision, or judgment is obtained.

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(11) This section does not authorize an attorney to have a lien in the representation of a client in a criminal matter or domestic relations matter where a final order of divorce has not been secured unless:

(a)

(i) the criminal matter has been concluded or the domestic relations matter has been concluded by the securing of a final order of divorce; or

(ii) the attorney/client relationship has terminated; and

(b) the client has failed to fulfill the client's financial

obligation to the attorney.

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